

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JANUARY 16, 1924



The Commonwealth of Massachusetts

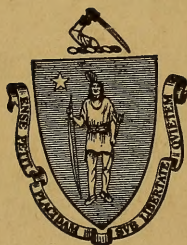
REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JANUARY 16, 1924



PUBLICATION OF THIS DOCUMENT
APPROVED BY THE
COMMISSION ON ADMINISTRATION AND FINANCE

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 16, 1924.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending this day.

Very respectfully,

JAY R. BENTON,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL.

State House.

Attorney General.

JAY R. BENTON.

Assistants.

ALEXANDER LINCOLN.

JOSEPH E. WARNER.

ALBERT HURWITZ.¹

LEWIS GOLDBERG.

A. CHESLEY YORK.

JAMES H. DEVLIN.

A. PERRY RICHARDS.

DAY KIMBALL.

ROGER CLAPP.²

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

¹ Resigned Sept. 30, 1923.

² Appointed October 1, 1923.

STATEMENT OF APPROPRIATION AND EXPENDITURES.

Appropriation for 1923	\$102,000 00
Appropriation for 1922, unexpended balance brought forward to pay 1922 bills	16,448 74
Appropriation (deficiency, 1922)	7,951 86
	\$126,400 60

Expenditures.

For salary of Attorney-General	\$8,000 00
For law library	886 69
For salaries of assistants	31,655 76
For clerks	8,003 55
For office stenographers	7,401 50
For telephone operator	904 50
For legal and special services and expenses	50,298 59
For office expenses and travel	8,607 39
For court expenses	1,540 11
	\$117,298 09
Total expenditures	\$117,298 09

Note. — The total appropriation for 1923 was \$102,000, and the expenditures incurred during the present administration for the fiscal year 1923 amount to \$92,897.49, leaving unexpended at the close of the fiscal year \$9,102.51.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 16, 1924.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my report for the year ending this day.

The cases requiring the attention of this Department during the year, to the number of 10,935, are tabulated below:—

Corporate franchise tax cases	3,196
Extradition and interstate rendition	270
Grade crossings, petitions for abolition of	61
Indictments for murder	69
Inventories and appraisals	4
Land Court petitions	302
Land-damage cases arising from the taking of land by the Department of Public Works	74
Land-damage cases arising from the taking of land by the Metropolitan District Commission	26
Land-damage cases arising from the taking of land by the State House Building Commission	1
Land-damage cases arising from the taking of land by the Armory Commissioners	1
Land-damage cases arising from the taking of land by the Department of Mental Diseases	4
Land-damage cases arising from the taking of land by the Pilgrim Tercentenary Commission	5
Land-damage cases arising from the taking of land by the Provincetown Tercentenary Commission	5
Miscellaneous cases arising from the work of the above-named commissions	23
Miscellaneous cases	694
Petitions for instructions under inheritance tax laws	42
Public charitable trusts	301
Settlement cases for support of persons in State hospitals	61
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	5,796

CAPITAL CASES.

Indictments for murder disposed of during the year 1923:

Berkshire County.—In charge of District Attorney Charles H. Wright: Paul Durante.¹

Bristol County.—In charge of District Attorney Stanley P. Hall: Frederick Baker, Avades Zahigian.¹

Essex County.—In charge of District Attorney William G. Clark: John Gancarz, Mike Khatshadoorian,¹ Joseph Lombardi, Constanti Marrotti, Anthony Stamatopailos.

Hampden County.—In charge of District Attorney Charles H. Wright: Frank Burek, Frank Lesnewski,¹ Giuseppe Parisi, Anthony Pass,¹ Eugene Sciebelli, Frank Williams.

Middlesex County.—In charge of District Attorney Arthur K. Reading: Morris A. Arnold, Hugo Baldi and Martino Bernado, Frank Brewer, John Kalapotharakos,¹ Charles La Bon and Gordon Warren, accessory, Salvatore Letteri, Francesco Magliozzi, Clemente Mamola, Domenic Procopio and Giacinto Sanzi, accessory, William M. Robb, Carmello Spiri.

Norfolk County.—In charge of District Attorney Harold P. Williams: Arthur L. Harvey, William Morgan.¹

¹ Committed to State hospital.

Suffolk County. — In charge of District Attorney Thomas C. O'Brien: Severio Calebretta, Ignatzio Carluccio, and Theresa Marangi, Jackino Costagliola, Paul Dascalakis, Joseph DiAmbrosio, Joseph Pisano and Charles Castalone, Anthony M. Gaeta, Felix Gesauldo and Samuel Bocuzzi, Gregory Kuriel, Antonio Mascatti, Stefano Militello and Antonio Bianco, John E. Morrison, Jeremiah J. Horgan and Henry T. Keefe, Jesse Murphy, George L. Rollins, Michael Siracusa, Biagio Vessella.

Worcester County. — In charge of District Attorney Emerson W. Baker: Isadore Guilbeault.

The following indictments for murder are pending:

Bristol County. — In charge of District Attorney Stanley P. Hall: John E. Kennedy.

Essex County. — In charge of District Attorney William G. Clark: Vito Caruso, Cyrille J. Vandenhecke.

Hampden County. — In charge of District Attorney Charles H. Wright: Mary C. Sullivan, Joseph Zygarowski.

Hampshire County. — In charge of District Attorney Thomas J. Hammond: John Greczynski.

Middlesex County. — In charge of District Attorney Arthur K. Reading: Thomas Lanzo, Nicola Lupo, Salvatore Vona.

Norfolk County. — In charge of District Attorney Harold P. Williams: Nicola Sacco and Bartolomeo Vanzetti.

Suffolk County. — In charge of District Attorney Thomas C. O'Brien: Frank Festa, J. Thomas Gettigan, Giovanni Micciche, Joseph Morello, Brickinbridge Russell.

THE NEED OF A JUDICIAL COUNCIL FOR EFFICIENT JUDICIAL ADMINISTRATION.

The law's delay has been a subject of adverse comment from a time much older than the origin of American courts, but it has been left to the present to seek and apply remedies for the ancient evil of delay. During the past ten years there has been a great development in the study of the administration of justice. Nevertheless, in this Commonwealth there never has been any central body of a permanent character for the accumulation of information and the consideration and discussion of questions of organization, practice and procedure bearing on the subject of judicial administration.

To remedy this defect, in 1921 the Judicature Commission recommended the establishment of a Judicial Council, composed of judges and members of the bar, "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, work accomplished, and the results produced by that system and its various parts."

The plan suggested by the commission was that this council should be an advisory body and that it should make an annual report to the Governor. The reason given by the commission for the recommendation was in substance that the judicial system constitutes a business institution for the purpose of administering justice as promptly as is reasonably possible and at a minimum of expense to litigants and to the public. The volume of business done by the courts, the resulting cost and administrative problems arising therefrom have expanded to such an extent as to call for continuous study of the different branches of the system, to the end that the system as a whole may function in accordance with advancing demands of modern life. The whole subject of judicial administration is being studied by the bench and bar all over the country to an increasing degree. Judicial administration is recognized to-day as one of the problems of current public concern.

The commission did not recommend radical changes in the Massachusetts system, but they felt that, through continuous study by such a body as they suggested, and the consequent discussion and consideration of details, gradual improvements could be made. They believed that the plan would commend itself to the business sense of the people of the Commonwealth.

The Committee on the Judiciary of the Legislature has twice recommended the substance of this plan, first in 1921 and again in 1922, but it has not yet been accepted by the Legislature. The recommendation of the commission has, however, attracted attention in other parts of the country and during the past year the substance of their proposal has been adopted in Ohio and in Oregon. In accordance with the advice of Chief Justice Taft, an act of Congress recently was passed creating such a commission for the Federal courts.

The practice hitherto has been to appoint special commissions and legislative committees to study such subjects in a limited time at intervals of ten or fifteen years, during which the work and material of these commissions have been scattered or forgotten except so far as specific recommendations have been adopted. The value of continuous study has been missing. A list of the various commissions thus appointed since 1798 is attached to the report of the commission (House 1205 of 1921 in Appendix C).

A careful study of the recommendation leads me to agree with the statement of the commission that "It is not a good business arrangement for the Commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals. The interest of the people, for whose benefit the courts exist, calls for some central clearing house of information and ideas which will focus attention upon the existing system and encourage suggestions for its improvement."

I therefore recommend that the proposal for a judicial council be given renewed consideration by the Legislature and that an act substantially as reported by the Judicature Commission be adopted.

In the bills reported by the Committee on the Judiciary in 1921 and 1922, it was provided that the annual report of the council to be created should be made to the Legislature instead of to the Governor as provided in the report of the commission. The reason for suggesting that the report should be made to the Governor was, as explained by the commissioners in a letter to the committee on the judiciary of May 20, 1921, as follows:

The question whether the reports shall be made to the legislature or to the governor was thoroughly discussed by the commissioners before making their recommendation, and they recommended that the reports be made to the governor as they do not believe it wise to place the judges, who would be members of such a council, in the position which might be misunderstood if they were expected to make annual recommendations to the legislature possibly altering some of their powers and duties.

We believe it to be the sounder plan that the report should be submitted to the governor for the information of the public as well as for the members of the state government, and that recommendations to the legislature based upon such reports should be made by others or such recommendations as might be contained in it should be called to the attention of the legislature either by the governor or by individuals or by members of the legislature themselves.

The traditions of Massachusetts in regard to the separation of functions are such that to place five judges in the position of making annual formal recommendations to the legislature might be seriously misunderstood and thus cause unfortunate results which might interfere to a considerable extent with the success of the plan. — (See Mass. Law Quart. Aug. 1921, pp. 150–151 Note.)

The suggestion of the commission in regard to this point seems to me a sound one. I suggest that a provision be made that the annual report thus made to the Governor should be a "public document" so that it would be automatically before the Legislature for such consideration as might seem advisable without any special reference to the subject by the Governor.

THE ADMINISTRATION OF CRIMINAL JUSTICE.

In submitting this portion of my report, I think that it is fitting to state, at the outset, that the eight district attorneys are administering their important offices honestly, with great industry and with loyalty to the Commonwealth.

Unless exigency otherwise requires, the prosecution of criminal cases will be left to the district attorneys. On May 31, last, I turned over to District Attorney

Thomas C. O'Brien, of the Suffolk District, for trial, the following criminal cases: *Commonwealth v. H. V. Greene et al.*; *v. Max Mitchell*; *v. John H. McNamee et al.*; *v. William J. Corcoran et al.*; *v. Aaron Jacobson*; *v. Charles Ponzi et al.*; and *v. Arthur M. Harvey*.

At that time I detailed Assistant Attorney General Albert Hurwitz to assist the district attorney's office in the final preparation of these cases, and to co-operate in the trial of the same.

It is the duty of the Attorney General to consult with and advise the district attorneys in matters relating to their duties. Following the mandate of the statute, the Attorney General, from time to time, has called conferences of the several district attorneys at the State House. These meetings have resulted in the consideration of many questions of administration in which we had a common interest. The exchange of opinions and the ascertainment of how various matters are handled in particular districts have already achieved a desired uniformity and efficiency.

At a conference held on March 3, last, among other subjects considered were certain recommendations for changes in the method of selecting jurors, submitted to the Legislature in the annual report of my immediate predecessor. This discussion and conference were preparatory to the appearance of the Attorney General and the several district attorneys before your joint committee on the judiciary.

At this meeting, the matter of speedy prosecution of persons guilty of giving short weight or selling "fireproof" coal, and the provisions of the "coal bill" then pending before the Legislature were also given attention.

At a conference on August 11, last, there was discussion of matters of general policy in the prosecution of criminal cases, and matters of joint interest were gone over with Hon. Frank A. Milliken of New Bedford, judge of the third district court of Bristol, and Hon. Charles L. Hibbard of Pittsfield, judge of the district court of Central Berkshire, members of the administrative committee of the district courts of the Commonwealth. The matter of asking for jail sentences for bootleggers, for first offences, was also considered, and a subcommittee of district attorneys was appointed to report at a subsequent meeting.

At a conference on September 22, a report was received from the aforesaid committee, and after discussion it was agreed that, while no hard and fast rule could be laid down in cases of violation of the liquor law, and that each case must be decided according to the evidence, it was the opinion of the conference that, in flagrant bootlegging cases, jail sentences should be asked for, even in the case of first offences.

At the September conference, we also discussed the matter of presenting the views of the conference as to the jury system, before the special commission investigating that subject. Certain recommendations upon which all the members of the conference were agreed were submitted to that commission at a hearing held on September 29. Seven recommendations were made, most of which were adopted by the commission and embodied in a report to the General Court in Senate Document No. 41 of 1924. The recommendations of the conference were, in brief, as follows:—

1. That all resident citizens be eligible to be placed on the jury lists.
2. That in the preparation of lists all persons should be required to fill out a questionnaire.
3. That all persons, before being placed on the jury list, should be personally examined.
4. That the exemptions should, on the whole, be left as they now stand in the statutes.
5. That jurors' fees should remain as they now are, but that jurors should be reimbursed for actual travel.
6. That the term of service of jurors should be shortened.
7. That the accommodations for jurors at many of the court houses should be improved.

At conferences held on December 8 and January 5, last, the entire time was given to a discussion of proposed recommendations to be made to the General Court in the matter of needed changes in statutes having to do with the administration of the criminal law.

Among others invited to appear before us at these conferences were Hon. Walter Perley Hall, Chief Justice of the Superior Court, and former Assistant District Attorney Abraham C. Webber of Suffolk.

At the conclusion of our deliberations, it was unanimously voted to authorize me, on behalf of the district attorneys, to make the following recommendations and suggestions.

A. Compensation for District Court Judges called to sit in the Superior Court.

There has been for some time a strong public demand for speedy criminal trials. Expeditious disposition of cases in the Superior criminal court has been impossible in recent years because of the hundreds of appeals of criminal cases from the lower courts. Many of these appeals were without merit and were taken so that a congested docket in the Superior Court would result in delay and lead to possible negotiation to avoid trial. The Judicature Commission, in 1921, recommended the enactment of a permissive statute enabling the chief justice of the Superior Court to call to his aid justices of the district courts for the trial of jury cases, which would provide the necessary means of relieving congestion of the criminal docket without increasing the number of permanent judges. This recommendation was also submitted to the General Court in two annual reports by my immediate predecessor. The Legislature followed the recommendation last year and enacted into law chapter 469 of the Acts of 1923, which authorized the chief justice of the Superior Court to call justices of district courts, except in the Municipal Court of the City of Boston, to sit in the Superior Court at the trial or disposition, with or without a jury, of certain criminal cases.

Before signing the bill the Governor submitted the same to this department for an opinion as to its constitutionality, and on May 25, last, His Excellency was advised that it was within the constitutional power to enact the proposed bill. Later in the year the constitutionality of the bill was attacked by certain defendants, and the case was carried to the Supreme Judicial Court. That tribunal held that the statute violated no one of the provisions of the Constitution. See *Commonwealth v. Leach*, Mass. Adv. Sh. (1923) 113.

At our recent conferences, it was the unanimous opinion of the district attorneys that the calling of the district court judges, under the authority of the act, very promptly and effectively resulted in relieving the congestion of the dockets. Its efficacy will be even more marked in the months to come. The chief justice has called from the lower courts judges of high ability and broad experience in the criminal law, who have rendered public service of the very highest order when called upon to render this temporary service in the Superior Court. The act as passed provided no extra compensation for the judges. That they should not be adequately paid is manifestly unjust. The per diem pay on the basis of their compensation for service in the lower courts figures as low as \$4.62, \$6.90 and \$7.24 in certain cases.

It is strongly recommended as a matter purely of justice and fair dealing that the judges who are called to render this service should receive compensation commensurate with the dignity and importance of the work they perform when called to the Superior Court.

B. Increase of Jurisdiction of District Court Judges called to preside in the Superior Court.

The several district attorneys were also of the opinion that the district court judges so called to sit in the Superior Court might very properly have their jurisdiction increased. There are certain classes of cases which, by their experience and training in the lower courts, they are well qualified to preside over, in addition to those cases that were placed within their jurisdiction last year. It is therefore recommended that their jurisdiction be properly increased.

C. Simultaneous Sessions of a Criminal Sitting in Different Shire Towns.

G. L., c. 212, § 14, provides for sittings of the Superior Court in the several counties. G. L., c. 213, § 7, provides that two or more simultaneous sessions of the

court may be held in the same county, if public convenience requires. Section 10 of the act provides that the court, if public business requires, may adjourn an established sitting in one shire town to another in the same county.

A situation frequently arises where, particularly in connection with the criminal sittings, it is desirable simultaneously to hold separate sessions of a sitting in different shire towns in the same county. In order to effect this it appears necessary to amend the statute.

I therefore recommend that G. L., c. 213, § 7, be amended by inserting after the word "held" the words: — in the same shire town or in different shire towns, — so that the section as amended will read as follows:— *Section 7.* Two or more simultaneous sessions of the court may be held in the same shire town or in different shire towns in the same county, if public convenience requires; and the business may be so divided as to secure its speedy and convenient disposal.

D. Certifying the Entire Record and Testimony in Certain Criminal Cases.

In certain complicated and intricate criminal cases there has been unnecessary prolongation of the time between conviction and punishment. In some cases this delay has been of such an extent as seriously to impair, if not to destroy, the wholesome influence of conviction and sentence. Such delays tend to decrease the general respect of the community for law. Unreasonable delay is also unfair to defendants. They are entitled to relief from the mental strain and anxiety that accompanies a prolonged and unreasonable uncertainty in the legal determination of their guilt or innocence.

Today, it is not unusual for lawyers for defendants in cases of importance to accumulate, in the course of a long trial, hundreds of exceptions. In an address by the late Dean Ezra R. Thayer before the Law Association of Philadelphia he stated that this mischief was due first and foremost to the temptation offered by our system to each side — especially the side that scents defeat — to make as large a collection of exceptions as it can, hoping that something may be found among them to take the fancy of an appellate tribunal. In the case of *Commonwealth v. Dyer, et als.*, the so-called Fish Case, the number of exceptions ran into an extraordinary total.

An important cause of delay between conviction and punishment is the sparring that is involved in the process of reducing exceptions to "narrative form." No one who has not made this attempt with an aggressive and demanding adversary can appreciate its full exasperations. This is particularly true in certain kinds of cases; for instance, those involving commercial frauds, which require judicial inquiry into complicated business transactions. In the Fish Case, as an example, the "bill of exceptions" there filed contained some fifteen hundred long typewritten pages. To check up this bill required the comparison, page by page, of the five thousand pages of transcript of testimony. It meant an entire duplication of the work of the trial, with the added necessity of reaching a definite decision upon needless points which in the give and take of the trial were left unsettled in the discussions between counsel, witnesses and the court.

The district attorneys suggest that in certain cases the present practice of presenting points of law for review is open to improvement, and that in such cases the entire record and testimony might properly be certified to the Supreme Court. It is therefore recommended that legislation be enacted making it possible for such certification in all cases involving homicide, and in other serious and important cases where, in the exercise of a sound discretion, the presiding justice is of the opinion that there should be such a certification.

E. Bail in Criminal Proceedings.

Through the enactment of St. 1922, c. 465, relative to bail in criminal cases, some of the abuses referred to in the annual report of my predecessor for the year 1921, and in the report of the special commission appointed under Resolves of 1921, c. 34, for an investigation of the subject of bail in criminal cases, were eliminated. Cases are, however, not infrequent where persons who have become bail or surety in criminal cases, and who have offered real estate as their qualification for accept-

ance as such bail or surety, subsequently, while the criminal cases are pending, dispose of or encumber the real estate without notifying the court. Such act, under St. 1922, c. 465, may be punished by fine or imprisonment. Criminal prosecution of the bail or surety does not, however, satisfy the purpose of bail. There ought to be additional legislation which would protect the Commonwealth so far as possible in its monetary rights.

It is, therefore, recommended that this matter be referred to the proper legislative committee, and that the advisability of enacting legislation providing that the liability of a bail or surety be a lien upon the real estate offered for his qualification be considered.

RECOMMENDATIONS AT THE INSTANCE OF THE DISTRICT ATTORNEYS IN THE LAST REPORT.

Last year, previous to the filing of the report of the Attorney General, conferences were held of the then Attorney General, the Attorney General elect, the then district attorneys and the district attorneys elect, at which meetings numerous suggestions were considered with regard to needed changes in the criminal law. As a result, eight changes were recommended at the instance of the district attorneys. Four of these recommendations were enacted into law by the Legislature last spring.

At our conferences recently held it was unanimously voted to authorize the Attorney General, upon behalf of the district attorneys, to resubmit the remaining four recommendations of last year. They are as follows:—

(a) *Conspiracy to commit a Felony.*—It is recommended that legislation be passed providing that a conspiracy to commit a felony shall be punished in the same manner and to the same extent as an attempt to commit a felony.

(b) *Report of the Department of Mental Diseases as Evidence in Criminal Cases.*—St. 1921, c. 415, provides that whenever a person is indicted for a capital offence, or whenever a person, who is known to have been indicted for any other offence more than once or to have been previously convicted of a felony, is indicted or bound over for trial in the Superior Court, the Department of Mental Diseases shall cause such person to be examined as to his mental condition, and that its report shall be admissible as evidence. The district attorneys are of the opinion that this statute should be amended by striking out the provision that the report of the Department of Mental Diseases shall be admissible as evidence of the mental condition of the accused, and I so recommend.

(c) *Defence of Insanity. Pleadings.*—Existing legislation should be so amended that the defence of insanity of a defendant cannot be raised except by leave of court, unless a special plea of insanity is filed with the clerk of the court at least three days prior to the coming in of the court at the sitting at which the defendant is to be tried. I further recommend that the statutes be amended so as to provide that all dilatory pleadings, motions to quash, and requests for bills of particulars shall be filed at least three days prior to the coming in of the court at the sitting at which the respective cases are to be tried, except as otherwise allowed by leave of court.

(d) *Precedence of Certain Prosecutions.*—G. L., c. 212, § 24, provides that certain cases shall have precedence in the order of trial next after the cases of persons who are actually confined in prison and awaiting trial. The district attorneys are thereby prevented for extended periods from trying any cases except those given precedence by the statute, and certain classes of offences are barred from trial. Not infrequently, important cases, which, for special reasons should be tried, are postponed for long intervals. I recommend that the section be so amended as to provide that the court shall have discretion to modify the order of trial if in its opinion there is sufficient ground for so doing.

MASSACHUSETTS REPORTS.

The reports of the decisions of the Supreme Judicial Court, styled "Massachusetts Reports," for many years prior to July 1, 1923, had been published and sold under successive contracts with the Commonwealth which in broad terms stipulated the

nature of the publication and in specific terms stated the price at which it should be sold to the public. The contract which expired on June 30, 1923, provided for a sale of the Reports to the public and to the State at the rate of \$3.15 per volume. Four hundred and fifty-four of these volumes were sold to the State for distribution among various municipal and other officers. Those contracts also gave to the publisher full copyright privilege and ownership of electroplates.

By Chapter 30 of the Resolves of 1923, the Attorney General, the Secretary of the Commonwealth and the Reporter of Decisions were directed to advertise for proposals for the execution of the printing and binding, and to provide for the sale to the public, of the "Massachusetts Reports" at such price as they might fix and for a term of three years beginning July 1, 1923.

Pursuant to such direction, the officers named prepared a form of contract and proposal and advertised for bids for the printing and binding of an edition of 3,750 copies of each volume of the Massachusetts Reports to be published during the three years beginning July 1, 1923. The successful bidder was Mr. Samuel Usher, proprietor of The Fort Hill Press, 289 Congress Street, Boston. He has agreed to publish each edition of 3,750 copies under terms agreeable to the officers named in the resolve for \$8,175, to be paid by the Commonwealth. The volumes are not copyrighted and the electroplates remain the property of the Commonwealth. The stipulations of the contract assure prompt performance of work and should result in prompt distribution of the volumes of the Reports to the public for cash within a reasonably short time after the decisions are rendered. A new type of paper is used which will make the volume about two thirds the thickness of the previous volumes with no diminution of binding strength or convenience in handling. The contract provides for the payment of the consideration price by the Commonwealth "when appropriation is made therefor by the legislature" and when the printer shall have completed the work on each volume.

The officers named in the legislative resolve above described, in behalf of the Commonwealth, also made with Mr. Usher a contract for the sale of 3,296 copies of each edition to the public, 454 of the copies being retained by the Commonwealth for distribution to municipal and other officers as above stated. This contract appoints Mr. Usher the Commonwealth's agent for the sale of these books. It provides that he shall sell and deliver the volumes at \$3.00 per copy for cash, and that at semi-annual periods he shall account to the Commonwealth for sums received by him at the rate of \$2.30 for each copy sold, the 70¢ difference between the amount charged to the public and the amount accounted for to the Commonwealth being the price to be received by him for the actual disbursements entailed in circularizing the public, packing, shipping and delivering the volumes, and the overhead expenses entailed by the merchandising.

It will therefore be seen that, if the entire 3,296 copies of each edition are sold, exclusive of the copies distributed to municipal and other authorities, the Commonwealth will have the 454 copies to distribute at a net outlay of \$835.90 less per edition than under the contract with the previous publisher; and, if four volumes appear during a year, the Commonwealth will be in a cash position \$3,343.60 better than under the former contract.

The finance system now in force in the Commonwealth, as well as the terms of the contract made with Mr. Usher, will require, however, an annual appropriation covering the entire amount to be paid for the volumes to be issued during the year. The return to the Commonwealth from the sale will be a separate item which will show in the balance at the end of the year. The officers named in the legislative resolve had no power to make an accounting arrangement with Mr. Usher so that he would receive a balance only to be due to him and to be appropriated by the legislature.

Between three and four volumes of the Reports are issued annually. It is advisable for the Legislature to make an appropriation covering the full contract price for four volumes. It is probable that volumes 245, 246, 247 and 248 will be issued during the fiscal year ending December 1, 1924. It is therefore recommended that the legislature appropriate for the purpose of the contract with Samuel Usher for the printing and binding of the Massachusetts Reports the sum of \$32,700 for the current fiscal year.

No recommendation is made as to what fund shall receive the returns from the sales of the Reports made by Mr. Usher; but the Attorney General and his associates, the secretary of Commonwealth and the Reporter of Decisions, feel that some accountancy method should be adopted so that year by year the net financial result of the contracts may appear.

ADVANCE SHEETS OF THE OPINIONS AND DECISIONS OF THE SUPREME JUDICIAL COURT.

By said chapter 30 the said officers were also authorized, if in their discretion it was deemed practicable and feasible, to contract for the printing and sale to the public of advance copies of opinions of the Supreme Judicial Court filed with the Reporter of Decisions. Pursuant to this authority, a supplemental contract was entered into with Mr. Usher, and he has for some weeks been publishing advance sheets, which are being distributed to subscribers within forty-eight hours of the time when the opinions are filed with the Reporter. In the past, members of the legal profession have been put to considerable difficulty in securing promptly copies of opinions after they have been handed down by the Supreme Judicial Court. The Advance Sheets now being issued are paged consecutively for the purpose of citation, and a brief index will be issued from time to time.

Pending the publication of the bound volumes the opinions may be cited "Mass. Adv. Sh.," with proper page. For instance, a decision filed with the Reporter of Decisions on October 25, 1923, was in the hands of the subscribers on October 26th, and could be cited in briefs then in the making as "B. v. B., Mass. Adv. Sh. (1923) 127."

THE DISBARMENT OF ATTORNEYS-AT-LAW.

As the Supreme Judicial Court of this Commonwealth has said, this subject is one of vital public interest. "The removal of attorneys, who have become unfaithful to their trust and are unfit longer to exercise their office and to be held out as trustworthy, faithful and competent, is of concern to all the people. It is the duty of members of the bar, as public officers, to see that their body is purged of unworthy members."

Up to 1919, disbarment proceedings were brought generally by bar associations after hearings before their grievance committees. The proceedings were conducted by an attorney appointed by the court upon the suggestion of the bar association, and such attorney was awarded compensation by the court.

In 1919, however, the Legislature provided that when a petition was filed for the removal of an attorney the proceedings should be conducted by the Attorney General, or such person as he might designate with the approval of the court; but such person should receive no compensation for his services.

During the past year several petitions have been filed asking for either the discipline or the disbarment of certain members of the bar, the petitions being filed by bar associations. In due course they have been referred to the Attorney General and passed upon, and attorneys have been designated to conduct the proceedings. There appears to be no good reason why these cases should be submitted to the Attorney General, passed upon and conducted directly or under his direction; in fact, both by statute and by the exercise of its inherent power, the court has the right to institute and prosecute proceedings looking toward the discipline or disbarment of members of the bar. It may also require members of the bar, its officers, to institute and prosecute such proceedings. The present method involves red tape which may well be dispensed with at this time. The requirement that attorneys conducting these proceedings should receive no compensation is unfair. It is disagreeable work, and an attorney should be reimbursed, in part at least, for the time during which he is taken away from his private practice for this public service.

I therefore renew the recommendation of my immediate predecessor that G. L., c. 221, § 40, be amended by striking out the words added in 1919, and inserting a provision for approval by the court of the attorney designated to conduct the proceedings, so that said section shall read as follows:

SECTION 40. An attorney may be removed by the supreme judicial or superior court for deceit, malpractice or other gross misconduct, and shall also be liable in damages to the person injured thereby, and to such other punishment as may be provided by law. Whenever a petition is filed for the removal of an attorney, the proceedings thereafter shall be conducted by an attorney to be designated by the court. The expenses of the inquiry and proceedings in either court shall be paid as in criminal prosecutions in the superior court.

THE LAND COURT.

Twenty-five years ago the court of land registration, with two judges, was established by St. 1898, c. 562, and was organized and ready to act October 14, 1898. The principal object in the establishment of the court was that titles to land might be made and kept clear, and transferred easily and quickly. On the recommendation of the Attorney General, made to the Legislature in 1901 and 1902, there was transferred to the Land Court exclusive original jurisdiction in all proceedings except bills in equity for the settlement of title to land. This step was taken principally to secure speedy trials and final determination in such cases. In 1915 jurisdiction over tax titles and their foreclosure was added. The system was early attacked both in the State and Federal courts, but was successfully defended.

In the intervening years the court has grown in importance and favor. It is an important court of record, having potential jurisdiction over all the lands within the Commonwealth. The work of the court covers the whole State, and, while most of its sittings are, under the statute, held in Suffolk County, it hears cases in such other counties as public convenience may require. The matters before the court require speedy hearing and decision.

The nature of the work, as well as the statute, requires preparation and filing of a written decision in each case. Registered land remains subject to the immediate order of the court. Every act of a register of deeds in regard to registered land is done directly under order of court. It is the act of the court, and the Commonwealth is responsible in money damages for any mistakes. Ordinary transactions are made under standing orders, but a judge has to pass directly on every instrument out of the ordinary and must hear and determine any matter affecting title to land once registered. The court is open in Boston every day throughout the year except Sundays and holidays, and one judge is necessarily always in attendance.

It has been represented to me, on good authority, that there has been a very great and steady increase in the work that the court is obliged to handle, that the increase in 1923 was thirty-three per cent over any figures up to 1920, and that it is no longer possible for two judges to keep up the work of the court. Despite this steady increase, there has been no increase in the number of judges since the establishment of the court twenty-five years ago.

I therefore recommend that the question of an increase in the number of judges of the Land Court be investigated by the proper legislative committee, and that, if it be found that the increased work of the court demands the addition of another judge, legislation to that end be enacted.

SERVICE ON COMMISSIONS.

The Attorney General appears for the Commonwealth, the Governor, the Executive Council, the Secretary, the Treasurer and Receiver General, the Auditor, and for State departments, boards and commissions in all suits and other civil proceedings in which the Commonwealth is a party or interested, or in which the official acts and doings of said officers are called in question, in all courts of the Commonwealth, and in such suits and proceedings before any other tribunal when requested by the Governor or by the General Court, or either branch thereof. All legal services required by such officers, boards and commissions in matters relating to their official duties are rendered by the Attorney General or under his direction. He has many other duties and responsibilities imposed by common law and statute, and they are all confined to matters of a strictly legal nature.

It is apparent that this work is sufficient to occupy the entire time of the Attorney General, and it interferes seriously with the performance of his duties to

have assigned to him work of an entirely different nature and character, such as has been put upon the Attorneys General by recent legislatures. Last year the Legislature required that the Attorney General serve on various commissions, among others, the commission to investigate certain land restrictions imposed by the Commonwealth in the Back Bay district of the city of Boston; the commission to investigate the claim for damages of Holbrook, Cabot & Rollins Corporation, arising out of the construction of the dry dock at South Boston; and the commission to consider contributory pensions for certain veterans in public employment.

Two of my predecessors in office, namely, Hon. James M. Swift and Hon. Thomas J. Boynton, protested, by annual report, against the custom of so appointing the Attorney General to commissions charged with the investigation of matters not directly connected with the work of this department. I am of the opinion that the protest should be renewed. I do this not only because this additional work does interfere with the general work of the office, but also because of the further consideration, pointed out first by Mr. Swift in 1914, that "inasmuch as any commission delegated by the Legislature to investigate these various subjects has the right to the assistance of the Attorney General in any matters involving legal considerations in connection with their deliberations, the Attorney General should not be required to serve as a member of such commissions."

Furthermore, the departments which may be involved in the consideration of matters before such commissions are thereby deprived of the assistance of the Attorney General in the preparation and presentation of their evidence to the commission, since manifestly the Attorney General cannot at the same time act as judge and counsel.

OFFICIAL ABSTRACTER AND CONVEYANCER.

The Commonwealth, through its several departments, boards and commissions, each year, either by gift, purchase or eminent domain, takes title to very many parcels of real estate. This is particularly true in the case of lands acquired for State forests and experiments in forest management, for State highways, and the recent large acquisitions at Plymouth and Provincetown by the Tercentenary Commissions. All instruments of conveyance and the title to be transferred thereby are passed upon by the Attorney General.

It has been the practice, of necessity, to have the examination of titles to land made by counsel not of the staff of the department. This is not an efficient method of handling the work. It does not result in furnishing the department with the abstracts of title, that they may serve as data for use when, as often happens, adjacent lands are acquired.

In my judgment, there will be a considerable saving if much of this work, now done outside, is centralized in this office. I therefore recommend the creation of the office of official abstracter and conveyancer, to be appointed by the Attorney General, whose duties shall be prescribed by him, and to include the work above mentioned and other similar duties.

EXECUTION OF LEASES IN BEHALF OF THE COMMONWEALTH.

There is no statute conferring authority on any official to execute leases in behalf of the Commonwealth. This department cannot give an authoritative answer as to how such leases should be executed when the Commonwealth acquires quarters outside of the State House for any of its departments, commissions or boards. A head of a department was so advised in an official opinion under date of February 24, 1921. A former Attorney General, in 1920, also pointed out that the matter was not clear, although the practice had grown up of submitting proposed leases to the Governor and Council for their approval. The present situation, therefore, is not satisfactory, for the Governor and Council do not sign leases but approval is indorsed thereon by the executive secretary. I therefore recommend the passage of an act authorizing the execution of leases by the heads of departments, such leases, however, not to be effective without the approval of the Governor and Council.

AMENDMENT RELATIVE TO EIGHT-HOUR LAW STIPULATION IN PUBLIC CONTRACTS.

G. L., c. 149, § 30, states in part:

. . . No officer of the commonwealth or of any county or of any such town, no such contractor or sub-contractor or other person whose duty it is to employ, direct or control the service of such laborers, workmen or mechanics shall require or permit any such laborer, workman or mechanic to work more than eight hours in any one day, or more than forty-eight hours in any one week, except in cases of extraordinary emergency.

St. 1923, c. 236, amends this section by adding at the end thereof the following:

The provisions of this section shall not prohibit the employment by the state department of public works, or by any contractor or sub-contractor for said department, of laborers, workmen and mechanics for more than eight hours in any one day in the construction or reconstruction of highways when, in the opinion of the commissioner of labor and industries, public necessity so requires.

It will be observed that this exception to the eight-hour law applies only to the Department of Public Works and in that department only to highway construction or reconstruction.

G. L., c. 149, § 34, requires the Commonwealth to place a stipulation in every contract that, —

no laborer, workman or mechanic working within the commonwealth, in the employ of the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract, shall be requested or required to work more than eight hours in any one day, and every such contract not containing this stipulation shall be null and void.

The Legislature has not amended section 34, and therefore, under the strict construction of that statute, our contracts should still be written with this stipulation, yet under St. 1923, c. 236, the definite provision of law may be waived. Contracts cannot be written in accordance with the amended law but must still require as a contract stipulation that the contractor must observe the law as it stood prior to the amendment. It is not advisable to assume that section 34 was amended by implication and change the wording of the State contract provisions.

I desire also to call the attention of the General Court to a variance in language in the two sections which ought to be corrected. Section 30 in effect states that no laborer, workman or mechanic shall be *required or permitted* to work more than eight hours, etc. Section 34 uses the language that no laborer, workman or mechanic shall be *requested or required* to work more than eight hours.

I therefore recommend that said section 34 be amended in accordance with the amendment of section 30 last year, so that the Department of Public Works, Division of Highways, will not be obliged to waive a definite provision of its contract in cases where it finds it necessary to avail itself of St. 1923, c. 236. Also, as pointed out above, the language of the two sections should be made to coincide.

PROPOSAL TO AMEND STATUTE RELATIVE TO JUSTICES OF THE PEACE AND NOTARIES PUBLIC.

Under existing law a change in the name of a male justice of the peace or notary public does not terminate his commission. In the case of a justice of the peace who is a woman there is doubt whether a change in name upon marriage or otherwise renders the commission void. Mass. Const. Amend., LVII, specifically provides that a change in the name of a notary public who is a woman shall render the commission void. An amendment to the Constitution striking out the foregoing provision was agreed to in joint session of the General Court on May 24, 1921, and on May 10, 1923, and will be submitted to the people at the next State election.

It is obvious that the law relative to the power of persons to act as justices of the peace should be clear and that any doubt as to such power should be terminated by legislation. There is also no valid reason for discrimination against cer-

tain justices of the peace on the ground of sex. Men and women who are justices ought to be governed by the same provisions of law and their powers should be equal. Furthermore, there is now no provision requiring justices of the peace and notaries public to give notice of changes in their names. Manifestly, such notice should be required.

I therefore recommend that G. L., c. 222, § 1, be amended by providing that a change in the name of a justice of the peace or male notary public shall not terminate his or her commission, but that such justice of the peace or notary public shall notify the Governor of such change in name and that such change shall be recorded on the commission.

RECOMMENDATIONS IN PREVIOUS REPORTS.

I resubmit sundry recommendations made in previous reports of Attorneys General, to which reports I beg to refer for the reasons therefor.

1. *Statutes relating to permits to be at liberty, parole and discharge of persons convicted of crime.*

These are contained in G. L., c. 127, §§ 128-151. Except for certain language in section 133, the statutes make no express provision for cases where prisoners have been convicted and sentenced to imprisonment for two or more offences. See Attorney General's Report, 1920, p. xx.

2. *Dividends and interest on deposits in the savings department of trust companies.*

G. L., c. 167, § 17, should be amended so that the intention of the Legislature in enacting this particular law may be carried out. See Attorney General's Report, 1920, p. xxi.

3. *Right of search and seizure under fish and game laws.*

G. L., c. 130, § 6, purports to authorize certain enumerated searches and seizures to be made *without warrant*. This section in its present form, in my judgment, is unconstitutional, and amendment is necessary. See Attorney General's Report, 1921, p. xxxvi.

4. *Ambiguity of Statutes relative to Approval by Attorney General of Public Health Regulations.*

G. L., c. 111, §§ 31, 122, and 127, all empower local boards of health to make reasonable health regulations. Reading these three sections together, an ambiguity arises as to whether or not, in a given case, regulations must be submitted to the Attorney General for his approval. The sections should be properly amended so that what is prescribed will be absolutely definite. See Attorney General's Report, 1922, p. xxxi.

THE SUIT TO TEST THE CONSTITUTIONALITY OF THE SHEPPARD-TOWNER ACT.

Pursuant to the joint order of the Honorable Senate and House of Representatives, my predecessor filed in the Supreme Court of the United States an original bill against officers of the Federal government charged with the administration and enforcement of the Sheppard-Towner Act, for the purpose of testing the constitutionality of that act. A suit for the same purpose was brought at about the same time by Harriet A. Frothingham, a citizen of Massachusetts. In May last, the two cases were argued together before the Supreme Court of the United States, the argument for the Commonwealth being made by Assistant Attorney General Alexander Lincoln. The court decided both cases adversely on the ground of want of jurisdiction alone, stating expressly that they did not consider the merits of the constitutional questions which had been raised. The court held, in the Massachusetts case, that the State presented no justiciable controversy either in its own behalf or as the representative of its citizens; and, in the Frothingham case, that the plaintiff had no such interest in the subject matter, nor was any such injury inflicted or threatened, as would enable her to sue. As to the operation of the statute the court observed: "Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." This statement, in my judgment, is not to be interpreted as intimating that a State legislature can yield a sovereign power of the State, since

the Supreme Court has repeatedly affirmed the principle that a State cannot bargain away any part of its sovereign powers, even by agreement with the Federal government.

The result of this decision is to leave the question of the constitutionality of the Sheppard-Towner Act wholly undetermined; indeed, the manner in which the court disposed of the cases leads, it seems to me, to a justifiable inference that the judges believed that question was at least open to serious doubt.

But the question is one which cannot be presented for judicial determination by any State, or citizen whose interest depends merely upon the increased burden of taxation resulting from the act. If by the passage of the act Congress has usurped reserved powers of the States, the enforcement of the statute can be prevented, as the court says, "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such act."

ACTIVITIES AGAINST "FIREPROOF" COAL.

Shortly after I took office, numerous complaints began to come in from various sources relative to so-called "fireproof" coal being sold in various parts of the State and to short weight. The situation, in my opinion, called for immediate state-wide action, and as a preliminary thereto, in February, a conference was called at my office of various State officials. At the same time letters were sent to the sealers of weights and measures and to the chiefs of police of the 39 cities and 316 towns of the Commonwealth, calling their attention to the situation and to existing law, urging them to prosecute vigorously all violators of the law and offering them the full co-operation of this department. The response from these public officials was prompt, and violators of the law in respect to the sale of coal were brought into court throughout the Commonwealth.

A temporary complaint bureau was established at once in this department and former Representative Jacob Bitzer was placed in charge thereof. This bureau, after giving very efficient service throughout the winter and early spring, was closed when the immediate need for a special bureau no longer existed.

The latter part of February Mr. Eugene C. Hultman, Chairman of the Special Commission on Necessaries of Life, Mr. James J. Phelan, Fuel Commissioner, and I conferred with the Governor, advising him that there was no law authorizing the seizure and destruction of coal offered for sale which was unfit for ordinary use, and recommended that such legislation and additional legislation relative to coal be enacted. The Governor requested the drafting forthwith of a bill in the matter. This was done, and the bill was transmitted by the Governor to the Legislature in a special message dated February 26, 1923. Assistant Attorney General Lewis Goldberg appeared at the hearings of the legislative committee to which this bill was referred and rendered assistance. After the passage of the bill, I sent letters and copies of the act to all the sealers of weights and measures in the Commonwealth, and thereafter called a conference of all such officials for the purpose of securing the fullest co-operation in the enforcement of the new act. In a number of flagrant cases attorneys were designated to assist in the prosecutions in the lower courts.

Mr. Goldberg appeared at a public hearing before the joint special coal investigating committee, established by a joint order of the General Court adopted April 5, 1923. Assistant Attorney General James H. Devlin sat with that committee for five days and assisted it. He also entered an appearance and examined witnesses at a two-day hearing in Boston of Interstate Commerce Commissioners (held by one of its examiners) in the "matter of rates, charges, classifications, railroads and practices governing the transportation of anthracite coal".

Opponents of the new "pure coal law", so called, contended that its passage would keep coal out of Massachusetts. Time has fully demonstrated that the law in no way diminished the shipment of good coal to Massachusetts, but that it did keep out of the Commonwealth and out of the hands of Massachusetts consumers black rock, non-burnable coal and coal containing an unreasonable amount of foreign substance. It has been the most effective means of preventing the Massachusetts market from being flooded with "fireproof" coal and of preventing

the people of Massachusetts from being cheated and defrauded in respect to coal. It has been administered efficiently. No honest or reputable coal dealer or operator has had the slightest occasion to fear the working of the law or its effect upon his business or property. Dishonest dealers and operators have learned that coal which will not burn will not be tolerated in Massachusetts. The law is now being used as a basis for similar legislation proposed in other States.

I desire to commend the several sealers of weights and measures throughout the Commonwealth for their co-operation in the enforcement of the act.

GASOLINE INVESTIGATION.

At the annual meeting of the National Association of Attorneys General, held last summer at Minneapolis, the following resolution was adopted on August 28th:

Whereas, a situation now exists with regard to petroleum and its products that is of interest to the public, particularly so in that a wide variance and spread of prices now appears in petroleum products which leads to the charge of price manipulation,

Therefore, be it resolved by the National Association of Attorneys General that a thorough and nation-wide investigation of such conditions be made by the attorneys general and in order to co-ordinate the facilities of the several attorneys general for this purpose that the association requests Attorney General O. S. Spillman of Nebraska to call a meeting immediately at Kansas City, Mo., or some other convenient city, of the several attorneys general of the mid-continent field and such others as may be interested, there to devise ways and means of gathering and disseminating information relating to all phases of the oil industry of the several states for the use of the attorneys general of the several states and of the Attorney General of the United States.

Pursuant to the resolution, Attorney General Spillman called a meeting of all the attorneys general of the United States, to be held October 15-17, inclusive, at the Old Colony Club in Chicago, for the purpose of devising ways and means of gathering and disseminating information relating to all phases of the oil industry of the several states for the use of the attorneys general of the several states and of the Attorney General of the United States.

Your Attorney General requested, and promptly received, from Mr. Eugene C. Hultman, Chairman of the Special Commission on the Necessaries of Life, the fullest co-operation in gathering information and data in regard to the sale and price of gasoline in Massachusetts.

Your Attorney General, accompanied by Assistant Attorney General Lewis Goldberg, attended the conference, and was chosen by the conference as a member of the committee on resolutions and of the permanent executive committee. The conference was attended by the attorneys general of twenty-four different states and representatives of the Department of Justice of the United States. Resolutions were adopted and a standing executive committee of nine was appointed. The committee was directed to confer forthwith with the Attorney General of the United States in regard to the conditions in the petroleum industry, and representatives of the committee accordingly proceeded to Washington. Last month the Federal Department of Justice ordered an investigation of alleged conspiracies to fix gasoline prices, the investigation to be directed by Assistant Attorney General Seymour, and the United States district attorneys throughout the country were ordered to co-operate and participate in the inquiry.

I recommend consideration by the Legislature of the advisability of broadening the authority of the Commission on the Necessaries of Life, so that said commission may inquire into all matters relating to the production, transportation, distribution and sale of gasoline and refined petroleum products, and into all facts and circumstances relating to the cost of production, wholesale and retail prices, and the methods pursued in the conduct of the business of any persons, firms or corporations engaged in the production, transportation or sale of gasoline and refined petroleum products.

NATIONAL BANK TAX LITIGATION.

Pursuant to an order of the House of Representatives, that branch, on April 12, last, was informed concerning the litigation involving the validity of the national bank tax, and concerning the status of the remedial legislation then pending in Congress, and was advised as to what action should be taken to protect the interests of the Commonwealth and of the cities and towns therein.

PUBLIC ACCESS TO GREAT PONDS.

St. 1923, c. 453 provided that, upon petition of ten citizens, public hearing should be held by a joint board to decide whether or not public necessity requires a right of way for public access to any great pond within the Commonwealth. Pursuant to the act, I designated Assistant Attorney General Lewis Goldberg to represent the Attorney General on the board. To date one petition has been received, relative to a right of way to Long Pond in Lakeville. After hearing evidence and arguments, the joint board found that Long Pond was a body of water used as a source of water supply by the city of Taunton and that the board therefore, under the statute, had no jurisdiction.

HEARING ON THE CLAIM OF PERSONS ALLEGING DAMAGE BY REASON OF CONSTRUCTION OF ARMORY AT CHARLESTOWN.

Res. 1923, c. 52 requested the Attorney General to hear the claims of persons who alleged damage to their property arising out of the construction and maintenance of the armory at Charlestown.

Assistant Attorney General Joseph E. Warner was designated to hear the case, and the Adjutant General requesting counsel to represent his department, Assistant Attorney General Lewis Goldberg was designated to present the Commonwealth's side of the case. The matter was not pressed by counsel for the claimants until recently. A hearing was held on December 27, last, and the report to the Legislature is separately filed.

CONTROVERTED ELECTIONS IN THE HOUSE OF REPRESENTATIVES.

At the request of the committee on elections, on the part of the House of Representatives, Assistant Attorney General James H. Devlin appeared before such committee and gave legal aid and advice at the hearings given by the said committee in the matter of the petitions of Napoleon Bergeron and John Hayes for seats as representatives from the Twelfth Essex District.

DEPARTMENT OF THE ATTORNEY GENERAL.

The number of official opinions rendered by the department during the year was 172.

The collections of the department for the fiscal year amounted to \$1,529,160.60.

One case was argued and two hearings held before the Supreme Court of the United States, and several hearings have been held before a special master appointed by that court. One case has been argued before the Circuit Court of Appeals for the First Circuit, six cases tried in the United States District Court, and a hearing held in the Court of Claims. Eighteen cases have been argued before the Supreme Judicial Court of this Commonwealth, and there have been twenty hearings and trials before a single justice of that court. There have been two appearances before regular sessions of the Grand Jury, and one before a Special Grand Jury, both in Suffolk County. There have been twenty-two hearings and trials in the civil session of the Superior Court, and four in the criminal session. Fifteen cases have been tried in the probate courts of this State, and three cases in the Land Court. Nine cases have been prosecuted in the local district courts, and two hearings have been held in the poor debtor court. The department has been in attendance at eighteen hearings before the Industrial Accident Board, and ten hearings have been held in extradition cases. There has been one hearing before the Supreme Court of New York, and one hearing in the Jefferson Market Court in New York City.

Changes have been made in the personnel of the department during the year.

On November 20, 1919, Attorney General Henry A. Wyman appointed Edwin H. Abbot, Jr., Esq., an Assistant Attorney General, and on August 7, 1920, Attorney General J. Weston Allen appointed Charles R. Cabot, Esq., an Assistant Attorney General. With the completion of Mr. Allen's term of office both Mr. Abbot and Mr. Cabot resigned in order to return to private practice. While Assistant Attorneys General they performed the duties assigned to them with conspicuous ability, and the meritorious and exceedingly able performance of their work deserves high praise.

After taking the oath of office before the Governor and Council on January 17, last, I reappointed Alexander Lincoln, Esq., Albert Hurwitz, Esq., Lewis Goldberg, Esq., A. Chesley York, Esq., and James H. Devlin, Esq., and announced the appointments of Joseph E. Warner, Esq., and Alfred Perry Richards, Esq., as Assistant Attorneys General.

On February 1, last, Day Kimball, Esq., was appointed an Assistant Attorney General.

On September 25, last, I appointed Honorable Frederick G. Katzmann, former District Attorney for the Southeastern District, a Special Assistant Attorney General to assist District Attorney Harold P. Williams in the prosecution of the cases of the Commonwealth against Nicola Sacco and Bartolomeo Vanzetti.

On November 20, 1919, Attorney General Henry A. Wyman appointed Albert Hurwitz, Esq., an Assistant Attorney General. On September 30, last, Mr. Hurwitz resigned from this office, after four years of faithful, indefatigable and valuable service, especially in connection with the investigation and prosecution of important criminal cases. Upon his resignation, I designated Mr. Hurwitz a Special Assistant Attorney General to aid the District Attorney for the Suffolk District in the preparation and trial of the cases that were turned over to Mr. O'Brien in May.

Roger Clapp, Esq., was appointed an Assistant Attorney General on October 1, 1923.

In submitting my report for the year just ending, I conclude with the observation that a great number of difficult and important cases, involving novel and interesting questions of law, have been disposed of with results, it is trusted, in the aggregate satisfactory.

It would have been impossible to have accomplished the amount of work without the loyalty and industry, at all times and under all circumstances, displayed by the Assistant Attorneys General and the employees of the department in the performance of their various duties. I take this opportunity to acknowledge publicly their services to the Commonwealth.

Annexed to this report are such of the opinions rendered during the current year as it is thought may be of interest to the public.

Respectfully submitted,

JAY R. BENTON,
Attorney General.

OPINIONS.

Taxation — Exemption of Property of United States Housing Corporation.

The property of an agency of the Federal government is exempt from State taxation which obstructs the operations of the government through that agency; but not otherwise, unless Congress has indicated an intention that it shall be exempt.

Whether real estate held by the United States Housing Corporation after the close of the war was subject to local taxation, on the facts presented, is uncertain.

JAN. 2, 1923.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You ask my opinion on a question submitted by the assessors of Quincy relating to the assessment of taxes on real estate at one time owned by the United States Housing Corporation. This opinion I am required to give to you, upon request, under the provisions of G. L., c. 58, § 1.

The facts stated in the letter from the assessors to you may be summarized in a general way as follows.

The United States Housing Corporation is a New York corporation, all of whose stock is owned by the United States government. A few years ago it acquired a considerable area of real estate at Quincy Point, Quincy. This property is now divided into small lots of land, on which approximately two hundred and fifty dwelling houses have been erected.

In 1919 the question arose whether this property was subject to taxation, and an agreement was made between the city and the Housing Corporation, by which the city agreed to recognize the property as exempt from taxation, and the corporation agreed to pay each year, in lieu of taxes, an amount equal to the amount for which the property should have been assessed, if subject to taxation. Subsequently, in May, 1922, another agreement was made by which the amount to be paid the city for the years 1920 and 1921 was adjusted, and the 1919 contract was rescinded.

At some time prior to April 1, 1922, contracts were executed by the Housing Corporation for the sale of some or all of the lots above mentioned to persons then occupying the same or to others. In this respect the facts are not definitely stated in the assessors' letter.

In 1922 this property was assessed by the assessors to those persons who were occupying lots on April first, either with or without contracts for the purchase of them, and apparently also to such persons as held contracts from the corporation for the purchase of lots which were unoccupied, if there were any such.

The persons to whom the property was assessed object to paying taxes thereon, claiming that the legal title was in the Housing Corporation, that the corporation was an agency of the United States government, that therefore property belonging to it was exempt from taxation and the occupier could not be taxed therefor, and, where there were contracts for the purchase of lots, that such contracts did not subject them to tax.

Since April first the Housing Corporation has given to most of the persons occupying lots quitclaim deeds of the premises, in almost every instance taking back a mortgage running directly to the United States government.

The assessors ask whether they should abate the assessments made by them in 1922 as having been illegally made.

By virtue of G. L., c. 59, § 11, the property referred to was assessable only to the Housing Corporation as owner or to the persons in possession thereof on April first. It was not assessable to those, not occupying the premises, who held contracts from the Housing Corporation for the purchase and sale of the same, even although those contracts contained provisions for the payment of such taxes or any portion thereof. V Op. Atty. Gen. 714.

Furthermore, the property was not assessable at all if it was on April first the property of the United States. Such property is expressly exempted from

taxation by our statutes, G. L., c. 59, § 5, cl. First, and also by the Constitution of the United States. *Van Brocklin v. Tennessee*, 117 U. S. 151; *Wisconsin Central R.R. Co. v. Price Co.*, 133 U. S. 496, 504.

The Federal inhibition against the exercise of the taxing power of a state extends not only to the levying of taxes on the property of the United States, but also to the taxing of the agencies and instrumentalities of the Federal government in such a way as to obstruct its operations in the execution of its powers. *McCulloch v. Maryland*, 4 Wheat. 316, 425-431, 436; *Osborn v. Bank of United States*, 9 Wheat. 738, 859-868; *Williams v. Talladega*, 226 U. S. 404, 419.

On the other hand, the property of a Federal agency may be taxed by a State where the tax does not interfere with the operations of the Federal government and is levied under a law which is general and non-discriminatory in its application, and where Congress has not by legislation indicated an intention that it shall be exempt. The validity of such a tax depends largely on its effect. *McCulloch v. Maryland*, 4 Wheat. 316, 436; *Osborn v. Bank of United States*, 9 Wheat. 738, 867; *Thomson v. Pacific R.R.*, 9 Wall. 579, 590; *Railroad Co. v. Peniston*, 18 Wall. 5, 36, 37; *Central Pacific R.R. Co. v. California*, 162 U. S. 91; *Large Oil Co. v. Howard*, 163 Pac. Rep. 537.

It is necessary now to consider the application of the rules and principles just stated to the assessments in question.

The United States Housing Corporation was incorporated under the authority of Act of May 16, 1918, c. 74 (40 Stat. 550), as amended by Act of June 4, 1918, c. 92 (40 Stat. 594, 595), and by Act of July 19, 1919, c. 24 (41 Stat. 163, 224).

Said Act of May 16, 1918, c. 74, is, in part, as follows: —

“CHAP. 74. — AN ACT TO AUTHORIZE THE PRESIDENT TO PROVIDE HOUSING FOR WAR NEEDS.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, for the purposes of providing housing, local transportation and other general community utilities for such industrial workers as are engaged in arsenals and navy yards of the United States and in industries connected with and essential to the national defense, and their families, and also employees of the United States whose duties require them to reside in the District of Columbia, and whose services are essential to war needs, and their families, only during the continuation of the existing war, is hereby authorized and empowered, within the limits of the amounts herein authorized —

(a) To purchase, acquire by lease, construct, requisition, or acquire by condemnation or by gift such houses, buildings, furnishings, improvements, local transportation and other general community utilities and parts thereof as he may determine to be necessary for the proper conduct of the existing war.

(b) To purchase, lease, requisition, or acquire by condemnation or by gift any improved or unimproved land, or any right, title, or interest therein on which such houses, buildings, improvements, local transportation and other general community utilities and parts thereof have been or may be constructed:

(c) To equip, manage, maintain, alter, rent, lease, exchange, sell, and convey such lands, or any right, title, or interest therein, houses, buildings, improvements, local transportation and other general community utilities, parts thereof, and equipment upon such terms and conditions as he may determine: . . .

The President may exercise any power or discretion herein granted, and may enter into any arrangement or contract incidental thereto, through such agency or agencies as he may create or designate: . . .

SEC. 5. That the power and authority granted herein shall cease with the termination of the present war, except the power and authority to care for, sell,

or rent such property as remains undisposed of and to conclude and execute contracts for the sale of property made during the war. Such property shall be sold as soon after the conclusion of the war as it can be advantageously done: *Provided*, That before any sale is consummated the same must be authorized by Congress."

Said Act of June 4, 1918, contains the following provision:—

"The President, if in his judgment such action is deemed necessary or advantageous, may authorize the creation of a corporation or corporations for the purpose of carrying out the Act entitled 'An Act to authorize the President to provide housing for war needs,' approved May sixteenth, nineteen hundred and eighteen, such corporation or corporations to have or obtain all powers necessary or appropriate therefor. The total capital stock of the corporation or corporations authorized hereunder shall not exceed \$60,000,000: *Provided*, That where such corporation or corporations are created by authority of the President, representatives appointed by the President, or by such agency as he may designate to carry out the purposes of the said Act, shall subscribe to, own, and vote the capital stock thereof for and on behalf of the United States, and shall do all other things in regard thereto necessary to protect the interests of the United States and to carry out the provisions of the said Act: . . ."

By said Act of July 19, 1919, c. 24, section 5 of the Act of May 16, 1918, c. 74, was amended so as to read as follows:—

"That the power and authority granted herein shall cease with the termination of the present war as formally proclaimed by the President, except the power and authority to care for, rent, operate, and sell such property as remains undisposed of; to conclude and execute contracts or other obligations made or incurred during the war or in carrying out the provisions of this section; to collect the principal and interest of loans made or other sums due under obligations entered into under this Act; and to take such other steps as are necessary to protect the interests of the Government and to fulfill the obligations duly incurred in carrying out the powers granted by said Act. All property shall be sold at its fair market value as soon as can be advantageously done, and a reasonable effort shall be made to sell the houses direct to prospective individual home owners for their own occupancy before they are offered for sale in bulk or to speculative investors. Full power and authority is hereby given to sell and convey all such property remaining undisposed of after the termination of the present war. All deeds, contracts, or other instruments of conveyance executed by the United States Housing Corporation by its duly authorized officer or officers where the legal title to the property in question is in the name of said corporation, and by the United States of America by the Secretary of Labor where the title to the property in question is in the name of the United States of America, shall be conclusive evidence of the transfer of title to the property in question according to the purport of such deeds, contracts, or other instruments of conveyance, and in no case shall any purchaser or grantee thereunder be required to see to the application of any purchase money: *Provided, however*, That no sale or conveyance shall be made hereunder on credit without reserving a first lien on such property for the unpaid purchase money: *Provided further*, That in no case shall any such property be given away; nor shall rents be furnished free, but the rental charges shall be reasonable and just as between the tenants and the Government. The United States Housing Corporation (a corporation organized by authority of the President of the United States, pursuant to the provisions of an Act approved May 16, 1918, entitled 'An Act to authorize the President to provide housing for war needs,' and an Act approved June 4, 1918, entitled 'An Act making appropriations to supply additional urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, on account of war expenses, and for other purposes') shall wind up its affairs and dissolve as soon as it has disposed of said property and performed the duties and obligations herein set forth: *Provided*, That the corporation shall report to Congress on December 31, 1919, and on

June 30, 1920, all sales made and the amounts received therefrom together with a detailed statement of receipts and expenditures on account of the other activities authorized by law."

In *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 546, the Supreme Court of the United States has recently made a decision relating to the rights and status of the Fleet Corporation which has considerable application to the question under discussion. The decision was in three cases involving the question of the liability of that corporation to be sued, and its right to claim priority in bankruptcy proceedings. It appears from the opinion that the Fleet Corporation was formed by virtue of authority given by the Shipping Act of September 7, 1916, c. 451 (39 Stat. 728), which established the United States Shipping Board and gave it power to form a corporation under the laws of the District of Columbia for the purchase, construction and operation of merchant vessels and to purchase not less than a majority of the stock. The corporation was organized on April 16, 1917, war having been declared on April sixth of that year. The United States took all the stock of the company. Subsequently the powers of the corporation were greatly enlarged. A majority of the court held that the Fleet Corporation, notwithstanding the enormous powers ultimately given to it, was not so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows, and that the claim of the Fleet Corporation of priority in bankruptcy was properly denied on the ground that the Fleet Corporation was a distinct entity, which stood like other creditors and was not to be preferred. Chief Justice Taft and Justices Van Devanter and Clarke dissented from the decision that the corporation was subject to suit, expressing the opinion that Congress intended that the corporation, as an agent of the government, should have the same immunity from suit as its principal, and that the suits were in fact against the United States.

In the previous case of *United States v. Strang*, 254 U. S. 491, the court held that the Fleet Corporation must be regarded as a separate entity, notwithstanding that all its stock was owned by the United States, and that an employee of the corporation was not an agent of the United States.

The proposition that the Fleet Corporation was not entitled to priority of payment in bankruptcy was held also by the Circuit Court of Appeals for the Second Circuit in the case of *In re Eastern Shore Shipbuilding Corp.*, 274 Fed. 893, the basis of the decision being that the debt due the corporation was not a debt due to the United States.

By reason of the similarity of the Housing Corporation to the Fleet Corporation, it follows from these decisions, in my judgment, that the Housing Corporation is a separate entity, and that property of which the title is in the Housing Corporation is not property of the United States. It does not, however, follow that such property is not exempt from State taxation. It will be exempt if the tax attempted to be levied obstructs the operations of the United States government through the Housing Corporation as its agent.

With respect to the Fleet Corporation, there are decisions in two Federal cases that property standing in its name was exempt from State taxation. *United States v. Coghlan*, 261 Fed. 425; *King County, Wash., v. United States Shipping Board E. F. Corp.*, 282 Fed. 950. The same has been held with respect to the United States Spruce Production Corporation, a corporation organized to expedite the production of airplanes for war purposes, all of whose shares were owned by the United States. *United States v. Clallam County, Wash.*, 283 Fed. 645. In *United States Housing Corp. v. Watertown*, 113 Misc. Rep. (N. Y.) 679, it was held that property of the Housing Corporation was exempt.

In the Coghlan case the tax assessed was for the year 1919 on land which had been improved by the Fleet Corporation. The court based its decision on the proposition that the Fleet Corporation "is a governmental agency, exclusively employed in governmental work, and as such its property is not subject to State taxation."

In the King County case, taxes levied were for the years 1919 and 1921 upon shipyard property belonging to the Fleet Corporation. This decision was subsequent to the Sloan Shipyards Corporation case. The court expressed the view that the question was not foreclosed by the Sloan Shipyards decision, since exemption from suit and exemption from taxation are distinct prerogatives. They pointed out that the property was acquired with public funds and was to be used exclusively for public purposes. They held that since it was clearly in the power of Congress to exempt from taxation property so acquired and held, the question was one of legislative intent, that the taxable character of the property was to be referred to the status of the real rather than of the nominal owner, and that with the unparalleled burdens of war it seemed plain that Congress did not intend to grant permission to tax the property.

In the Clallam County case, the tax levied was for the years 1919, 1920 and 1921 upon a railroad acquired and built with government funds. The court distinguished the Sloan Shipyards Corporation case as inapplicable. It held that the property was exempt, as the property of the government administered through a corporation in executing a wholly Federal employment, and as itself the only means and instrumentality by which the purposes and employment could be carried out.

In the Housing Corporation case, the tax was assessed on a large tract of land in the city of Watertown which had been acquired by the corporation and on which the corporation had constructed a large number of dwellings. This case was in the Supreme Court of New York. The court held that the property assessed was itself the only means and instrumentality by which the Federal purpose could be carried out, that to tax the property would be to tax an agency solely engaged in carrying out the constitutional duties of the general government, that the tax would be on the means employed to carry out a Federal power, and that the tax was wrongfully levied.

In the instant case the property assessed was real estate which presumably had been taxed by the city of Quincy, prior to its acquisition by the Housing Corporation, for many years. The extent to which, if any, the property was improved and the assessed value augmented by the use of Federal funds during the period of its ownership by the Housing Corporation is not stated. The war having ended, the only power remaining in the Housing Corporation under the acts of Congress cited above with respect to this property was to sell it, and to maintain and rent it before it could be advantageously sold. The property was not to be used in the meantime as an instrumentality for the fulfilment of any governmental purpose.

The question asked by the assessors cannot be answered with any degree of certainty as to what would be the decision of a court of last resort if the question were brought to the test of judicial proceedings. The uncertainty is increased because in some important respects the facts are not made definite. The taxes assessed cannot interfere with the operations of the Federal government except as they may render it more difficult for the Housing Corporation to dispose of the property. Whether they have had or will have that effect I cannot determine from the facts as presented. On the other hand, if the assessment is not valid the city of Quincy will lose the customary return from taxes on a considerable area of real estate within its limits. My conclusion is that I cannot advise you that the assessors should abate the assessments as having been illegally made.

The assessors state in their request for advice that in almost every instance where lots have been conveyed since April 1, 1922, to persons occupying them, a mortgage has been given back to the United States government direct. It may be desirable to point out that such property is, nevertheless, properly taxable in subsequent years to the mortgagor under G. L., c. 59, § 11, the following provisions in sections 12 to 14 not being applicable to a case where a mortgagee is exempt from taxation under section 5.

Very truly yours,

J. WESTON ALLEN, *Attorney General*.

State Officers — Supervisor of Accounts.

The Legislature has power to change or abolish an office created by it. St. 1922, c. 545, abolishing the office of the Supervisor of Accounts, is constitutional and valid.

JAN. 2, 1923.

Hon. ALONZO B. COOK, *Auditor of the Commonwealth.*

DEAR SIR:— You ask my opinion "as to the legality of the proposed abolition by St. 1922, c. 545, of the office of the Supervisor of Accounts," established by St. 1908, c. 597; §§ 3 and 4, which has been filled from the time of the passage of the act by a veteran of the Civil War, in view of R. L., c. 19, § 23 (G. L., c. 31, § 26). You state that no notice of any kind has ever been served as required by the statute.

St. 1908, c. 597, § 3, which creates the office of Supervisor of Accounts, is as follows:—

"The auditor, with the consent of the governor and council, shall appoint a supervisor of accounts, whose salary shall be fixed by him, with the approval of the governor and council, and whom he may remove from office for cause at any time with the consent of the governor and council."

Section 4 prescribes the powers and duties of the Supervisor of Accounts. St. 1922, c. 545, § 27, provides, in part, as follows:—

"The offices of the second deputy, of the supervisor of accounts and of the assistant supervisor of accounts in the department of the state auditor are hereby abolished."

R. L., c. 19, § 23, as amended by St. 1905, c. 150, § 1, is as follows:—

"No veteran who holds an office or employment in the public service of the Commonwealth, or of any city or town therein, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment, nor shall his office be abolished, nor shall he be lowered in rank or compensation, except after a full hearing of which he shall have at least seventy-two hours' written notice, with a statement of the reasons for the contemplated removal, suspension, transfer, lowering in rank or compensation, or abolition. The hearing shall be before the state board of conciliation and arbitration, if the veteran is a state employee, or before the mayor of the city or selectmen of the town, of which he is an employee, and the veteran shall have the right to be present and to be represented by counsel. Such removal, suspension or transfer, lowering in rank or compensation, or such abolition of an office, shall be made only upon a written order stating fully and specifically the cause or causes therefor, and signed by said board, mayor or selectmen, after a hearing as aforesaid."

This provision appears without changes material to the present inquiry in G. L., c. 31, § 26.

It is well established that a law which abolishes an office by repealing a former act by which the office was created does not impair the obligation of any contract, and that there is no vested interest or property right in such an office. *Butler v. Pennsylvania*, 10 How. 402; *Crenshaw v. United States*, 134 U. S. 99; *Taylor v. Beckham*, 178 U. S. 548; *Taft v. Adams*, 3 Gray, 126; *Russell v. Howe*, 12 Gray, 147; *Opinion of the Justices*, 117 Mass. 603. *Attorney General v. Pelletier*, 240 Mass. 264, 296. Moreover, it is established that a Legislature cannot create an office which may not be abolished, or pass a law which shall prevent a subsequent Legislature from abolishing such an office. This is a corollary of the general principle that one Legislature may not restrict or limit the power of its successors, and particularly the power to amend or repeal legislation, unless thereby the obligation of a contract is impaired. *Crenshaw v. United States*, 134 U. S. 99; *People v. Coler*, 173 N. Y. 103; 12 C. J. 806.

By the Constitution of Massachusetts the General Court is empowered to legislate concerning offices which are not provided for in the Constitution. Mass. Const., c. I, § I, art. IV, gives full power and authority to the General Court "to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth." The power to create such offices includes the power to change or abolish them. *Taft v. Adams*, 3 Gray, 126, 128; *Opinion of the Justices*, 216 Mass. 605; *Attorney General v. Tufts*, 239 Mass. 458, 479; *Attorney General v. Pelletier*, 240 Mass. 264, 295.

If, therefore, the Legislature had intended by R. L., c. 19, § 23, as amended, to attempt to prohibit any future Legislature from abolishing any office occupied by a veteran, in my judgment, the attempted prohibition would have been wholly ineffective. But, in my opinion, the language of the provision does not indicate any such intention. Whatever the Legislature may have meant, it surely did not mean to make the signing of a written order by the State Board of Conciliation and Arbitration, or by the mayor of a city or the selectmen of a town, a condition precedent to the right of a subsequent Legislature to abolish an office held by a veteran. I must advise you, therefore, that St. 1922, c. 545, is constitutional and valid.

Very truly yours,

J. WESTON ALLEN, *Attorney General*.

Fees — Inspectors of Slaughtering — Charge for Services.

Inspectors of slaughtering, appointed under G. L., c. 94, §§ 118-139, have no right to demand or receive any fees from butchers for the performance of their duties.

JAN. 9, 1923.

EUGENE R. KELLEY, M.D., *Commissioner of Public Health*.

DEAR SIR:— I have the honor to acknowledge your communication in which you request my opinion as to whether or not it is proper for inspectors of slaughtering to demand and receive fees, for the performance of their duties, from butchers.

Inspectors of slaughtering are appointed under G. L., c. 94, § 128, which provides as follows:—

"For the purposes of sections one hundred and nineteen, one hundred and twenty-five to one hundred and twenty-seven, inclusive, and one hundred and forty-seven, said inspectors shall be appointed and compensated, and may be removed, in the manner provided for inspectors of animals, under sections fifteen to seventeen, inclusive, of chapter one hundred and twenty-nine, except that in respect to such first named inspectors, local boards of health and the department of public health shall perform the duties and exercise the authority imposed by said sections upon the aldermen or selectmen and upon the director of animal industry, respectively, as to inspectors of animals."

This section provides that said inspectors shall be compensated in the manner provided for inspectors of animals under G. L., c. 129, §§ 15-17. G. L., c. 129, § 17, provides as follows:—

"Each inspector shall be sworn to the faithful performance of his official duties, and shall receive from the town for which he is appointed reasonable compensation, if appointed by the town, or such compensation as shall be fixed by the director, but not in excess of five hundred dollars a year, if appointed by the director. Towns having a valuation of less than two and one half million dollars shall be reimbursed by the commonwealth for one half of such compensation, not exceeding two hundred and fifty dollars for each inspector in any one year."

The language of the statute is explicit. It expressly provides that each inspector shall receive his compensation "from the town." Obviously, the pur-

pose of the Legislature is that the salary or compensation paid by the town shall be in full payment of all services which they may render in their official capacities.

Apparently the only statutory provision for the payment of fees by persons carrying on the business of slaughtering neat cattle, sheep or swine is found in G. L., c. 94, §§ 119 and 120, which provide for payment of a license fee by persons engaged in said business.

It follows that inspectors of slaughtering have no right to demand or receive any fees from butchers for the performance of their duties. I am accordingly of the opinion that the system of collecting fees referred to in your communication is improper and illegal.

The Director of Animal Industry may undoubtedly remove an offending inspector by virtue of the authority conferred in the second paragraph of section 16 of G. L., c. 129, namely:—

“... The director ... may remove an inspector who refuses or neglects to be sworn or who, in the opinion of the director, does not properly perform the duties of his office and may appoint another inspector for the residue of his term.”

There is also an added safeguard in the provisions of G. L., c. 129, § 15, as follows:—

“The mayor in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the director. In cities at least one such inspector shall be a registered veterinary surgeon.”

The power of appointment and removal thus conferred applies also to inspectors of slaughtering by virtue of the provisions of G. L., c. 94, § 128, *supra*.

Very truly yours,

J. WESTON ALLEN, *Attorney General*.

Taxation—Trust Companies—Meaning of Words “Capital Stock.”

The words “the total amount of its capital stock,” in G. L., c. 63, § 58, are intended to describe the amount of capital stock authorized, issued and paid in in cash.

So long as a trust company is not dissolved and is not prevented by the State itself from doing business, it is subject to the franchise tax imposed by G. L., c. 63, § 58.

JAN. 22, 1923.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:—You have requested my opinion as to the application of G. L., c. 63, § 58, in respect to two trust companies which have applied for abatement of taxes assessed to them for the year 1922 under said section; one on the ground that on April 1, 1922, it had no assets whatever, having transferred all of its assets to another trust company which had assumed its liabilities; and the other on the ground that on that date the stock of the company had been turned over to liquidating agents under an agreement for merger with another trust company, which had been approved by the Commissioner of Banks, and the stockholders had voted that proceedings be taken for the dissolution of the company.

G. L., c. 63, § 58, is as follows:—

“Every corporation subject to section fifty-three or fifty-four shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section fifty-five, at a rate equal to the average of the annual rates for three years preceding that in which such assessment is laid, the annual rate to be determined by an apportionment of the whole amount of money

to be raised by taxation upon property in the commonwealth during the same year, as returned by the assessors of the several towns under section forty-seven of chapter fifty-nine, upon the aggregate valuation of all towns for the preceding year, as returned under sections forty-seven and forty-nine of chapter fifty-nine; but the total amount of the tax to be paid by a trust company in any year upon the value of its corporate franchise shall amount to not less than two fifths of one per cent of the total amount of its capital stock, surplus and undivided profits at the time of said assessment, as found by the commissioner."

The questions presented are, first, whether the words "the total amount of its capital stock," used in section 58, mean the amount of the capital stock of the corporation or the value of its capital assets, including franchises and good will, less its liabilities; and, secondly, whether or not the two trust companies referred to were subject to said section.

In the strict and proper sense the "capital stock" of a corporation is the amount paid in, or to be paid in, as the capital upon which the corporation is to do business. *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 392; *State v. Norwich & Worcester R.R. Co.*, 30 Conn. 290, 293; *Commercial Fire Ins. Co. v. Board of Revenue, Montgomery Co.*, 99 Ala. 1, 7; *Slater v. Taylor*, 241 Ill. 102, 108; Cook on Corporations, 6th ed., § 8; 14 C. J. 379.

In our corporation laws the term "capital stock" is generally, if not uniformly, used to designate stock authorized or issued.

By G. L., c. 172, concerning trust companies, it is provided in section 7 that the agreement of association shall specifically state "the amount of its capital stock, and the number of shares into which it is to be divided," and in section 11 that, as a preliminary to the transaction of business, it must appear that the whole capital stock has been issued and paid in in cash.

G. L., c. 172, § 18, is as follows:—

"The capital stock of such corporation shall be not less than two hundred thousand dollars, except that in a city or town whose population numbers not more than one hundred thousand the capital stock may be not less than one hundred thousand dollars, divided into shares of the par value of one hundred dollars each; and except also that in towns whose population is not more than ten thousand the capital stock may be not less than fifty thousand dollars divided into shares of the par value of one hundred dollars each; and no business shall be transacted by the corporation until the whole amount of its capital stock is subscribed for and actually paid in. Any such corporation may, subject to the approval of the commissioner, increase its capital stock in the manner provided by sections forty-one and forty-four of chapter one hundred and fifty-six. No stock shall be issued by any such corporation until the par value thereof shall be fully paid in in cash. Any such corporation may, subject to the approval of the commissioner, decrease its capital stock in the manner provided by said section forty-one and the first sentence of section forty-five of said chapter; provided, that the capital stock as so reduced shall not be less than the amount required by this section."

The franchise tax imposed by G. L., c. 63, §§ 53-60, is assessed on the value of the corporate franchise, with certain deductions, that value, by section 55, being defined as "the fair cash value of all the shares constituting its capital stock on April first preceeding."

In the form of return which the Commissioner requires from trust companies the first three items on the side of liabilities are Capital Stock, Surplus, Undivided Profits.

The provision in G. L., c. 63, § 58, imposing a minimum tax on trust companies measured by the amount of capital stock, surplus and undivided profits, was first enacted by Gen. St. 1918, c. 264, § 1, which amended St. 1909, c. 490, pt. III, § 43 (as last amended by Gen. St. 1918, c. 222), by adding that provision

at the end thereof. At the end of said section 43, before the amendment made by Gen. St. 1918, c. 264, § 1, was the following provision:—

“and the total amount of the tax to be paid by such (domestic business) corporation in any year upon its property locally taxed in this commonwealth and upon the value of its corporate franchise shall amount to not less than one tenth of one per cent of the market value of its capital stock at the time of said assessment as found by the tax commissioner.”

Section 43, as thus amended, contained both these provisions, the later immediately following the earlier. One relates to domestic business corporations and the other to trust companies. Both are provisions for minimum taxes, one purporting to be measured by the *market value* of the capital stock and the other by the *amount* of the capital stock, to which the amount of surplus and undivided profits is to be added. In my judgment, it is clear that the Legislature, in using the words “the total amount of its capital stock,” which appear in Gen. St. 1918, c. 264, § 1, and in G. L., c. 63, § 58, intended to distinguish “amount” from “value,” and meant to describe the amount of capital stock authorized, issued and paid in in cash.

I take up now the question whether the two trust companies mentioned by you were subject to section 58.

In a recent opinion my predecessor advised you with reference to the taxation of certain trust companies, some of which were in the hands of the Commissioner of Banks on April first, and others of which had ceased to do business on April first, that the former were not subject to tax, but that the latter were liable to pay a franchise tax. Attorney General's Report, 1921, p. 300. This opinion was given on the authority of *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207, and *Attorney General v. Mass. Pipe Line Gas Co.*, 179 Mass. 15, 19. In the latter case the rule is stated in the following words:—

“The franchise which subjects the corporation to taxation is the right to do business legally by complying with the laws. A corporation having this right under legislative action cannot relieve itself from liability to taxation by neglecting to do business, or ceasing to do business. Its franchise remains, and it may do business when it chooses. Nor can it escape taxation by failing to comply with a statute which is intended to regulate its conduct while doing business, or before commencing business. Whatever the effect of such conditions upon the amount to be assessed, after it once has a capital stock divided into shares nothing short of the loss of the franchise as a power that may be exercised, if the corporation chooses to comply with the law, can leave it free from liability to taxation under the statute.”

So long as a corporation is not dissolved its franchise is outstanding and, in my opinion, is subject to tax, except when by the authority of the State itself a corporation is not permitted to do business. The tax levied by G. L., c. 63, § 58, is a franchise tax, *i.e.*, a tax on the right to do business, and in that respect is to be distinguished from the tax levied by G. L., c. 63, §§ 32–51, which is an excise with respect to the carrying on or doing of business, to which only corporations engaged in business are subject. Attorney General's Report, 1921, p. 89.

It is my opinion that the trust companies which you name, since on April 1, 1922, they were not dissolved and were not prevented by the State from doing business, were subject to tax for 1922 under section 58, and that the fact that one of the companies had made an agreement with another trust company for a merger, that the stock had been put in the hands of a liquidating committee, and that the stockholders had voted to petition for dissolution of the corporation, does not take the case from the operation of the rule. *Revere v. Boston Copper Co.*, 15 Pick. 351, 359, 360; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71; *Morawetz on Corporations*, § 1011.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Military Supplies — Military Purposes.

“Military supplies” are such supplies as are used for the maintenance of the militia in suitable efficiency.

The term “military purposes” comprehends all such uses as may be said to be incidental to the general purpose to conserve the military needs of the regimental organization.

JAN. 25, 1923.

Commission on Administration and Finance.

GENTLEMEN:— You have requested my opinion as to whether “sundry miscellaneous articles, such as auto supplies and equipment, gas and oil, office furniture and equipment, office supplies, printing, stationery and postage,” used by the Adjutant General’s Department, are military supplies, within the purview of St. 1922, c. 545, § 10.

The pertinent provisions of that statute are as follows:—

“SECTION 10. All materials, supplies and other property, except legislative or *military supplies*, needed by the various executive and administrative departments and other activities of the commonwealth shall be purchased by or under the direction of the purchasing bureau in the manner set forth in the three following sections. . . .

SECTION 11. No supplies, equipment or other property, other than for legislative or *military purposes*, shall be purchased or contracted for by any State department, office or commission unless approved by the state purchasing agent as being in conformity with the rules, regulations and orders made under the following section. . . .”

Supplies used by the Adjutant General’s Department are not necessarily “military supplies” or for “military purposes.” “Military supplies” may be defined as such supplies as are used for the maintenance of the militia in suitable efficiency. Thus the construction and maintenance of armories may reasonably be treated as necessary for the maintenance of the militia in suitable efficiency. *Hodgdon v. Haverhill*, 193 Mass. 406, 409. The term “military purposes” comprehends all such uses as may be said to be incidental to the general purpose to conserve the military needs of the regimental organization. *McCarter, Attorney General, v. Dungan*, 74 N. J. Eq. 251, 252.

No supplies may be purchased or contracted for by the Adjutant General’s Department except such as come within the meaning of “military supplies” or are for “military purposes.” Whether or not particular supplies are military supplies or are used for military purposes is a question of fact in each instance.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Election — Registrars of Voters — Recount — Clerical Assistance — Guard Rail.

Clerical assistants appointed under G. L., c. 54, § 135, may, under the supervision of the registrars of voters, do the actual counting of ballots at recounts.

Such assistants need not be sworn.

There is no provision of law requiring that a guard rail shall be set up at the place of a recount of ballots.

JAN. 26, 1923.

ALLEN LAWSON, Esq., Chairman, Committee on Elections.

DEAR SIR:— I have the request of the Committee on Elections of the House of Representatives (to which was referred the petitions of Napoleon Bergeron and John Hayes, claiming that they were elected to your body from the Twelfth Essex Representative District) for my opinion on three matters.

1. “Must the registrars of voters of a city or town personally do the actual recounting of ballots?”

G. L., c. 54, § 135, provides for a recount of ballots by the registrars, and in that section it is stated that “registrars of voters may employ such clerical

assistance as they deem necessary to enable them to carry out this section." Unless the clerical assistance is to be in the recounting of the ballots, it is difficult to find any need for any such authorization, having in mind the things required by said section. Assuming, therefore, that you wish to know whether the registrars only must do the counting of the ballots, I advise you that those employed by them under the provision above quoted may, under their supervision, do in whole or in part the actual counting.

2. "Must the clerical assistants to the registrars, as provided in G. L., c. 54, § 135, last paragraph, be sworn, in any event?"

The paragraph to which you refer is the provision above quoted. I do not find any statutory requirement to that effect, such as exists in the case of election officers. I am therefore of the opinion that they need not be sworn.

3. "Do unauthorized persons have a right to go behind the guard rail?"

There is no provision of law, such as exists in regard to voting places at primaries or elections, which requires registrars to set up a guard rail. The statute requires that each candidate "shall be allowed to be *present* and *witness* such recount, either in person, accompanied by counsel, if he so desires, or by an agent appointed by him in writing. It is a question of fact in each instance whether such opportunity to be present and witness the recount has been afforded.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Records — Public Records — Public Inspection.

The only records open to public inspection are public records and those which some statute specifically provides shall be so open.

Public records are records required by law to be filed, or upon which the law requires an entry to be made.

FEB. 5, 1923.

MR. WILLIAM F. CRAIG, *Director of Registration, Department of Civil Service and Registration.*

DEAR SIR:— You request my opinion as to whether certain books and papers of the Board of Registration in Pharmacy are open to the inspection of the public, representatives of the press or attorneys at law.

The only records open to public inspection are public records and those which some statute specifically provides shall be so open.

G. L., c. 66, § 10, provides:—

"Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision, and shall furnish copies thereof on payment of a reasonable fee. . . ."

R. L., c. 35, § 5, now G. L., c. 66, § 3, provides:—

"In construing the provisions of this chapter and other statutes, the words 'public records' shall, unless a contrary intention clearly appears, mean any written or printed book or paper, any map or plan of the commonwealth or of any county, city or town which is the property thereof and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the commonwealth or of a county, city or town has received or is required to receive for filing, . . ."

This section relates only to books, papers, maps and plans which are "intended for the use of the public" and required by law to be filed, or upon which the law requires an entry to be made. *Round v. Police Commissioner*, 197 Mass. 218; 1 Op. Atty. Gen. 186; 278; 280; III Op. Atty. Gen. 122; 136; 351.

A former Attorney General, in an opinion dated September 22, 1902 (II Op. Atty. Gen. 381), relative to this section, said:—

"This legislative definition cannot be held to include within its intention every paper which an officer of the Commonwealth receives and files. It must be limited to such as he is required by law to so receive for filing. Any other construction must be prejudicial to the rights and interests of the Commonwealth or its officers, and indeed, of parties or persons making communications with such officers."

G. L., c. 66, § 3, defines "record," and merely refers to "public records" without defining them. The definition of "public records" previously established is, however, carried over into this act, since no clear intent to the contrary appears.

Only such records, therefore, as you are required by some specific statute to keep, receive for filing, or upon which you are required to make an entry, are open to public inspection.

G. L., c. 112, § 25, provides:—

"The board shall keep a record of the names of all persons examined and registered by it, of all persons to whom permits are issued under section thirty-nine, and of all money received and disbursed by it, and a duplicate thereof shall be open to public inspection in the office of the state secretary . . ."

I am therefore of the opinion that only the records referred to in the above section are open to the inspection of the general public. Representatives of the press and attorneys at law stand upon no different footing from the general public. A registered pharmacist, against whom a complaint or charge is pending before the board, or his counsel, has, in addition to his right of inspection as a member of the public, a right of access to certain other documents.

G. L., c. 112, § 33, provides:—

"A registered pharmacist against whom a complaint or charge is pending before the board, or his counsel, shall have the same right of access to documents in the possession of said board as a person charged with crime in the courts of the commonwealth would have to documents in the possession of the clerk of the court or the prosecuting officer."

This would include a right of access to the complaint, entries made thereon, the finding of the board, and any deposition (not affidavits) which might be taken. What other documents might be included would depend upon the facts of the specific case.

You inquire further whether transcripts of the testimony given at hearings "should be provided, either at the State's expense or at the expense of the person desiring the same, or whether they should be provided at all except through summons and court process." I find no provision of law requiring the board to have stenographic notes taken of such testimony, and I am consequently of the opinion that you are not required to furnish transcripts under any circumstances. A stenographer, when duly summoned, may be required to read his notes in any judicial proceedings. Whether or not you should furnish a transcript of such testimony to parties in interest, and under what terms such transcript should be supplied, is a matter of policy for you to determine.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Constitutional Law—Impairment of Contract—Eminent Domain—Police Power—Boston Elevated Railway Company—Eastern Massachusetts Street Railway Company.

The power to take property by eminent domain and the police power are sovereign powers which cannot be granted away by contract with the State. Certain bills, if enacted, would be unconstitutional, for reasons stated in previous opinions.

A bill providing for the construction of a tunnel in Boston and a lease thereof to the Boston Elevated Railway Company, with a proviso that if the company does not consent thereto its elevated structures shall be removed

without compensation, would, if enacted, be unconstitutional as an impairment of the contract contained in Spec. St. 1918, c. 159, and an arbitrary confiscation of the company's property.

A bill providing for an amendment of Spec. St. 1918, c. 159, to take effect on its acceptance by the Boston Elevated Railway Company, if enacted, would be constitutional, under circumstances stated in the opinion.

Bills providing for the taking by eminent domain of property of the Eastern Massachusetts Street Railway Company and leasing the same to the Boston Elevated Railway Company would be constitutional, if enacted.

FEB. 6, 1923.

HON. B. LORING YOUNG, *Speaker of the House of Representatives.*

DEAR SIR:—On behalf of the committee on rules you have asked my opinion upon the constitutionality of several street railway bills now pending before the committee. Within the past two years my predecessor has given opinions to committees of the House of Representatives on the constitutionality of bills relating directly or indirectly to the service and management of the Boston Elevated Railway Company and Eastern Massachusetts Street Railway Company, involving a consideration of the application and effect of Spec. St. 1918, c. 159, and Spec. St. 1918, c. 188. Attorney General's Report, 1921, p. 140; Attorney General's Report, 1922, p. 23. In these opinions he ruled that the provisions in each of said statutes relating to the right of the trustees to regulate and fix fares and to determine the character and extent of the service and the facilities to be furnished, and the right of the directors to pass upon contracts for the construction or operation of additional lines, constituted contracts between the Commonwealth and the companies concerned which could not be impaired without violating U. S. Const., art. I, § 10, and that a number of the bills submitted would, if enacted into law, be unconstitutional because they contained provisions which would directly impair the contractual rights given by the two special statutes of 1918.

With reference to Spec. St. 1918, c. 158, the court held, in *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 413, 414, that that statute, "having been accepted by the railway companies (the Boston Elevated Railway Company and the West End Street Railway Company), constitutes an agreement between the Boston Elevated Railway Company and the Commonwealth that the latter shall take over the management and operation of the railway company and shall pay therefor the amounts specified in way of compensation for the use thereof," and that the act is constitutional.

Some of the bills on which my opinion is asked are plainly open to the objections stated in the opinions of my predecessor. Others involve wholly different considerations.

Several of the bills provide for the taking of the property of one or the other of the two companies in the exercise of the power of eminent domain or of the police power. It is therefore desirable at the outset to state some of the more fundamental principles governing the nature, extent and limitations of those powers and the manner in which they must be exercised.

The power to take property by eminent domain for public use is one of the high prerogatives of government. *Turner v. Gardner*, 216 Mass. 65, 70; *Kohl v. United States*, 91 U. S. 367, 371. It cannot be granted away by contract with the State. Such a grant, if it were attempted to be made, would not come under the protection of the contract clause of the Federal Constitution. *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20. The fact that the taking renders impossible further performance of a contract touching the property taken does not impair the obligation of such contract. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685.

The property taken must be appropriated to public and not private uses. Mass. Const., pt. I, art. X; *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371, 377. Property already devoted to a public use may be taken for a different public use, and such an exercise of the right of eminent

domain over property or rights in the nature of property previously granted by the State does not impair the obligation of a contract. Franchises, like other property, are subject to the sovereign right of eminent domain. *Boston Water Power Co. v. Boston & Worcester R.R. Corp.*, 23 Pick. 360; *Central Bridge Corp. v. Lowell*, 4 Gray, 474, 481; *Eastern R.R. Co. v. Boston & Maine R.R.*, 111 Mass. 125, 131; *Old Colony R.R. Co. v. Framingham Water Co.*, 153 Mass. 561; *West River Bridge Co. v. Dix*, 6 How. 507.

But property cannot be taken from one party who holds it for a public use and given to another to hold in the same manner for precisely the same public use. Such a taking, effecting a mere change of control, cannot be founded on a public necessity. *Boston Water Power Co. v. Boston & Worcester R.R. Corp.*, 23 Pick. 360, 393; *Cary Library v. Bliss*, 151 Mass. 364, 378-380; *Lake Shore & Michigan Southern Ry. v. Chicago & Western Indiana R.R.*, 97 Ill. 506.

In this connection the provisions in Spec. St. 1918, c. 159, § 16, and Spec. St. 1918, c. 188, § 19, reserving the right of the Commonwealth to acquire the property and franchises of the respective companies at any time through the exercise of the power of eminent domain, should be noted. While these provisions cannot be taken to diminish the power of the Commonwealth to take property by eminent domain in any case, they may have the effect of an agreement by the companies that their property may be taken by the Commonwealth even if such taking works a mere change of control.

There is a further constitutional requirement that "reasonable compensation" must be paid. Declaration of Rights, art. X. It seems to be generally accepted that compensation must be made in money, to be paid within a reasonable time after the taking, and that future obligations cannot be substituted. *Attorney General v. Old Colony R.R. Co.*, 160 Mass. 62, 90, 91; *Commonwealth v. Peters*, 2 Mass. 125; *Vanhorne v. Dorrance*, 2 Dall. 304; *Waterbury v. Platt*, 76 Conn. 435.

The police power similarly is a sovereign power of which the State cannot be divested by any act of Legislature. *Commonwealth v. Alger*, 7 Cush. 53, 85; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650. "A requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts." *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583, 596. This principle has been applied in decisions sustaining regulations requiring railroad companies at their own expense to move grade crossings (*New York & New England R.R. Co. v. Bristol*, 151 U. S. 556; *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583); requiring a railroad company to remove a railroad track from a city street (*Denver & R. G. R.R. Co. v. Denver*, 250 U. S. 241); requiring a gas company at its own expense to change the location of gas pipes to accommodate a system of drainage (*New Orleans Gas Co. v. Drainage Commission*, 197 U. S. 453); and requiring overhead wires to be removed and placed under ground (*People v. Squire*, 107 N. Y. 593; *Western Union Tel. Co. v. New York*, 38 Fed. 552). But the exercise of the power must be reasonable in its character, and, under the guise of legislation for the public good, property cannot be arbitrarily confiscated or destroyed. *Durgin v. Minot*, 203 Mass. 26; *Dobbins v. Los Angeles*, 195 U. S. 223; *Dillon, Municipal Corporations*, 5th ed., §§ 1269, 1270.

With these preliminary observations I now proceed to a particular consideration of the bills which you have submitted to me.

1. *Petition for the establishment of five-cent fare zones for transportation on the street railways in the city of Lynn.*

The bill submitted with this petition provides specifically that the Eastern Massachusetts Street Railway Company shall carry passengers on its cars within certain areas for five cents. Such a provision would be a direct impairment of the right given the trustees by Spec. St. 1918, c. 188, to regulate and fix fares on the lines of that company.

2. *Petition for the construction of an additional tunnel and subway in the*

city of Boston and the removal of the elevated railway structure in the Charlestown district of said city.

The bill accompanying this petition in substance provides that the Boston Transit Commission shall construct a tunnel and subway from the northerly end of the present Washington Street tunnel to Sullivan Square; that the commission shall within ninety days after the passage of the act execute with the Boston Elevated Railway Company, in the name of the city, the company consenting thereto, a contract in writing for the sole and exclusive use of the tunnel and subway and appurtenances, for a period not beyond the period of existing leases of subways to the company, at an annual rental of four and one-half per cent of the net cost; that at the next city election the question shall be submitted to the voters of the city of Boston whether they favor the removal of the elevated structure and the substitution therefor of subways or tunnels in the city of Boston; that if a majority of the voters actually voting answer the question in the affirmative, and if the company shall not execute the contract with the commission, the company shall forthwith discontinue the use of and remove its elevated structures between the present Washington Street tunnel and Sullivan Square and between the present Washington Street tunnel and Dudley Street, together with all connections, deflections, loops, stations, etc., and any locations theretofore granted to the company between said points shall be thereafter revoked as being a menace to the public health and a detriment to the public welfare; but that if the contract is executed by the company, upon the completion of the tunnel or subway and appurtenances and upon notification, the company shall remove and forever discontinue the use of that part of its elevated structure for which the tunnel or subway has been substituted, the expense of removing the same to be a part of the cost of the tunnel or subway; and in that event the damages sustained by the company above the benefit received are to be determined and paid.

Briefly summarized, the bill gives to the company an option within ninety days after the passage of the act to execute a contract for the sole and exclusive use of the proposed tunnel, with the alternative provisions that if such a contract is executed and the city votes to construct the tunnel, the elevated structure between the northerly end of the Washington Street tunnel and Sullivan Square shall be taken by the city and removed, the cost of removal to be charged to the cost of construction of the subway and adequate compensation for the taking paid to the company therefor, while if the contract is not executed and the city votes to construct the tunnel, the entire elevated structure of the company shall be removed by the company at its own expense and without compensation, as a menace to the public health and a detriment to the public welfare.

Spec. St. 1918, c. 159, gives to the trustees of the Boston Elevated Railway Company the authority to determine the character and extent of the service and facilities to be furnished, subject to the consent of the directors to the making of contracts for the operation or lease of subways, elevated or surface lines in addition to those then owned, leased or operated by the company, or any extensions thereof beyond their then limits, involving the payment of rental or other compensation by the company beyond the period of public operation. Assuming that the provision in this bill for securing the company's consent means consent by the officials authorized to act by Spec. St. 1918, c. 159, the provision that if the company shall not consent its entire elevated structure shall be removed without compensation would, in my opinion, if enacted, be unconstitutional for two reasons: first, because it manifestly is included in an attempt to coerce the trustees and directors to make a contract for the use of the proposed tunnel, and would, therefore, be an impairment of the contract with the Commonwealth contained in said Spec. St. 1918, c. 159, and secondly, because it would be manifestly an arbitrary confiscation of the property of the company under the guise of legislation for the public welfare. Whether the company's elevated structure, erected under the authority and direction of the Legislature (St. 1894, c. 548, and amending acts), could be ordered to be removed without compensation to the company, under any circumstances, as an

exercise of the police power, is, to say the least, doubtful. But an act containing a merely alternative provision for such removal as a penalty for failing to do some voluntary act would, on its face, show that the provision for removal was not passed as a matter of public necessity but in order to compel the doing of the voluntary act. For these reasons, as I have stated, the provisions of this bill which I have referred to are, in my judgment, plainly unconstitutional.

3. *Petition for an amendment of the law providing for the public operation of the Boston Elevated Railway Company and establishing a five-cent fare on the lines of said company.*

The bill accompanying this petition amends Spec. St. 1918, c. 159, by striking out provisions giving the trustees the right to regulate and fix fares, requiring them to establish a five-cent fare for a single continuous passage in the same general direction upon the roads owned, leased or operated by the company, and providing that the difference between the amount received from fares and the cost of service shall be paid by the Commonwealth. There is also an amendment to section 14 changing the method of apportionment of amounts assessed to cities and towns to meet any deficit. The bill provides that the act shall take effect upon its acceptance by the Boston Elevated Railway Company before January 1, 1924.

The provisions of this bill, taking from the trustees the right to regulate and fix fares and establishing a five-cent fare, are clearly in derogation of the grant contained in Spec. St. 1918, c. 159, and the proposed act would therefore be unconstitutional unless the changes were accepted by the parties to the contract. The parties to the contract, other than the Commonwealth, are the Boston Elevated Railway Company and the West End Street Railway Company (see *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 413). In his opinion to you of February 11, 1922, my predecessor ruled, with reference to a bill to repeal Spec. St. 1918, c. 159, containing a provision that it should take effect upon its acceptance by the directors or a majority of the stockholders of the Boston Elevated Railway Company, that the proposed act would be unconstitutional because the directors could not exercise the power attempted to be conferred upon them to impair the obligation of Spec. St. 1918, c. 159, which had become a binding contract by acceptance of the stockholders of the two companies. In that opinion my predecessor expressly reserved the question whether, if the bill provided simply that the act should take effect upon its acceptance by a majority of the stockholders of the Boston Elevated Railway Company, it would be constitutional. That precise question is now before me for decision, understanding, as I do, that the provision that the act shall take effect "upon its acceptance by the Boston Elevated Railway Company" means its acceptance by the stockholders of that company.

Ordinarily the stockholders of a corporation by a majority vote may assent to an amendment or repeal of a statute constituting a contract between the State and their corporation. *Pennsylvania College Cases*, 13 Wall. 190; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574; *Cf. Durfee v. Old Colony, etc., R.R. Co.*, 5 Allen, 230. Applying this rule, if the Boston Elevated Railway Company were the sole party to the contract with the Commonwealth the proposed act would, in my opinion, be constitutional. But the West End Street Railway Company was also a party to the contract, and if that corporation is now in existence, in my judgment, acceptance of the act by its stockholders should be provided for. Such provision was made in the Senate bill, affecting Spec. St. 1918, c. 159, considered by the court in *Opinion of the Justices*, 231 Mass. 603, 606, where the court gave their opinion that the bill, if enacted, would be constitutional, without, however, considering its effect on the contractual rights of the corporations concerned. I am informed that, under St. 1911, c. 740, the properties and franchises of the West End Street Railway Company have been conveyed to the Boston Elevated Railway Company, and preferred stock of the latter has been issued to the former in payment therefor, of which a large proportion has been distributed to its stockholders. Whether thereby a merger of the corporate franchise of the West End Street Railway Company has been effected, so that its identity has

been destroyed, is a doubtful question about which I am not sufficiently advised as to the facts to express an opinion. See *Parkinson v. West End Street Ry. Co.*, 173 Mass. 446; *Whiting v. Malden & Melrose R.R. Co.*, 202 Mass. 298. If such a merger has taken place, acceptance by the stockholders of the Boston Elevated Railway Company is necessarily sufficient; but otherwise I think the stockholders of the West End Street Railway Company should also be given an opportunity to accept or reject the act.

The Boston Elevated Railway Company has different classes of stockholders. In the Senate bill considered and held constitutional in *Opinion of the Justices*, 231 Mass. 603, holders of the preferred stock issued under Spec. St. 1918, c. 159, § 5, were excluded from voting on the question of acceptance, but, as I have said, the court in their opinion did not consider the question whether the constitutional rights of the corporations were affected. I see no reason why the right of stockholders to vote on the question of acceptance should be in any respect different from their right to vote generally as prescribed by the statutes and by-laws of the corporation.

My opinion, therefore, is that the bill, if enacted, would be constitutional if the West End Street Railway Company has, in fact, ceased to exist, but that otherwise it would not be constitutional unless provision were made for acceptance by the stockholders of that company.

4. *Petition that the city of Boston be authorized to purchase or take by eminent domain the property and franchises of the Eastern Massachusetts Street Railway Company in the Hyde Park district of said city for the purpose of leasing the same to the Boston Elevated Railway Company.*

The bill accompanying this petition authorizes the city of Boston, through its transit department, with the approval of the mayor, to purchase or take by eminent domain the whole or any portion of the street railway locations, tracks, poles, wires and other property used in connection therewith, owned by the Eastern Massachusetts Street Railway Company and located in Hyde Park, which, in its opinion, is necessary for the safe and efficient operation of street railways in that portion of Boston. It provides that before such purchase or taking the department shall, with the approval of the mayor, execute with the Boston Elevated Railway Company, in the name of the city, the company consenting thereto, a contract in writing for the sole and exclusive use of said property at an annual rental of four and one-half per cent of the net cost for an unspecified term of years. In order to be valid, as I have previously said, the consent of the company must be given by those officials who are authorized by Spec. St. 1918, c. 159, to determine whether the property should be leased.

There are provisions for the issuing of bonds and notes to be used in meeting damages, costs and expenses incurred in carrying out the provisions of the act. The bill does not expressly provide that compensation shall be paid to the Eastern Massachusetts Street Railway Company for its property taken by eminent domain, and does not provide the method by which the amount of such compensation shall be determined. But it is not necessary that the proposed act shall expressly provide for payment of compensation or the method of determining this amount. The General Laws contain adequate provisions for payment of such compensation. G. L., c. 79, §§ 6, 12, 14, 45. The bill secures payment by the provision for an issue of bonds and notes outside the statutory limit of indebtedness, assuming that the amount of such issue, left undetermined in the bill, is adequate. These provisions would seem to be sufficient. *Brimmer v. Boston*, 102 Mass. 19, 23; *Bent v. Emery*, 173 Mass. 495, 498.

This bill raises the question of major importance whether the Eastern Massachusetts Street Railway Company can be taken by the Commonwealth or a political subdivision thereof for the purpose of leasing that property to the Boston Elevated Railway Company. As I have previously stated, property cannot be taken from one party holding it for a public use and given to another to hold in the same manner for precisely the same public use, since such a taking, effecting a mere change of control, cannot be founded on a public necessity. But the taking here proposed is of not precisely that sort. The use proposed to be made of the property is to lease it to the Boston Elevated Railway Com-

pany for some number of years, on terms to be agreed upon, which must, therefore, be such as the trustees and the directors of that company, under Spec. St. 1918, c. 159, have power to make. It should not be overlooked that the Commonwealth, in Spec. St. 1918, c. 188, § 19, has expressly reserved the right to take this property by eminent domain. The force of the argument in favor of the bill, I presume, is that the public will thereby receive the benefit of a unified transportation system with a unified control, and that in no other way can that desirable result be achieved. In view of these considerations, in my opinion, the proposed act, if enacted, would be constitutional.

5. Petition for the creation of a Metropolitan Transportation District.

The bill accompanying this petition creates a metropolitan transportation district composed of the cities and towns of Arlington, Belmont, Boston, Brookline, Cambridge, Chelsea, Everett, Malden, Medford, Newton, Revere, Somerville and Watertown. It contains provisions for the management of the affairs of the district and provides for the purchase or taking of any or all street railway tracks, poles, wires, lands, property and appurtenances and any rights or interest therein, except the interest of the Boston Elevated Railway Company therein, owned, leased or operated in whole or in part by the Eastern Massachusetts Street Railway Company in East Boston, Charlestown, Everett, Chelsea, and in Revere and Malden with certain exceptions, after the execution of a contract for use as therein provided. It authorizes the execution with the Boston Elevated Railway Company of a contract in writing for the sole and exclusive use by that company of the street railway tracks and other property about to be taken, at a rental of five per cent of the net cost, the term ending with the termination of public operation of the company. It provides that the lines of transportation thus added to the railway system of the Boston Elevated Company shall be managed by the public trustees appointed under Spec. St. 1918, c. 159, as if a part of the system at the date of the passage of that act. It provides an adequate method for determination of damages caused by the taking, and makes the district liable for the amount thereof. It provides for payment by the issuing and selling of bonds of the district to a limit not specified, and provides that any deficit in income necessary to meet the principal and interest of such bonds and other expenses shall be apportioned by the Treasurer of the Commonwealth among the several cities and towns included in the district and added to the amounts due from such cities and towns in the State tax next thereafter to be collected. There are other provisions giving powers and duties to the district and its officers which it is not necessary now to refer to.

The general nature of the scheme and system here laid out is similar to that of the bill last considered, and what I said there will apply here. I should, however, refer specifically to the provision that the lines of transportation added to the system of the Boston Elevated Railway Company by the provisions of the act shall be managed by the trustees as if a part of the system at the date of the passage of that act. No such obligation, of course, could be imposed upon the trustees without their consent, but the bill does not purport to impose any such obligation upon them without their consent, since the lease is to be made with the consent of the company for a term ending with the termination of public operation, and therefore cannot be made except by the trustees; and if the lease is made by them the privileges and obligations defined by the bill are precisely those under which the trustees would operate by virtue of Spec. St. 1918, c. 159. Therefore, in my judgment, this bill, if enacted into law, would be constitutional.

6. Petition that the Boston Elevated Railway Company be authorized to enlarge its terminal at Forest Hills in the West Roxbury district of the city of Boston.

The bill accompanying this petition purports to authorize the Boston Elevated Railway Company to enlarge its terminal at Forest Hills, and for that purpose to take property by eminent domain, whether privately or publicly owned, to borrow money and issue bonds and notes. It provides that takings and proceedings for compensation and other proceedings thereunder shall be

in accordance with the provisions of St. 1921, c. 386. The provisions and effect of that statute were considered by my predecessor in an opinion to you under date of March 1, 1922 (Attorney General's Report, 1922, p. 37). I see nothing in the proposed act repugnant to any constitutional provision.

7. *Petition that the Boston Elevated Railway Company be required to keep in repair the portions of highways occupied by its tracks.*

The bill here presented involves entirely different considerations and will be dealt with in a separate opinion.

8. *Petition that provisions be made for improved transportation facilities between the cities of Boston and Revere.*

The bill accompanying this petition empowers the Boston Elevated Railway Company to extend its transportation system and, with the approval of the Department of Public Utilities, after public hearing, to take by eminent domain, subject to the provisions of G. L., c. 79, or to acquire by purchase, street railway lines within the city of Revere, together with tracks, poles, wires and other structures and appliances connected therewith, all property so taken or acquired to be the property of the company and to be used and operated with and as part of its railway system and subject to the management and control provided by Spec. St. 1918, c. 159. The company is empowered, with the approval of the trustees, during the term of public operation, to issue stocks, bonds, notes and other evidences of indebtedness to provide funds for payment of properties taken or acquired under the provisions of the act, such securities to be subject to Spec. St. 1918, c. 159, § 6, so far as applicable.

What I have said concerning petitions numbered 4 and 5 is equally pertinent in the consideration of this bill, except that here the taking is not to be made by the Commonwealth or any political subdivision thereof, but by the Boston Elevated Railway Company, to which control of the property taken is transferred. I do not, however, believe that in order to be valid such a taking must be by the Commonwealth or some political subdivision thereof. Because of the legitimate public interest which may be served through unified control and ownership, the proposed act, if enacted, would be constitutional, in my opinion.

9. *Petition for the acquisition and public operation by the city of Boston of street railway lines in the Hyde Park district of said city.*

The bill accompanying this petition purports to create in the Hyde Park section of Boston a district for the purposes of street railway transportation, and to make the trustees of the Boston Elevated Railway Company, under Spec. St. 1918, c. 159, a corporation under the name of Hyde Park Transportation District, with all the powers of a street railway company organized under the General Laws. It purports to provide that certain lines named within that district shall be managed and operated by the corporation in behalf of the city of Boston as lines of the Boston Elevated Railway Company, subject to the provisions of Spec. St. 1918, c. 159. It further purports to provide that the Eastern Massachusetts Street Railway Company shall cease to operate said street railway lines and shall permit the corporation to take over and use the same and all property appurtenant thereto, with a provision that the corporation shall pay to the company an annual rental at the rate of five per cent on a sum equal to the value of the property taken. There are other provisions purporting to regulate rates of fare, and other provisions which need not now be referred to.

In my opinion, this bill is clearly unconstitutional, both because of additional powers and duties imposed upon the trustees of the Boston Elevated Railway Company in violation of the provisions of Spec. St. 1918, c. 159, and because the management and control of the Eastern Massachusetts Street Railway Company is taken from the trustees thereof in violation of the contract contained in Spec. St. 1918, c. 188. The bill does not indicate an intention that the property of the Eastern Massachusetts Street Railway Company shall be taken by an exercise of the power of eminent domain, and its provisions, in my opinion, cannot be so construed. But if the exercise of that power were intended by the bill, there is clearly no adequate provision for compensation, since there is no provision for payment for the property taken, but only a provision for the pay-

ment of annual rental. *Attorney General v. Old Colony R.R. Co.*, 160 Mass. 62.

10. *Petition relative to establishing a five-cent fare zone on street railway lines operated in the city of Lowell.*

The bill accompanying this petition provides specifically that the rate of fare for a single passage on the lines of the Eastern Massachusetts Street Railway Company operating in the city of Lowell within the limits of travel of two miles from Kearney Square shall be five cents. Such a provision would be a direct impairment of the right given the trustees by Spec. St. 1918, c. 188, to regulate and fix fares on the lines of that company.

With respect to the nine bills which I have dealt with I have not attempted to scrutinize with particularity each one of them and point out every detailed feature which may be objectionable. Your inquiry not being directed to any specific feature of the bills, it is clear that it is impossible for me to foresee every question that might be raised or that your committee might have in mind. I have confined my attention to the fundamental questions of constitutional law involved in each bill which to me seem to merit consideration.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Impairment of Contract — Requirement that Boston Elevated Railway Company keep in Repair Portions of Highways occupied by its Tracks.

A statute requiring the Boston Elevated Railway Company to keep in repair the portions of highways occupied by its tracks, and exempting it from taxes imposed by G. L., c. 63, §§ 61-66, inclusive, would be constitutional.

FEB. 7, 1923.

Hon. B. LORING YOUNG, *Speaker of the House of Representatives.*

DEAR SIR: — On behalf of the committee on rules you have transmitted to me the petition of Edward W. Quinn, mayor of the city of Cambridge, and another, that the Boston Elevated Railway Company be required to keep in repair the portions of highways occupied by its tracks, and have asked my opinion as to the constitutionality of that measure.

The bill accompanying the petition is as follows: —

"SECTION 1. During the period of public operation of the Boston Elevated Railway Company under the provisions of chapter one hundred and fifty-nine of the special acts of nineteen hundred and eighteen, and acts in amendment thereof, and supplementary thereto, the Boston Elevated Railway Company shall keep in repair, to the satisfaction of the superintendent of streets, street commissioner, road commissioners, or surveyors of highways, the paving, upper planking or other surface material of the portions of streets, roads and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and shall be liable for any loss or injury that any person may sustain by reason of the carelessness, negligence or misconduct, of its agents and servants in the construction, management, and use of its tracks.

SECTION 2. When a party upon the trial of an action recovers damages of a city or town for an injury caused to his person or property by a defect in a street, highway, or bridge occupied by the tracks of said company, if said company is liable for such damages, and has had reasonable notice to defend the action, the city or town may recover of the said company, in addition to the damages, all costs of both plaintiff and defendant in the action.

SECTION 3. During the period of public operation of the Boston Elevated Railway Company under the provisions of chapter one hundred and fifty-nine of the special acts of nineteen hundred and eighteen, and acts in amendment thereof and supplementary thereto, said company shall not be required to make the returns nor shall there be assessed upon or paid by it the taxes required by sections sixty-one to sixty-six, inclusive, of chapter sixty-three of the general laws."

Your question requires a somewhat extended analysis of the charter of the Boston Elevated Railway Company and certain amendments thereof, of statutes relating to the repair of highways occupied by street railway companies, and of decisions and opinions interpreting those statutes and their effect.

The Boston Elevated Railway Company was incorporated by St. 1894, c. 548. At the time of its incorporation P. S., c. 113, § 32, was in force, containing the following provision:—

“Every street railway company shall keep in repair, to the satisfaction of the superintendent of streets, street commissioner, road commissioners, or surveyors of highways, the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and shall be liable for any loss or injury that any person may sustain by reason of the carelessness, neglect, or misconduct of its agents and servants in the construction, management, and use of its tracks.”

The charter of the Boston Elevated Railway Company was amended in many respects by St. 1897, c. 500. Section 10 of that statute contained the following provision:—

“... During said period of twenty-five years no taxes or excises not at present in fact imposed upon street railways shall be imposed in respect of the lines owned, leased or operated by said corporation, other than such as may have been in fact imposed upon the lines hereafter leased or operated by it at the date of such operating contract or of such lease or agreement hereafter made therefor nor any other burden, duty or obligation which is not at the same time imposed by general law on all street railway companies; *provided, however,* that said corporation shall be annually assessed and shall pay taxes now or hereafter imposed by general law in the same manner as though it were a street railway company, and shall, in addition, . . . pay to the Commonwealth, . . . during said period of twenty-five years, an annual sum, . . .” (to be determined as therein provided).

The law requiring street railway companies to keep in repair portions of streets occupied by their tracks was materially changed in the following year by St. 1898, c. 578. Section 1 excepted from the operation of the act the Boston Elevated Railway Company and companies whose railways were then leased or operated by said company. Sections 6 to 10, inclusive, imposed upon street railway companies an additional excise tax for the benefit of cities and towns in which such companies were operating, to be applied to the construction, repair and maintenance of the public ways and the removal of snow therefrom. Section 11 contained the provision that “street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but they shall remain subject to all legal obligations imposed in original grants of locations”; and this provision appears in substantially the same form in R. L., c. 112, § 44, and G. L., c. 161, § 89. By section 26, P. S., c. 113, § 32, was repealed, subject to the exception contained in section 28. Section 28 provided, in part, that “for the term of twenty-five years from the tenth day of June in the year eighteen hundred and ninety-seven this act shall not apply to or affect the Boston Elevated Railway Company or any railways now owned, leased, or operated by it, . . . and the acts and parts of acts repealed by section twenty-six hereof shall continue during said term in full force so far as they relate thereto.”

The constitutionality of St. 1898, c. 578, § 11, was questioned and sustained in *Springfield v. Springfield St. Ry. Co.*, 182 Mass. 41, and *Worcester v. Worcester, etc., St. Ry. Co.*, 182 Mass. 49, and the decision in the latter case was affirmed on a writ of error by the Supreme Court of the United States in *Worcester v. St. Ry. Co.*, 196 U. S. 539. In those cases the question raised by the respective cities was whether the statute, in so far as it abrogated

conditions in grants of location not original, violated the constitutional provision against impairing the obligation of contracts. In the Springfield case the court held that the locations did not constitute contracts, or, if they did, that they were of such a nature that the Legislature could modify or annul them without thereby violating the constitutional provision; that they were analogous to licenses to run omnibuses and conveyed no exclusive rights in the highways or streets in which they were granted. In the Worcester case the court pointed out that the imposition of an obligation in the charters of street railways or the general laws to keep in repair some small portions of the streets and bridges occupied by their tracks, and other obligations in the guise of restrictions upon grants of locations, was a method of compelling the companies to contribute to the burden imposed upon municipalities with respect to roads and bridges, in the nature of indirect taxes, and that St. 1898, c. 578, was enacted for the purpose of freeing the companies, at least to a considerable extent, from such indirect obligations and imposing certain new taxes, of which the municipalities were given the benefit. The Supreme Court of the United States on writ of error sustained this decision, on the ground that the city had no proprietary right in the property of the defendant or to demand the continuance of an obligation to pave and repair the streets, that the city was merely a political subdivision of the state, and that the rights in question were not private property beyond legislative control.

The effect of St. 1898, c. 578, by its terms (§§ 1 and 28), was to leave the Boston Elevated Railway Company under the same duty with regard to the repair of streets that existed prior thereto, and this obligation continued by virtue of the exception in section 28 until June 10, 1922. On the other hand, of course, it was not required to pay the new taxes imposed by sections 6 to 10, inclusive, of the act. There is a serious question whether this exception of the Boston Elevated Railway Company from the operation of the act did not make the whole statute unconstitutional. The question is of a nature that makes a positive answer difficult. A statute requiring street railway companies to carry pupils of the public schools to and from school at reduced rates, and excepting the Boston Elevated Railway Company from its provisions, was held constitutional in *Commonwealth v. Interstate Consolidated St. Ry. Co.*, 187 Mass. 436. The court there pointed out that the situation of the lines of the Boston Elevated Railway Company in the midst of a dense population was so different from that of other lines in the State that it might properly call for an exemption from the law established for others. See also *Commonwealth v. Boston & Northern St. Ry. Co.*, 212 Mass. 82. The same consideration may lead to the conclusion that there might properly be a special reason for continuing to impose a duty on the company to keep in repair portions of streets and bridges occupied by their tracks. I cannot say, therefore, that St. 1898, c. 578, was unconstitutional because the Boston Elevated Railway Company was excepted from its operation.

There is a further question whether St. 1898, c. 578, was in violation of any right created by St. 1897, c. 500, § 10. Two of my predecessors held that section 10 constituted a contract between the Commonwealth and the Boston Elevated Railway Company. II Op. Atty. Gen. 261; 426. If so, it might well have been questioned whether the provision in that section, that during the period of twenty-five years no burden, duty or obligation other than taxes or excises should be imposed on the Boston Elevated Railway Company which was not at the same time imposed by general law on all street railway companies, did not have the effect of making the provisions of St. 1898, c. 578, § 11, applicable to the Boston Elevated Railway Company, notwithstanding the provisions of sections 1 and 28 excepting the Boston Elevated Railway Company from the operation of that statute. But I am informed that no such contention was made and that, in fact, the obligations of the previous law were always applied to and performed by the Boston Elevated Railway Company. St. 1897, c. 500, § 10, was expressly repealed by Spec. St. 1918, c. 159, § 17, so that this possible constitutional question was thereby removed.

We come now directly to the question whether the proposed act would be unconstitutional.

Certainly it violates no rights given or protected by Spec. St. 1918, c. 159. There is no provision in that statute affecting to the slightest extent the right of the Commonwealth to impose any obligation on, or to change any obligation of, the company with respect to the repair of streets or the payment of taxes. Indeed, section 2 provides that "nothing herein contained shall be held to affect the right of the commonwealth or any subdivision theretof to tax the company or its stockholders in the same manner and to the same extent as if the company had continued to manage and operate its own property."

The effect of section 1 of the proposed act is merely to continue the obligations of the Boston Elevated Railway Company imposed by P. S., c. 113, § 32, for the period of public operation under Spec. St. 1918, c. 159, as they were during the period of twenty-five years from June 10, 1897, by virtue of the excepting provision in St. 1898, c. 578, § 28. In my judgment, therefore, section 1 of the proposed act would be constitutional, if enacted.

Section 3 of the proposed act, providing that during the period of public operation the company shall not be required to make the returns and shall not have assessed upon it the taxes imposed by G. L., c. 63, §§ 61-66, inclusive, exempts the company from payment of the excise tax imposed by those sections. This excise tax is the same tax which was first imposed by St. 1898, c. 578, §§ 6-10, inclusive. The effect of this section, therefore, is merely to except the company from the burdens as well as the benefits of the law first appearing in St. 1898, c. 578. If section 1 of the proposed act is constitutional, in my judgment, section 3 also would be clearly constitutional.

The provisions of section 2 are similar to those contained in P. S., c. 113, § 33. I see nothing unconstitutional in those provisions.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Pharmacist — Narcotic Drugs — Prescriptions — Copies — Evidence.

Under G. L., c. 94, § 198, a prescription for narcotic drugs, when filled, must be retained on file for at least two years by the druggist filling it, and no copy of such prescription shall be made except for the purpose of record by said druggist.

It follows that a druggist cannot be summoned to appear before a court and ordered to bring with him the original prescription for narcotic drugs; but since the prescription and the druggist's record are required by statute to be open at all times to inspection by the officers of the Department of Public Health, the Board of Registration in Pharmacy, the Board of Registration in Medicine, authorized agents of said department and boards, and by the police authorities and police officers of towns and cities, the statements and items contained therein may be shown by the testimony of any observer thereof.

FEB. 7, 1923.

PAYSON DANA, Esq., *Commissioner of Civil Service.*

DEAR SIR:— You request my opinion on the following questions:—

"1. May a copy of a prescription or the original prescription for a narcotic drug be taken from the files of a retail pharmacy by any of the authorities specified in G. L., c. 94, § 198, for purposes of evidence in the prosecution of a violator of the provisions of this chapter, in so far as it relates to narcotic drugs?

2. May a druggist be permitted or required, under said section 198, to make a copy of a prescription for narcotic drugs, filled by him in the course of his business, and give the copy to any of the authorities specified in said section, at their request, for purposes of evidence?

3. May a druggist who has in his possession a prescription for narcotic drugs which has been filled by him in the course of his business, be summoned to appear before a court and ordered to bring with him the original prescrip-

tion for narcotic drugs, which, according to said section 198, 'shall be retained on file for at least two years by the druggist filling it?'"

The sale and distribution of narcotic drugs are governed by the provisions of G. L., c. 94, §§ 197-217, inclusive. The law pertaining to your question is contained in section 198, the material portion of which is as follows:—

"The prescription, when filled, shall show the date of filling and the legal signature of the person filling it, written across the face of the prescription, together with the legal signature of the person receiving such drug, and the prescription shall be retained on file for at least two years by the druggist filling it. No prescription shall be filled except in the manner indicated therein and at the time when it is received, and the full quantity of each substance prescribed shall be given. No order or prescription shall be either received for filling or filled more than five days after its date of issue as indicated thereon. Each pharmacist who fills a prescription for a narcotic drug shall securely attach to the container thereof a label giving the name and address of the store where the prescription is filled, the date of filling, the name of the person for whom it is prescribed, the name of the physician, dentist or veterinarian who issued it; and the narcotic drug so delivered shall always be kept in its container until used. No prescription shall be refilled, nor shall a copy of the same be made except for the purpose of record by the druggist filling the same, such record to be open at all times to inspection by the officers of the department of public health, the board of registration in pharmacy, the board of registration in medicine, authorized agents of said department and boards, and by the police authorities and police officers of towns."

This statute is explicit, and in view of the express prohibition contained therein I am of the opinion that no copy of a prescription therein specified can properly be made and used for the purpose outlined in your first and second questions, and I accordingly answer them in the negative.

Your third question presents other considerations, depending upon whether or not the druggist in question is a defendant or a witness in a case where another person is defendant. In the former instance, he could not be obliged to furnish evidence tending to incriminate him. The general rule as to production of documents may be stated thus (I Greenleaf on Evidence, 14th ed., § 560):—

"When the instrument or writing is in the hands or power of the adverse party, there are, in general, no means at law of compelling him to produce it; but the practice, in such cases, is, to give him or his attorney a regular 'notice to produce' the original. Not that, on proof of such notice, he is compellable to give evidence against himself, but to lay foundation for the introduction of secondary evidence of the contents of the document or writing, by showing that the party has done all in his power to produce the original."

See also Wigmore on Evidence, §§ 1199-1210.

On the other hand, if a party is summoned as a witness in an action against another person and it is desired to have the witness produce certain documents, the procedure is to issue a subpoena *duces tecum* directed to the person who has them in his possession. See I Greenleaf on Evidence, 14th ed., § 559; Wigmore on Evidence, §§ 1211, 1213.

But in the case stated by your inquiry the statute expressly provides that said prescription "shall be retained on file for at least two years by the druggist filling it," and expressly prescribes and restricts the use of the same. It is therefore possible that the druggist is, by reason of a privilege, legally not compellable to produce the prescription, which would be clearly an excuse for non-production.

In this connection the decision in the case of *Commonwealth v. Stevens*, 155, Mass. 291, is significant. Like the case under consideration, that case involved the production of the register required by law to be kept by a druggist, in which entries of sales of intoxicating liquors were required to be made. In that case the court says:—

"The rule that requires the production of the best evidence readily obtainable is an important one. Where the contents of a book or written document are needed in evidence, the book or writing should be produced, when there is no good reason for the non-production of it; and if in the present case the presiding justice had excluded the evidence, unless the defendant had failed to produce the book on notice, we cannot say that his ruling would have been erroneous.

On the other hand, this was not an ordinary writing or a public record. It was a register required by the statute to be kept as a part of the business done by the defendant under his license. St. 1887, c. 431, § 3. Its form is prescribed by the statute. The pages are to be divided into eight columns, each column with a prescribed heading, under which the entries are to be made showing the required particulars in regard to each sale. These particulars must be entered at the time of every sale. The statute contemplates that this book shall all the time be kept at the store of the apothecary, and provides that it shall at all times be open to the inspection of certain officers mentioned. The witness was one of these officers, and he was allowed to testify to the number of entries of sales within a specified time. Neither the witness nor any other of the officers of the Commonwealth had a right to take the book from the defendant and bring it to the court, and there would be some force in a suggestion that a notice to the defendant to produce it to be used in evidence would have been inconsistent with a proper regard for his duty to keep it where entries of sales might immediately be made in it, so long as he continued to do business under his license. The particulars of the entries in regard to the sales were not offered in evidence, and the precise words written in the register were not in question. It has been held that the language of a license hanging on the wall of a liquor dealer's shop may be testified to orally. *Commonwealth v. Brown*, 124 Mass. 318. This decision does not cover the case at bar; but there is some ground for contending that the number of sales found recorded in the register should be considered as a fact in the mode of conducting the defendant's business, to be observed by a police officer in the performance of his duty of inspecting the register, and to be testified to like any other material fact apparent to an observer. Such evidence was received without objection in *Commonwealth v. Perry*, 148 Mass. 160. We are not convinced that there was such error in this particular as to entitle the defendant to a new trial."

I am accordingly constrained to advise you that in either case, namely, whether the druggist be a defendant or a witness, he cannot be "summoned to appear before a court and ordered to bring with him the original prescription for narcotic drugs"; but since the prescription and the druggist's record are required by statute to be open at all times to inspection by the officers of the Department of Public Health, the Board of Registration in Pharmacy, the Board of Registration in Medicine, authorized agents of said department and boards, and by the police authorities and police officers of towns and cities, the statements and items contained therein may be shown by the testimony of any observer thereof, which might well be the best evidence readily obtainable.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Civil Service — Promotion — Probationary Period.

The rule providing that no person "shall be regarded as holding office or employment in the classified public service until he has served a probationary period of six months," does not apply in the case of promotion from one grade of the classified civil service to the next grade.

FEB. 8, 1923.

PAYSON DANA, Esq., *Commissioner of Civil Service*.

DEAR SIR: — You request my opinion as to whether section 1 of Civil Service Rule 18 applies in the case of promotion from one grade of the classified civil

service to the next grade. I assume that you are referring to the case of a person who is in the classified public service.

Section 1 provides:—

“No person appointed in the official or labor division shall be regarded as holding office or employment in the classified public service until he has served a probationary period of six months.”

This rule is made under the provisions of G. L., c. 31, § 3, which reads, in part, as follows:—

“The board shall, subject to the approval of the governor and council, from time to time make rules and regulations . . . Such rules . . . shall include provisions for the following:

(e) A period of probation before an appointment or employment is made permanent; . . .”

One of the purposes of the Civil Service Act is to ensure tenure of office for an employee who has satisfactorily passed his period of probation. If, under section 1 of Civil Service Rule 18, a person in the classified public service lost his status as a civil service employee upon promotion to the next grade, and again became a probationer, the rule would not afford the protection of permanent employment contemplated by the statute. Under such a construction a civil service employee could accept a promotion only at the cost of his civil service standing, and the appointing officer could rid himself of any employee in the classified public service by the simple device of first promoting him, thus making him a probationer, and then discharging him. Neither the statute nor the rule intends such result. The statute, as well as the rules made thereunder, distinguishes between an “appointment” and a “promotion.” See G. L., c. 31, §§ 3 and 18; Civil Service Rules 18 and 28; *McDonald v. Fire Engineers of Clinton*, 242 Mass. 587.

I am therefore of the opinion that section 1 of Civil Service Rule 18 does not apply to persons who are holding office or employment in the classified public service and are promoted from one grade of the classified civil service to the next grade. The case of *McDonald v. Fire Engineers of Clinton*, *supra*, which involved the status of a call fireman appointed to the permanent force, has no bearing on this question.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Listing Board of the City of Boston—City Department.

The listing board of the city of Boston is not a city department, and is not subject to the ordinances of that city relative to printing and office supplies.

FEB. 12, 1923.

HON. HERBERT A. WILSON, *Police Commissioner for the City of Boston*.

DEAR SIR:—You request my opinion on certain questions of law having to do with the listing board of the city of Boston, created by Gen. St. 1917, c. 29, § 7.

You ask, first, as to whether or not the said listing board is obliged to have all its printing and stationery supplied by the printing department of the city of Boston or whether outside bids for the same can be called for. You ask, second, as to whether the said listing board may legally contract for other supplies without advertising for the same in accordance with the provisions of the city charter governing department heads, as found in St. 1909, c. 486, § 30.

In your communication you call my attention to section 1 of chapter 26 of the Revised Ordinances of the City of Boston, which provides that the printing department of the city of Boston shall supply all printing, stationery and office supplies used by any board, commission or department for which the said city is required by law to furnish such supplies; and to section 16 of chapter 3 of said ordinances, which provides that every officer in charge of a department requiring any printing, binding, stationery or other office supplies shall obtain the

same from the said superintendent of printing, by requisition, on blanks to be prepared by the superintendent.

The answer to both your questions depends upon whether the listing board is a "department," within the meaning of the statute and of the ordinances above quoted.

The listing board is a board established by Gen. St. 1917, c. 29, § 7, which reads as follows:—

"In Boston there shall be a listing board composed of the police commissioner of the city and one member of the board of election commissioners, who shall annually be appointed by the mayor, without confirmation by the city council, for the term of one year and who shall belong to that one of the two leading political parties of which the police commissioner is not a member. In case of disagreement between the two members of said board, the chief justice of the municipal court of the city of Boston, or, in case of his disability, the senior justice of said court who is not disabled, shall, for the purpose of settling such disagreement, be a member of said board and shall preside and cast the deciding vote in case of a tie."

No authority is given to the city to review its action or to add to or subtract from the powers and duties of the listing board. Section 1 of chapter 2 of the Revised Ordinances provides that "the mayor shall appoint heads of *departments* and members of municipal boards and fill vacancies therein in the manner provided by statute." It would seem that the departments contemplated by the other sections of the Revised Ordinances, to which you refer, are those which come within the purview of section 1 of chapter 2 of the Ordinances, and, obviously, the listing board does not.

Furthermore, this is a board created by statute, of which the Police Commissioner for the City of Boston is one member. As he is a State official, the city government cannot impose on him duties in addition to those imposed by the acts creating his office, and acts in addition to and in amendment thereof. V Op. Atty. Gen. 394. The fact that the mayor has the power of appointment, within a very restricted field, of one member of the board has no significance. *Mahoney v. Boston*, 171 Mass. 427, 429.

The same construction must of necessity be given to the word "department" in St. 1909, c. 486, § 30. The listing board, as established, is not a department of the city nor one of its governing boards. *Phillips v. Boston*, 150 Mass. 491, 494. I therefore advise you that the listing board does not come within the provisions of that statute nor within the provisions of section 1 of chapter 26 or of section 16 of chapter 3 of the Revised Ordinances of the City of Boston.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Income Tax Act — Interpretation.

G. L., c. 62, § 1 (a), Third, excepting from the income tax interest from "loans secured exclusively by mortgage of real estate, taxable as real estate, situated in the commonwealth," should be construed as providing for the exemption of interest from loans secured by mortgage exclusively of real estate, taxable as real estate, situated in the Commonwealth.

Interest from a mortgage note, or an issue of mortgage bonds, endorsed by another person and secured by a mortgage of real estate situated and taxed in Massachusetts, is exempt from taxation by virtue of G. L., c. 62, § 1 (a), Third.

FEB. 12, 1923.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:— You ask my opinion as to the proper interpretation of G. L., c. 62, § 1, subsection (a), cl. Third. The material portion of said section 1 is as follows:—

"SECTION 1. Income of the classes described in subsections (a), (b), (c) and (e) received by any inhabitant of the commonwealth during the preceding calendar year, shall be taxed at the rate of six per cent per annum.

(a) Interest from bonds, notes, money at interest and all debts due the person to be taxed, except from:

Third, Loans secured exclusively by mortgage of real estate, taxable as real estate, situated in the commonwealth, to an amount not exceeding the assessed value of the mortgaged real estate less the amount of all prior mortgages."

You state the cases of a mortgage note and of an issue of mortgage bonds, each secured by real estate situated and taxed in Massachusetts to an amount greater than the face of the mortgage plus all prior mortgages, but with the addition of an endorsement of another person on the mortgage note or mortgage bonds. You ask whether the fact of such endorsement takes the interest out of the exempted class for the reason that the loan is not then secured "exclusively by mortgage of real estate."

As a general proposition, the term "securities" embraces promissory notes. *Griggs v. Moors*, 168 Mass. 354, 361; *Jennings v. Davis*, 31 Conn. 134; *Wagner v. Scherer*, 89 N. Y. App. Div. 202. Broadly speaking, the obligation of another person may be security for a loan, and such obligation may be created or evidenced as well by endorsement of a note given by the person to whom the loan is made as by the furnishing of a separate promissory note. On the other hand, when we speak of a "secured note" we generally mean a note with collateral security, and the endorsement of a note by a third person is not collateral security for the note. Cf. *Boston Railroad Holding Co. v. Commonwealth*, 215 Mass. 493, 497.

In order to determine the meaning of the words used in G. L., c. 62, § 1, (a), Third, reference must be made to the statutes as they existed prior to the enactment of the income tax law as well as to other parts of the present tax laws.

By St. 1881, c. 304, §§ 1-3, provision was made for taxing separately as real estate the interest of a mortgagee, and by section 6 of the same statute "loans on mortgages of real estate, taxable as real estate," except the excess of such loans above the assessed value of the mortgaged real estate, were exempted from taxation. The chapter is entitled "An Act relieving property from double taxation in certain cases," and the object of the statute was to avoid double taxation in the cases to which it applied. See *Knight v. Boston*, 159 Mass. 551. The statute was construed to apply only to cases where the mortgaged security was wholly real estate situated wholly in Massachusetts. *Brooks v. West Springfield*, 193 Mass. 190, 194. In that case the court held that a mortgage which included, besides real estate in the Commonwealth, real estate in other States and also personal property, did not come within the terms of the statute, since the statute granted an exemption only in cases where all the security was taxable as real estate in Massachusetts, and no provision was made for apportionment when only a part of the security was so taxable.

Re-enactments of St. 1881, c. 304, §§ 1-3 and 6, appear in P. S., c. 11, §§ 14-16 and 4, R. L., c. 12, §§ 16-18 and 4, St. 1909, c. 490, pt. I, §§ 16-18 and 4, and G. L., c. 59, §§ 12-14 and 4, respectively.

The income tax law of 1916 (Gen. St. 1916, c. 269) contained in section 2 (a), Third, the exemption which is substantially re-enacted in G. L., c. 62, § 1 (a), Third. It made a change in the previous law, the result of which was that in cases where interest was not taxable loans were exempt from taxation, as before, if they were secured by mortgage of real estate, taxable as real estate, within the interpretation of those words as given in *Brooks v. West Springfield*, while in cases where the interest was taxable the exemption was governed by the provision of the clause under consideration. The purpose of this clause clearly was to continue and make applicable to interest from loans the same exemption of which the loans themselves had previously had the benefit. In passing, it should be noted that in the report of the special commission appointed by Res. 1915, c. 134, the clause read,—"3. Loans on mortgages of

taxable real estate situated within this commonwealth to an amount not exceeding the assessed value of the mortgaged real estate," and that in the report of the House Committee on Taxation (House Document, No. 2073) the clause was changed to read,—“Third: Loans secured exclusively by mortgages of real estate, taxable as real estate, situated within the commonwealth, to an amount not exceeding the assessed value of the mortgaged real estate.”

Under the provision exempting from taxation loans secured by mortgage of real estate, taxable as real estate, it was held in *Brooks v. West Springfield*, as stated above, that the mortgaged property must consist of real estate exclusively, and that the real estate must lie wholly in the Commonwealth. The ground of the decision was that the statute in terms applied only to domestic real estate, and that the Legislature had not provided for an apportionment when other property was included in the mortgage. The words “loan on mortgage of real estate, taxable as real estate” are readily susceptible of the interpretation that the mortgaged property shall consist of real estate alone, and that it must be taxable as such in Massachusetts, but they do not justify a construction which would make them inapplicable to loans on mortgages exclusively of Massachusetts real estate, where the mortgage note is endorsed by a third person, and there is no suggestion in *Brooks v. West Springfield* or any other case that such an implication should be made. To exclude such loans from the exemption would be to impose double taxation in the very cases which the statute was intended to provide for.

The provision in G. L., c. 62, § 1 (a), Third, was evidently, as I have said, made for the purpose of giving an exemption to interest on loans co-extensive with the exemption previously given to the loans themselves. It is reasonable to suppose that the changes in language by the insertion of the word “exclusively” and the addition of the words “situated in the commonwealth” were for the purpose of expressing in the statute the result of the decision in *Brooks v. West Springfield*, the word “exclusively” being intended to exclude cases where the mortgage covered other property as well as real estate, and the phrase “situated in the commonwealth” to confine the exemption to cases where the real estate was wholly in Massachusetts. In other words, it seems probable that what the Legislature intended would be more precisely expressed by changing the location of the word “exclusively” so that the phrase would be “loans secured by mortgage exclusively of real estate, taxable as real estate, situated in the commonwealth,” etc. In view of the manifest purpose for which the statute was passed, it is my opinion that the clause should be construed in the way which I have indicated, and that each of the two cases you have stated comes within the exemption.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Attorney General — Member of the Bar.

The office of attorney general is recognized by, and provided for in, the Constitution.

It is not within the province of the Legislature to add to or subtract from the qualifications for the office of attorney general required by the Constitution.

The qualifications for the office of attorney general established by the Constitution need not be established by express provision; they may be implied.

The Constitution contains the implied qualification that the attorney general shall be a member of the bar.

The Legislature may pass an act which merely expresses what in the Constitution is implied.

FEB. 15, 1923.

Joint Committee on the Judiciary.

GENTLEMEN:—You request my opinion whether it is within the province of the Legislature to pass a law requiring the attorney general to be a member

of the bar, or whether an amendment to the Constitution would be necessary to bring about that result.

The office of attorney general was not created by the Constitution. The first appointment of an attorney general in Massachusetts was in 1680. The office was recognized as already in existence by I Prov. Laws, 1693-4, c. 3, § 12. The office was recognized by c. II, § I, art. IX, of the Constitution as originally adopted in 1780. By Mass. Const. Amend. XVII it was provided that the attorney general, with other State officers, should be elected annually (now biennially by Mass. Const. Amend. LXIV). Mass. Const. Amend. XVII contains the following provision with respect to qualification:—

“No person shall be eligible to either of said offices unless he shall have been an inhabitant of this commonwealth five years next preceding his election or appointment.”

By that amendment the tenure of the office is secured and its terms defined. At least since the adoption of Mass. Const. Amend. XVII, therefore, the office of attorney general is an office provided for in the Constitution, whose tenure, mode of election and qualifications are prescribed by the Constitution.

Where the tenure, the mode of election or appointment, and qualifications of an office are prescribed by the Constitution, the Legislature cannot change them unless the Constitution gives the Legislature authority to do so. *Taft v. Adams*, 3 Gray, 126, 130; *Kinneen v. Wells*, 144 Mass. 497; *Graham v. Roberts*, 200 Mass. 152, 157; *Attorney General v. Tufts*, 239 Mass. 458, 480; *Attorney General v. Pelletier*, 240 Mass. 264; *Opinion of the Justices*, 165 Mass. 599, 601; *Opinion of the Justices*, 240 Mass. 611, 614.

The Constitution does not give the Legislature authority to make such changes with respect to the office of attorney general. Since 1780 the powers and duties of the office have been declared and defined to some extent by statute (see G. L., c. 12, §§ 1-11). But the authority so to act is not to be confused with authority to make changes in the qualifications for office.

Article IX of the Declaration of Rights provides:—

“All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.”

This article in substance declares that the right of electors and of persons to be elected for public office shall be limited only by such qualifications as are prescribed in the Constitution. *Brown v. Russell*, 166 Mass. 14, 21; *Opinion of the Justices*, 160 Mass. 586. It applies to the office of attorney general, since the qualifications of that office are established by the frame of government.

I am therefore of the opinion that it is not within the province of the Legislature to pass any law which would add to or subtract from the qualifications for the office of attorney general required by the Constitution.

It is necessary now to consider whether the Constitution requires that the attorney general shall be a member of the bar.

Qualifications for office established by the Constitution need not be established by express provision; they may be implied. Striking instances of such implication are found in *Opinion of the Justices*, 107 Mass. 604, and *Opinion of the Justices*, 165 Mass. 599, where the court held, regarding justices of the peace and notaries public, respectively, that the Constitution implied a qualification that the incumbent be a man, and precluded the appointment of a woman to the office.

In the former case the justices said:—

“By the Constitution of the Commonwealth, the office of justice of the peace is a judicial office and must be exercised by the officer in person, and a woman, whether married or unmarried, cannot be appointed to such an office. The law of Massachusetts at the time of the adoption of the Constitution, the whole frame and purport of the instrument itself, and the universal

understanding and unbroken practical construction for the greater part of a century afterwards, all support this conclusion, and are inconsistent with any other. It follows that, if a woman should be formally appointed and commissioned as a justice of the peace, she would have no constitutional or legal authority to exercise any of the functions appertaining to that office."

In the latter case the court gave the opinion that it was not within the constitutional power of the Legislature to authorize the appointment of women as notaries public. In the course of the opinion the justices said:—

"The Constitution did not create the office of notary public. It was an office known to the Roman law, and has existed in all or nearly all Christian countries for many centuries. The duties of the office in this Commonwealth are in part prescribed by statute, and in part are such as by usage notaries public for a long time have been accustomed to perform, and the international character and relations of notaries public are important. . . .

. . . The question in every case is of the meaning of the Constitution, and in determining this, the history and nature of the particular office and the usages of this and other States and countries with regard to the office at the time of the adoption of the Constitution must be considered. . . .

Where an office is created by statute, the tenure, the mode of appointment, the qualifications required, the duties of the office, and the compensation, are wholly within the control of the Legislature, unless there is some limitation put upon the Legislature by the Constitution; and the statute creating the office may be altered or repealed by the Legislature at any time. But if the tenure of an office and the mode of appointment are prescribed by the Constitution, the Legislature cannot change them, unless the Constitution gives the Legislature authority to do so. If the qualifications for the office are prescribed by the Constitution, the Legislature cannot change them. If the qualifications are not prescribed by the Constitution, although the tenure and mode of appointment are, there has been some question whether the Legislature can prescribe the qualifications, but the solution of this question in any particular case depends upon the construction of the particular clauses of the Constitution involved, as well as of the whole frame and purport of the Constitution. . . .

. . . It was the nature of the office of justice of the peace, and the usage that always had prevailed in making appointments to that office, that led the Justices to advise that it could not have been the intention of the Constitution that women should be appointed justices of the peace. 107 Mass. 604. In our opinion, the same considerations apply to the office of notary public."

The same considerations apply even more strongly to the question you have submitted, as will appear from an examination of the history and nature of the offices of attorney and attorney general, in Massachusetts and elsewhere, and the usages with regard to them in 1780.

Charles Warren, in his "History of the American Bar," gives the following information as to the development and significance of the title of "attorney" in Massachusetts during the colonial period.

As early as 1649 there existed "attorneys" of some kind in the Massachusetts Bay Colony, for they are mentioned in the records of the General Court for that year. They probably appeared by special powers.

In 1686 the Superior Court was created under the new Governor, Sir Edmund Andros, and attorneys were obliged, upon admission to the bar, to take oath.

In 1701 the practice of the law became first dignified as a regular profession through the requirement by statute of an oath for all attorneys admitted by the courts. By this oath, since the time of Lord Holt, the attorney was pledged to conduct himself "in the office of an attorney within the courts" according to the best of his knowledge and discretion, and with all good fidelity, as well to the courts as to his clients. *Robinson's Case*, 131 Mass. 376, 379.

At first no special qualifications and no definite term of study appear to

have been required for admission to the bar; but in 1761 the bar prescribed a term of seven years' probation—three of preliminary study, two of practice as attorney in the Inferior Court, and two of practice as attorney in the Superior Court.

In 1781 the first order relating to lawyers, made by the court after Massachusetts became a State, dealt with the method of creating barristers from among the practicing attorneys.

In 1806 the Supreme Judicial Court adopted the following rule:

“Ordered—First, no attorney shall do the business of a counsellor unless he shall have been made or admitted as such by the Court.

Second, all attorneys of this Court who have been admitted three years before the sitting of this Court shall be and hereby are made counsellors and are entitled to all the rights and privileges of such.

Third, no attorney or counsellor shall hereafter be admitted without a previous examination.”

In short, at the time of the use of the term “attorney general” in the Constitution of Massachusetts, in 1780, the word “attorney” had come to have a specific and well-recognized meaning. Whether we examine the history of England or that of our own colonial period, we find that the word signified a man entitled to engage in the practice of law before the courts—in other words, a “member of the bar”; and that admission to the bar, for a long time prior to 1780, entailed a formal presentation of the candidate, the administering of an oath, and compliance with certain educational requirements.

Likewise by 1780 the phrase “attorney general” had come to designate the incumbent of a public office which possessed well-recognized characteristics. The office of attorney general is of ancient origin, and its powers and duties were defined and prescribed by the common law. *Commonwealth v. Kozlowsky*, 238 Mass. 379, 385; *State v. Ehrlick*, 65 W. Va. 700, 702. In England the attorney general was the chief legal representative of the crown, and the official head of the bar. 3 Bl. Com. 26, 27; 13 Ill. Law Rev. 602. In Massachusetts, in colonial times, the attorney general was the chief law officer of the province, and his powers and duties were largely such as attached to it at common law. *Commonwealth v. Kozlowsky*, 238 Mass. 379, 385, 386; Attorney General's Report, 1921, p. 132. So far as it has been possible to ascertain, every provincial attorney general, from Anthony Checkley in 1680 to Robert Treat Paine, the last of the provincial attorneys general, appears to have been, prior to his elevation to that office, an “attorney” qualified to practice in the provincial courts.

The phrase “attorney general” in Mass. Const., c. II, § I, art. IX, must be taken to have been used in its natural, long-established sense; and to include within itself those same incidents, characteristics and qualifications which the phrase imported at common law.

This construction is supported not only by history and usage, but by direct implication from the use of the word “attorney” in the title of the office. The attorney general, as the name of his office implies, is the chief law officer of the Commonwealth. Attorney General's Report, 1921, p. 132; *Dearborn v. Ames*, 8 Gray, 1, 15; *State v. Robinson*, 101 Minn. 277, 288. The qualification that he should be a member of the bar is inherent in the office and required by the duties which he has to perform.

In *Opinion of the Justices*, 240 Mass. 611, 614, the court stated their opinion that a bill providing that the several district attorneys should be members of the bar of the Commonwealth, if enacted, would be constitutional. This opinion contains a strong intimation, applicable as well to the office of attorney general, that the use of the word “attorney” in the title of the office establishes an implied qualification that the incumbent must be a member of the bar. On this point the court said:—

“There is a considerable body of authority which holds that the use of the word ‘attorney’ in the title of the office carries with it the meaning that the

incumbent must be a member of the bar. It has been said that 'To be a district attorney, he must be a lawyer. He is not an attorney in fact. He must be an attorney at law. The name of the officer implies it. He is the attorney of the state in a certain district, to distinguish him from an attorney general.' *State v. Russell*, 83 Wis. 330, 332, 333. *People v. May*, 3 Mich. 598. *Enge v. Cass*, 28 No. Dak. 219. *Danforth v. Egan*, 23 So. Dak. 43."

It is therefore my opinion that the Constitution itself contains the implied qualification that the attorney general must be a member of the bar, and that an amendment to the Constitution would not be necessary to fix such qualification.

I have not as yet directly answered your question whether it is within the province of the Legislature to pass a law requiring the attorney general to be a member of the bar. I have stated that in my opinion the Constitution itself contains such a requirement.

By the Constitution (c. I, § I, art. IV) the Legislature is given full power to make all manner of wholesome and reasonable laws not repugnant or contrary to the Constitution, and to set forth the duties, powers and limits of the several civil and military officers of the Commonwealth, not repugnant or contrary to the Constitution. The legislative branch of the government is the repository of legislative power, and may make any law whatever, except in so far as it is restrained by the provisions of the Constitution (where no question is involved concerning the exercise of powers granted to the Federal government by the Constitution of the United States). *Stoughton v. Baker*, 4 Mass. 522, 529; *Commonwealth v. Alger*, 7 Cush. 53, 101. The law proposed clearly would not be repugnant or contrary to the Constitution but, as I have shown, would be in exact accordance with its provisions. It is true, as the court has stated, that "where qualifications of voters or officers are fixed by the Constitution the Legislature cannot add to or subtract from them." *Opinion of the Justices*, 240 Mass. 611, 614; *Kinneen v. Wells*, 144 Mass. 497. But this rule is not applicable to a legislative act which does not add to or subtract from a constitutional requirement, but merely expresses what in the Constitution is implied. So in *Opinion of the Justices*, 240 Mass. 601, the court gave their opinion that it would be constitutionally competent for the General Court to enact legislation declaring women eligible to hold any public office within the Commonwealth, although such legislation would apply to offices the qualifications for which are determined by the Constitution. I see nothing in the proposed act inconsistent with article XXX of the Declaration of Rights.

Accordingly, it is my opinion, and I advise you, that the proposed legislation, if enacted, would not be unconstitutional, and that therefore it is within the province of the Legislature to pass such a law.

Very truly yours,

JAY R. BENTON, Attorney General.

Constitutional Law — Interstate Commerce — Correspondence School — Agency.

An institution chartered under the laws of a foreign State may come into Massachusetts for the purpose of enrolling students here for instruction by correspondence, and may grant such degree as it is authorized to grant under the laws of the State from which it receives its charter; and accordingly a State statute which makes it a condition precedent to a foreign corporation engaging in this branch of interstate commerce to obtain what practically amounts to a license to transact such business is unconstitutional, as a burden and restriction upon interstate commerce. But personal instruction within the confines of this Commonwealth by a resident agent of such foreign corporation is not interstate commerce, and is accordingly within the prohibition contained in G. L., c. 266, § 89.

A resident agent of a foreign correspondence school, who by advertisement holds himself out as empowered to grant a degree, violates G. L., c. 266, § 89.

DR. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You request my opinion on the following questions: —

It appears that a certain correspondence school, named the American Extension University, has been advertising the fact that a degree is awarded on completion of the prescribed course. Is this action on the part of this school a violation of G. L., c. 266, § 89?

Under what conditions can an institution chartered under the laws of a foreign State come into Massachusetts for the purpose of enrolling students here, either for personal instruction within the confines of this State or for instruction by correspondence, and thus grant a degree for the completion of the required course of study?

Can the American Extension University be held responsible for the acts of its alleged agent here?

Can its alleged agent here hold himself out as empowered to grant a degree without mentioning the name of the institution chartered to grant degrees?

The statutory provisions governing correspondence schools are contained in G. L., c. 93, §§ 19–23, inclusive. Section 22 prescribes as follows: —

“The department of education may establish rules and regulations governing correspondence schools.”

Section 23 provides: —

“Whoever violates any provision of law relating to correspondence schools for which no penalty is provided, or of sections twenty and twenty-one or of any rule or regulation established under section twenty-two, shall be punished by a fine of not more than five hundred dollars.”

Under the authority conferred by section 22, the Department of Education formulated and published certain rules and regulations, among which is the following: —

“Every person, firm, association or corporation doing business in this Commonwealth as a correspondence school shall report to the Department of Education, on or before August thirty-first of each year, on blanks to be obtained from the Department on request, the following facts: —

1. Name of the school, and of organization conducting the same.
2. Headquarters. (Give address, whether outside or inside of Massachusetts.)
3. Management of the school, whether by individual, co-partnership or corporation.
4. Names of officers and directors. . . .
5. Location and designation of offices, if any, in Massachusetts.
6. Name and address of resident agent or representative, if any, in Massachusetts.
7. List of correspondence courses advertised and offered in Massachusetts . . . with copies of advertisements inserted in magazines or newspapers published or circulated in Massachusetts.
8. Number of persons enrolled in each course or separately offered part thereof, in Massachusetts, for the twelve months prior to July 1st preceding the date of this report (but if the business year of the school closes at some other date, then for the last business year). . . .
9. Number of persons receiving certificates or other evidence as to completion of courses or separate parts thereof, during the twelve months prior to July 1 preceding the date of this report, or for the last business year. . . .
10. Brief description of samples of advertising literature circulated in Massachusetts (other than appearing in newspapers and magazines), filed with this report.

Date of this report. Name, office, and address of person making this report.”

In accordance with this rule, a report was filed on December 9, 1922, signed “Ralph Culver Bennett, 472 Boylston Street, Boston, Massachusetts. Telephone Back Bay 7598,” in which it appears that the American Extension Uni-

versity is a corporation chartered under the laws of California, with headquarters in the Stimson Building, Los Angeles, California, its office in Massachusetts being at 472 Boylston Street, Boston, Mass., and its resident agent or representative in Massachusetts being Professor Ralph Culver Bennett, D.C.L., LL.D. Said report also states that the only advertisement used is the one set forth in full in the answer to question No. 7, as follows:—

“Solely a Law Course.

Only advertisement used is as follows:

‘Law professor, D.C.L. Yale, has complete law correspondence course. Anyone may enroll. No books required. Time payments. Invaluable business training, complete Bar preparation, and degree. Consult Professor R. C. Bennett, D.C.L., LL.D. 472 Boylston St., Boston. Telephone Back Bay 7598.’”

You state that this advertisement has appeared in street cars.

It also appears that in answer to question No. 8 of the report required of correspondence schools, *supra*, the following reply was given:—

“Have been located here in Boston only since September 1, 1922.

Since that date I have enrolled four (4) students in Massachusetts, (only four) and in Law—the only course given by the American Extension University. However, 21 are now studying law in Massachusetts under my direction. I am an attorney-at-law of Illinois and of Texas. Have been a teacher and professor of law and am ex-Asst. State’s Attorney for Cook County, Illinois.”

G. L., c. 266, § 89, prescribes as follows:—

“Whoever, in a book, pamphlet, circular, advertisement or advertising sign, or by a pretended written certificate or diploma, or otherwise in writing, knowingly and falsely pretends to have been an officer or teacher, or to be a graduate or to hold any degree, of a college or other educational institution of this commonwealth or elsewhere, which is authorized to grant degrees, or of a public school of this commonwealth, and whoever, without the authority of a special act of the general court granting the power to give degrees, offers or grants degrees as a school, college or as a private individual, alone or associated with others, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. Any individual, school, association, corporation or institution of learning, not having power to confer degrees under a special act of the general court, using the designation of ‘university’ or ‘college’ shall be punished by a fine of one thousand dollars; but this shall not apply to any educational institution whose name on July ninth, nineteen hundred and nineteen, included the word ‘university’ or ‘college’.”

A literal interpretation of this statute would seem to forbid any individual, school, association, corporation or institution of learning not having the power to confer degrees under a special act of the General Court of this Commonwealth from offering or granting degrees as a school, college or private individual, and would also seem by its terms to prohibit the use of the designation of “university” or “college” by any individual, school, association, corporation or institution of learning not having the power to confer degrees under a special act of the General Court. It appears from the report filed by the agent of the American Extension University, *supra*, that the university is a corporation chartered under the laws of the State of California, and, although the power to grant degrees is not referred to therein, nevertheless, in the booklet apparently prepared by said university and distributed through its agent, appears the following statement on page 1:—

“The American Extension University is chartered under the laws of the State of California, as an educational institution, and is authorized to give instruction either to resident students or by correspondence, and to confer all appropriate honors and degrees.

The Extension Law Department of the University gives a complete course in law by correspondence, leading to the degree of bachelor of laws, — LL.B."

The Supreme Court of the United States has decided, in the case of *International Textbook Co. v. Pigg*, 217 U. S. 91, that intercourse or communication between persons in different States, through the mails and otherwise, and relating to matters of regular, continuous business, such as teaching by correspondence, and the making of contracts relating to the transportation thereof, is commerce among the States, within the commerce clause of the Federal Constitution, and accordingly a State statute which makes it a condition precedent to a foreign corporation engaging in this legitimate branch of interstate commerce to obtain what practically amounts to a license to transact such business is a burden and restriction upon interstate commerce, and as such is unconstitutional.

I am accordingly of the opinion that an institution chartered under the laws of a foreign State may come into Massachusetts for the purpose of enrolling students here for instruction by correspondence, and may grant such degree as it is authorized to grant, under the laws of the State from which it receives its charter, for the completion of the required course of study; but I am also of the opinion that personal instruction within the confines of this State by a resident agent does not come within the principle laid down in the case of *International Textbook Co. v. Pigg*, *supra*, and accordingly is within the prohibition contained in G. L., c. 266, § 89.

As to how far the American Extension University may be held responsible for the acts of its alleged agent here, it would seem that the ordinary principles of the law of agency would apply, namely, that for any act committed by such agent within the actual or ostensible scope of his employment the principal could be held liable. Inasmuch as the advertisement appearing in the answer to question No. 7 of the report of correspondence schools, *supra*, does not mention the American Extension University, and the answer to question No. 8 of said report sets forth that four students in Massachusetts have been registered in the course, while twenty-one are studying law in Massachusetts under the direction of the aforesaid agent, I am of the opinion that this method of advertising constitutes a violation of G. L., c. 266, § 89, inasmuch as it cannot be questioned but that the information conveyed to the average reader by said advertisement would entitle such reader to consider that said alleged agent holds himself out as empowered to grant a degree, which would be a violation of the statute.

In the case of *Commonwealth v. New England College of Chiropractic*, 221 Mass. 190, in construing the statute under consideration, the court says:—

"Its obvious purpose is to suppress the kind of deceit which arises from the pretence of power to grant academic degrees, and to protect the public from the evils likely to flow from that variety of misrepresentation and imposition. . . It aims to ensure to the people of the Commonwealth freedom from deception, when dealing with those who put forward professions of educational achievement such as ordinarily is accompanied by a collegiate degree from an institution authorized to grant it and to make certain that those who use such symbols have had the opportunity of being trained according to prevailing standards in some school of recognized standing, under teachers of reputation for learning. . .

The statute should be interpreted in the light of its design to effectuate its purpose so far as the words used reasonably construed permit of this result."

Very truly yours,

JAY R. BENTON, Attorney General.

Eminent Domain—Notice of Taking to Parties in Interest—Confirmatory Deed.

Where land is taken by the Commonwealth by eminent domain, it is the duty of the board of officers who have made the taking to use reasonable diligence to ascertain the owners of the land taken, and to give notice of such taking to each and every owner thus ascertained.

Failure on the part of such board of officers to give the required notice to owners of land taken by eminent domain does not invalidate a taking.

A confirmatory deed given by the owner of land taken by eminent domain should include, among other requisites, a warranty to the extent of the amount of the award, and a provision that it is in confirmation, and not in derogation, of the rights acquired.

FEB. 24, 1923.

HON. W. A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR:— You request my opinion on certain questions arising from the taking or contemplated taking by your department of what you term “low value land,” and I shall answer each inquiry in order.

1. “How far must this department proceed in attempting to find out the ownership of lands taken, and in determining the status of the title of parties known to have an interest in the land taken or who claim to have an interest?”

So far as your duty under the law is concerned, it is set forth in G. L., c. 79, § 8, which reads, in part, as follows:

“Immediately after the right to damages becomes vested, the board of officers who have made a taking under this chapter shall give notice thereof to every person whose property has been taken or who is otherwise entitled to damages on account of such taking.”

It is apparent, therefore, that it is your duty to use reasonable diligence to ascertain the owners of the land taken, and it might well be that information from the local assessors would be sufficient, as they, presumably, keep themselves informed on matters of such ownership. Where, however, there is a question of ownership, and conflicting claims, to the knowledge of your department, it is your duty to have such search of title made as will in each case justify the award you make.

2. “Is it incumbent upon this department to notify each and every owner of land taken, when such owners are known?”

To that question my answer is “Yes.” See *Wright v. Lyons*, 224 Mass. 167.

3. “After a taking has been made, is a release from an owner to the Commonwealth sufficient or is a warranty deed essential in clearing interior holdings?”

To that question I reply that the ordinary release is insufficient, but that the deed taken should include, among its other requisites, a warranty to the extent of the amount of the award and a provision that it is in confirmation, and not in derogation, of the rights acquired by the taking.

4. “After a taking has been placed on record, in compliance with the provisions of the act above mentioned, how long a period of time must elapse before this department can absolutely be assured that its plans for development of the lands taken cannot be affected in any way by claims of any nature by any party or parties who might consider their interests or possible interests affected by said takings?”

In this connection, I call to your attention again G. L., c. 79, § 8, particularly the last line thereof, which says:—

“Failure to give notice shall not affect the validity of the proceedings, or the time within which a petition for damages may be filed, except as provided by section sixteen.”

Section 16 is as follows:—

“A petition for the assessment of damages under section fourteen may be filed within one year after the right to such damages has vested; but any person whose property has been taken or injured, and who has not received notice under section eight or otherwise of the proceedings whereby he is entitled to damages at least sixty days before the expiration of such year, may file such petition within six months from the time when possession of his property has been taken or he has otherwise suffered actual injury in his property.”

I therefore advise you that anyone who is entitled to notice, but who has received none, may not bring action to question the validity of the taking, but is

left to such remedy as is afforded by section 16, and must bring his action within the time fixed by that section. As G. L., c. 79, § 12, provides, in part, that "the damages for property taken under this chapter shall be fixed at the value thereof before the taking," such a claimant, even if he established his claim, might not claim the value of the land as enhanced by any improvements made by the Commonwealth.

Yours very truly,
JAY R. BENTON, *Attorney General.*

Constitutional Law — Criminal Cases — Burden of Proof.

An act which provides, in substance, that after some material facts have been established in criminal cases, the burden of proof with respect to certain essential facts may, under certain circumstances, be placed upon the defendant, is constitutional.

FEB. 26, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth.*

SIR:— You request me to consider House Bill No. 1120, entitled "An Act relative to the burden of proof in prosecutions for certain violations of the laws relative to hunting and trapping by aliens."

The proposed bill amends G. L., c. 131, § 16, so that said section shall read as follows:—

"No unnaturalized foreign born person who has resided within the commonwealth for ten consecutive days, who does not own real estate in the commonwealth to the value of five hundred dollars or more, shall hunt, capture or kill any wild bird or animal of any description, excepting in defence of the person, and no such person shall, within the commonwealth, own or have in his possession or under his control a shotgun or rifle; any shotgun or rifle owned by him or in his possession or under his control shall be forfeited to the commonwealth. Violations of this section shall be punished by a fine of fifty dollars or by imprisonment for not more than one month, or both. If, in any prosecution for violation of this section, the defendant alleges that he has been naturalized or that he owns real estate in the commonwealth to the value of five hundred dollars or more, the burden of proving the same shall be upon him."

The bill thus places upon the defendant, after the Commonwealth has established certain material facts, the burden of proving that he has been naturalized or that he owns real estate in the Commonwealth to the value of \$500. These are matters which relate to him personally, and which are exceedingly difficult and, in many cases, impossible for the State to prove.

"Where the subject-matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him." (12 Cyc. 381, 382.)

In *Commonwealth v. Williams*, 6 Gray, 1, 5, the court said:—

"It is no new thing in the history or administration of the law, that peculiar and artificial force is given or attributed to particular facts, or series of facts, as means and instruments of legal proof. This may be seen in many of the rules of evidence which prevail by the common law, and in others which derive their force from legislative acts. These then are conclusive presumptions, which, from motives of public policy, or for the sake of greater certainty, or for the promotion of the peace and quiet of the community, have been adopted by common consent. Sometimes the common consent, by which this class of presumptions is established, is declared through the medium of the judicial tribunals, and thus becomes a part of the common law of the land. And sometimes it is expressly declared by the direct authority of the Legislature in statutes duly enacted."

See, also, *Duggan v. Bay State Street Ry. Co.*, 230 Mass. 370, 380.

In *Holmes v. Hunt*, 122 Mass. 505, 517, the court said:—

"The statutes of this Commonwealth have imposed upon the defendant in criminal prosecutions the burden of proving any license, appointment or authority, relied on as a justification, which the Commonwealth, but for these statutes, would have been obliged to disprove."

Such statutes have been held to be constitutional. *Holmes v. Hunt*, *supra*; *Commonwealth v. Williams*, 6 Gray, 1; *Commonwealth v. Lahy*, 8 Gray, 459; *Commonwealth v. Carpenter*, 100 Mass. 204; *Commonwealth v. Anselvich*, 186 Mass. 376, 378; *Duggan v. Bay State Street Ry. Co.*, 230 Mass. 370, 380.

As early as 1793 statutes were enacted in this Commonwealth providing that the proof of certain facts be treated as presumptive evidence of guilt, and placing the burden of proof on the defendant to discharge himself. St. 1793, c. 42, § 6. See also St. 1833, c. 148, § 3; St. 1844, c. 102, § 1; St. 1849, c. 158, § 1.

Thus the history of both legislative and judicial decisions in this Commonwealth shows that under certain circumstances, after some material facts have been established, the burden of proof with respect to certain essential facts may be placed upon the defendant. It is not necessary, for the purposes of this opinion, to consider the limitation upon the power of the Legislature so to act.

I am therefore of the opinion that the proposed bill, if enacted, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — "Anti-aid" Amendment — Playgrounds — Lease of Park Lands by City.

Legislation designed or framed to accomplish the ultimate object of placing property in the hands of one or more private persons after it has been taken by the superior power of the government from another private person, avowedly for a public purpose, is unconstitutional.

The Legislature may authorize the sale or lease of land held for a public purpose when the public purpose designed has been completely accomplished, or when through lapse of time or changed conditions continued ownership of the land by the public agency is no longer necessary or needed.

Land of a city or town held strictly for public uses as a park, and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court, which may transfer it to some other agency of government or devote it to some other public use.

Whether a statute appropriates property to a public use or to a private use is a judicial question, upon which the constitutionality of the act depends.

The advisability, necessity or expediency of passing legislation is a matter solely for the determination of the Legislature.

MARCH 12, 1923.

Committee on Cities, House of Representatives.

GENTLEMEN:— You request my opinion as to the constitutionality of House Bill No. 1126, entitled "An Act to enable the city of Melrose to improve and adapt certain of its undeveloped park lands located on Lynn Fells Parkway and Tremont Street to the purpose for which they were acquired by said city."

Said bill reads as follows:—

"SECTION 1. The city of Melrose is hereby authorized by and with the consent of its park commission to lease at a nominal rental for a term of not exceeding ninety-nine years certain of its now undeveloped park lands more particularly described in section two of this act to an association or corporation to be organized and maintained by Melrose citizens for the purpose of improving said park lands by constructing and enclosing an athletic field and erecting structures thereon for use in connection with athletics. Such association or corporation may rent the same for athletic contests and may charge or

permit a charge for admission thereto, but when not so used shall, subject to reasonable rules and regulations, permit the inhabitants of said city to use the same as a playground; it may issue bonds or other obligations for the purpose of raising funds for such improvement and in all respects, except as herein otherwise provided, may control and manage said property during the term of said lease and from time to time establish rules and regulations governing the use thereof. All profits accruing to said association or corporation from the use and management of said property shall be used for the further development and improvement thereof.

SECTION 2. The land that may be leased as herein authorized consists of about seven acres located north of Lynn Fells parkway and east of Tremont Street in said city and is more particularly bounded and described as follows:—Beginning at the northeast corner of Lynn Fells parkway and Tremont street northerly by Tremont street, six hundred and ninety-five feet more or less to land of R. J. Munn and brothers; thence easterly on land of said Munn and brothers, land of DeMar and by Union street, four hundred and fifteen feet more or less to land now or formerly of Conway estate; thence southerly by said land of Conway estate three hundred and thirty-eight feet more or less to the southwesterly corner of said land of Conway estate and the present park line; thence easterly one hundred and five feet more or less on said Conway estate land and along said park line to land of William Magner and the line of the proposed extension of Ashland street; thence southerly by the proposed extension of Ashland street two hundred feet more or less to Lynn Fells parkway; thence westerly by Lynn Fells parkway seven hundred feet more or less to the point of beginning.

SECTION 3. So long as said property is used solely for the purposes herein expressed, it shall be exempt from taxation but whenever it shall cease to be so used the said leasehold term shall terminate and said land shall revert to the city of Melrose and any structures thereon become its absolute property.

SECTION 4. This act shall take effect upon its acceptance by a vote of the board of aldermen of said city within two years from the date of its passage and the terms of any lease under the authority hereby granted shall be approved by vote of said board."

It does not appear in what manner this land was acquired by the city of Melrose, whether by a taking under the right of eminent domain, purchase or gift. I assume, however, that said land was acquired and is now held for playground purposes under the provisions of G. L., c. 45, § 14 (R. L., c. 28, § 19).

In *Wright v. Walcott*, 238 Mass. 432, the court says:—

"Land acquired by a city or town by eminent domain or through expenditure of public funds, held strictly for public uses as a park and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court. It may be transferred to some other agency of government or devoted to some other public use by legislative mandate. The power of the General Court in this regard is supreme over that of the city or town. When title in fee is acquired in the land by the municipality for such a public use, there is no right of reversion to the original owner. He has been divested of every vestige of title when he parted with the fee. *Higginson v. Treasurer & School House Commissioners of Boston*, 212 Mass. 583. *Stewart v. Kansas City*, 239 U. S. 14, 16."

Playgrounds acquired and maintained by cities and towns are closely analogous in their essential features to parks. See *Higginson v. Treasurer & School House Commissioners of Boston*, *supra*, and cases cited.

But legislation designed or framed to accomplish the ultimate object of placing property in the hands of one or more private persons after it has been taken by the superior power of the government from another private person, avowedly for a public purpose, is unconstitutional. See *Wright v. Walcott* *supra*; *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371, and cases there reviewed and collected.

Undoubtedly the Legislature may, under our Constitution, authorize the sale or lease of land held for a public purpose when the public purpose designed has been completely accomplished, or when through the lapse of time or changed conditions continued ownership of the land by the public agency is no longer necessary or needed for the public purpose for which the land was acquired. *Chase v. Sutton Mfg. Co.*, 4 Cush. 152; *Winnisimmet Co. v. Grueby*, 209 Mass. 1; *Bancroft v. Cambridge*, 126 Mass. 438; *Worden v. New Bedford*, 131 Mass. 23; *Dingley v. Boston*, 100 Mass. 544; *Davis v. Rockport*, 213 Mass. 279; *Sweet v. Rechel*, 159 U. S. 380; *Wright v. Walcott*, *supra*, and cases cited. So, also, since 1901 there has been a general law in this Commonwealth authorizing the abandonment of lands, easements and other rights taken by cities and towns otherwise than by purchase, upon compliance with certain conditions set forth in the statute. G. L., c. 40, § 15. The omission therein of mention of land acquired by purchase or gift is significant. But the apparent design of the bill under consideration is to permit the lease for a term not exceeding ninety-nine years of the aforesaid undeveloped park lands, in order that they may be improved and better adapted to the purpose for which they were acquired by the city. The power to lease is limited "to an association or corporation to be organized and maintained by Melrose citizens for the purpose of improving said park lands by constructing and enclosing an athletic field and erecting structures thereon for use in connection with athletics."

If this bill works simply a change of control of said park land, taking it from one party who holds it for a public use and transferring it to another to hold in the same manner for precisely the same public use, there may well be a constitutional objection. To such a situation the case of *Cary Library v. Bliss*, 151 Mass. 364, seems applicable. In that case, in holding that a public library held upon a public charitable trust of indefinite duration by trustees provided by the donor could not be taken by eminent domain and transferred to a corporation created to manage it for like purposes, the court said:—

"The question arises, whether taking property from one party, who holds it for a public use, by another, to hold it in the same manner for precisely the same public use, can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking for a public use property which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the Legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the Legislature to be, a matter of public necessity. *West River Bridge v. Dix*, 6 How. 507. *Lake Shore & Michigan Southern Railway v. Chicago & Western Indiana Railroad*, 97 Ill. 506. *Chicago & Northwestern Railway v. Chicago & Evanston Railroad*, 112 Ill. 589."

See also opinion of the Attorney General to the Joint Committee on the Judiciary, dated May 5, 1922 (Attorney General's Report, 1922, p. 132). It is to be noted, however, that the case of *Cary Library v. Bliss*, *supra*, involved a trust created by will.

In *Wright v. Walcott*, *supra*, the court expressly states that land of a city or town held strictly for public uses as a park and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court, which may transfer it to some other agency of government or devote it to some other public use. This is in accord with the general rule that the public property of a city or town does not belong to it in the same absolute sense as the property of an individual belongs to him, but is held by it, as a

subordinate part of the government, for public uses, and subject to the authority of the Legislature, which may change or authorize a change of the public agency of government in charge of it. *Higginson v. Treasurer & School House Commissioners of Boston*, 212 Mass. 583, and cases cited; *Stone v. Charlestown*, 114 Mass. 214; *Ware v. Fitchburg*, 200 Mass. 61, and cases cited.

The bill under consideration does not involve any taking of property either from a private person or from the public. There is nothing in the bill which takes away from the city its legal title to the land. It merely authorizes the leasing of property already owned and held by the city. In this respect, also, the case of *Cary Library v. Bliss*, *supra*, is distinguishable.

The question whether a statute appropriates property to a public use or to a private use is a judicial one, upon which the constitutionality of the act depends. Consequently, the determination of the Legislature thereon may be revised by the court. But the question as to the advisability, necessity or expediency of passing legislation is solely for the determination of the Legislature. *Boston v. Talbot*, 206 Mass. 82; *Moore v. Sanford*, 151 Mass. 285; *Lowell v. Boston*, 111 Mass. 454; *Opinion of the Justices*, 204 Mass. 607.

The next question is whether the management of this undertaking can constitutionally be vested in the association or corporation to be formed as provided in this bill, in view of the so-called "anti-aid amendment" (Mass. Const., Amend. XLVI). The second section of said amendment provides, in part:—

"... and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both. . . ."

The plain intent of this amendment is to require that the expenditure of public money for any educational, charitable or religious undertaking which possesses the requisite public character shall be under exclusive public control.

In deciding this question it is to be observed that although said association or corporation may rent the premises "for athletic contests and may charge or permit a charge for admission thereto," it is significant that it is authorized to issue bonds or other obligations for the purpose of raising funds for improvement, and it is particularly provided that "all profits accruing to said association or corporation from the use and management of said property shall be used for the further development and improvement thereof." Likewise significant are the provisions for freedom from taxation and termination of the lease contained in section 3 of the bill.

It is obvious that said contemplated lessee cannot operate for profit; also, that the city of Melrose is not authorized to appropriate any money to assist the lessee in its work. It would seem that the contemplated undertaking is not religious, charitable or educational, within the meaning of said constitutional amendment. Accordingly the case is dissimilar in all material respects to that upon which the Attorney General rendered an opinion to the committee on bills in the third reading, dated April 1, 1921 (Attorney General's Report, 1921, p. 112). I am therefore of the opinion that the bill does not fall within the scope of said amendment. Nor can it be said that the bill is unconstitutional because it takes away from the city the use or control of public property which had become vested in it for a public purpose. Even if the bill had this effect, the objection would be cured by the fact that the lease therein authorized is subject to the consent of the park commissioners of the city of Melrose, the body vested with charge and control of parks and playgrounds. The city, therefore, could not well complain of a use of its property to which it assents through its duly constituted authority. See *Ware v. Fitchburg*, 200 Mass. 61, and cases cited.

Your committee is entitled to take into consideration all the facts relating to the pending bill in determining whether or not the necessity exists for granting the authority therein referred to.

In my opinion the bill, if enacted, would be constitutional.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Public Money — Reimbursement.

A proposed bill which authorizes the city of Boston to discharge its obligation to reimburse a certain company for losses sustained in certain coal deliveries is constitutional, inasmuch as the reimbursement is not a gift of the public money but is in the nature of compensation for value received by the city.

MARCH 13, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth.*

SIR:— You request me to consider Senate Bill No. 31, entitled "An Act authorizing the city of Boston to discharge its obligation to reimburse the D. Doherty Company for losses sustained in certain coal deliveries."

While the bill itself does not definitely disclose the precise nature of the obligation referred to therein, I have ascertained from data submitted to the committee on cities that the D. Doherty Company, in order to supply the amount of coal to the schools of Boston called for by its contract, was obliged to purchase coal from certain sources at an increased price, and that the sum set forth in the bill represents the difference between the contract price and the replacement price; in other words, the actual loss sustained by the D. Doherty Company in filling its contract.

Apparently the D. Doherty Company was under no legal obligation to supply this coal or to go on with its contract, inasmuch as it was undoubtedly discharged from its obligation to make deliveries thereunder by reason of seizures of its coal by the Federal government in the exercise of war-time powers.

On these facts, there is an unquestionable moral or equitable right to reimbursement. But, regardless of the moral obligation, if the bill in effect authorizes the city of Boston to pay out money raised by general taxation gratuitously to an individual, although under no legal obligation to do so, it is manifestly unconstitutional unless some public purpose or interest is furthered thereby.

The Supreme Court of this Commonwealth has rigidly applied the rule that public money can be expended only for a public purpose.

In *Whittaker v. Salem*, 216 Mass. 483 (a case in which a moral obligation unquestionably existed), the court says:—

"However meritorious the project may appear to be either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it. These principles often have been declared respecting a great variety of subjects and cannot be doubted."

To the same effect are *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Kingman v. Brockton*, 153 Mass. 255; *Opinion of the Justices*, 204 Mass. 607; *ibid.*, 211 Mass. 624.

But on the facts before me it cannot fairly be said that the bill under consideration authorizes a gift. Rather, it would seem that it authorizes compensation or reimbursement for value received by the city.

It has been decided in several cases that towns may vote money to indemnify their agents who may incur a liability in the performance of their duties, although the towns were under no legal obligation to do so. *Nelson v. Milford*, 7 Pick. 18; *Bancroft v. Lynnfield*, 18 Pick. 566. In the case of *Friend v. Gilbert*, 108 Mass. 408, it was decided that a town could properly award a sum of money as compensation to an individual who had rendered valuable service to the town, although no contract existed for such services. The court there said:—

"The petitioners contend that the town had no legal relation or connection with Watson, and therefore that the payment to him is a gratuity or gift. It is true the town had no express contract with him, but they had a direct and vital interest in his work and its quality, and we cannot regard the proposed payment to him as a mere gratuity. The vote is, to pay him five thousand dollars as compensation, that is, as an equivalent, for his services, and for the benefits received by the town, and not as a gift without consideration. The fact that the town was under no legal obligation to pay does not make it a gift without equivalent. . . .

We are of opinion, in this case, that it was within the corporate power of the town to pass the vote in question. Whether it was wise to do so, was a matter within the discretion of the inhabitants of the town; and, in the absence of fraud or corruption, we cannot revise their judgment."

The facts of the present case are fully as strong, if not stronger, than those in the case last cited. I am accordingly of the opinion that the proposed bill, if enacted, would be constitutional.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Insurance—Joint and Several Liability of Two or More Companies—Use of Corporate Name of more than One Insurance Company at the Head of a Policy.

A policy of insurance on which two or more companies are jointly and severally liable may not be issued except when specifically authorized by statute.

A contract of insurance must be headed or entitled only by the name of the company issuing the policy.

MARCH 21, 1923.

HON. CLARENCE W. HOBBS, *Commissioner of Insurance*.

DEAR SIR:—You request my opinion as to the effect of the first clause of G. L., c. 175, § 18, requiring, as you state, that a contract of insurance shall "be headed or entitled only by the name of the company." You ask to be advised whether that clause "prevents the use of policies on which two or more companies are severally and jointly liable." The first clause of G. L., c. 175, § 18, is as follows:—

"Every company shall conduct its business in the commonwealth in its corporate name, and all policies and contracts, other than contracts of corporate suretyship, issued by it, shall, except as provided in section fifty-six of chapter one hundred and fifty-two, be headed or entitled only by such name."

You submit with your letter a copy of the proposed policy, entitled "automobile policy," which is neither a contract of corporate suretyship nor one falling within the exemption of G. L., c. 152, § 56. It purports to be a policy establishing a joint and several liability on seven companies, all of whose corporate names head the policy.

G. L., c. 175, § 105, specifically authorizes fidelity and corporate surety companies to "act as joint or sole surety" upon official and other bonds.

G. L., c. 152, § 56, specifically authorizes two or more insurance companies to "unite in issuing joint and several workmen's compensation policies which may be headed by the names of all such companies."

The provisions of G. L., c. 175, as to reinsurance of risks do not apply to this proposition.

It would seem clear, therefore, that the Legislature has clearly indicated under what circumstances a company may undertake a joint and several liability, and under what circumstances the names of more than one company may head a contract of insurance. As the policy in question does not fall within the exceptions noted in section 18, it may not be written by several companies and headed by their names.

I answer your question, therefore, in the negative.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — "Anti-aid" Amendment — Appropriation of Public Money for Private Purposes — Soldiers' Home — Civilian Employees — Civil Service Rules and Regulations — State Retirement System.

The Soldiers' Home is a privately owned charitable corporation, not a State institution.

Employees of the Soldiers' Home are not employees of the Commonwealth, and are not within the scope of the State retirement system, provided for by G. L., c. 32, §§ 1-5.

Employees of the Soldiers' Home are not "in the service of the Commonwealth," within the meaning of G. L., c. 31, § 3, and are not subject to the civil service rules and regulations.

A statute extending the State retirement system so as to include all civilian employees of the Soldiers' Home would authorize the employment of public money for private purposes, and would be unconstitutional.

A statute extending the State retirement system so as to include the civilian employees of the Soldiers' Home is not an appropriation "for the maintenance and support of the Soldiers' Home in Massachusetts," authorized by Mass. Const. Amend. XLVI, § 2.

MARCH 22, 1923.

Hon. B. LORING YOUNG, *Speaker, House of Representatives.*

DEAR SIR:—In your letter of February 23rd you request my opinion on the following questions:—

"1. Are the employees of the Soldiers' Home State employees, within the general meaning of that term in the statutes?

2. Are the employees of the Soldiers' Home subject to the civil service laws, rules and regulations now in force?

3. If your answer to question 1 is in the affirmative, are State employees at the Soldiers' Home now within the scope of the State retirement act, or is a special act necessary to bring them within its provisions?

4. If your answer to question 2 is in the negative, will you then answer the question—would House Bill No. 784, if enacted into law, be constitutional?"

"The Trustees of the Soldiers' Home in Massachusetts" was incorporated by St. 1877, c. 218, amended by St. 1886, c. 32. The number of trustees was limited to eighteen, of whom fifteen were to be members of the voluntary association known as the Department of Massachusetts, Grand Army of the Republic. In 1889 the number of trustees was increased from eighteen to twenty-one, the three new trustees to be appointed by the Governor, by and with the advice and consent of the Council. St. 1889, c. 282. By Res. of 1905, c. 77, \$100,000 was appropriated by the Commonwealth, to be expended under the direction of the Trustees of the Soldiers' Home, for the construction and furnishing of an additional building. A reversionary interest in the building was reserved to the Commonwealth by this resolve.

The Soldiers' Home is financed in part by the income from voluntary contributions and bequests, and in part by yearly appropriations by the Commonwealth. Mass. Const. Amend. XLVI, § 2, which forbids State contributions to private charitable organizations, contains a specific exception to the effect "that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town." Finally, the Soldiers' Home relies also for its support upon income derived from the Federal government. \$120 per annum is paid by the Federal government to the Commonwealth of Massachusetts for each inmate of the Home. The sums so received by the Commonwealth are paid over to the treasurer of the Soldiers' Home, in accordance with the provisions of St. 1890, c. 373.

1. In my opinion, the Soldiers' Home is a privately owned charitable corporation. Although the Commonwealth contributes to the support of the Home, it is not a State institution, and the employees of the Home are in no sense employees of the Commonwealth. In this connection your attention is respectfully directed to an opinion rendered by the Attorney General on Febru-

ary 5, 1913, in response to a letter from the treasurer of the Soldiers' Home requesting an opinion as to whether the Home should be covered by insurance under the workmen's compensation act, St. 1911, c. 751. In determining this question it was necessary to decide whether the Home was a State institution. On this point the opinion states: "The Home is not a State institution, and the employees of the Home are in no sense employees of the Commonwealth." My answer, therefore, to the first question propounded by you is in the negative.

2. Section 3 of the present civil service law, G. L., c. 31, provides that the Civil Service Commission shall, subject to the approval of the Governor and Council, from time to time make rules and regulations which shall regulate the selection of persons to fill appointive positions in the government of the Commonwealth, the several cities thereof, and certain towns, and the selection of persons to be employed as laborers or otherwise "in the service of the Commonwealth and said cities and towns." Clause 5 of rule 1 of the civil service rules provides:—

"Persons paid by the Commonwealth or any city, whether carried on the regular payroll, on special payroll or by presenting a bill personally or by some other person, company or corporation, shall be deemed to be 'in the service of the Commonwealth or the city' within the meaning of these rules."

As the employees of the Soldiers' Home are neither employed nor paid by the Commonwealth, it is my opinion that they are not subject to the civil service laws, rules and regulations now in force; and my answer to your second question is also in the negative.

3. G. L., c. 32, § 2, provides for a retirement association for the employees of the Commonwealth, including employees in the service of the Metropolitan District Commission. Section 1 of the same act, as amended by St. 1922, c. 341, § 1, defines "employees" as meaning "persons permanently and regularly employed in the direct service of the Commonwealth or in the service of the Metropolitan District Commission, whose sole or principal employment is in such service." It is apparent from what has been said above that the employees of the Soldiers' Home are not now within the scope of the State retirement act.

4. Your final question is whether House Bill No. 784, if enacted into law, would be constitutional. The act provides, in substance, that all civilian employees of the Trustees of the Soldiers' Home in Massachusetts shall be brought within the provisions of the present State retirement system, G. L., c. 32, §§ 1-5, inclusive.

As a general proposition, it seems clear that a law authorizing the employment of State funds, under a retirement system such as that now in force in the Commonwealth, to pension the ex-employees of a public charitable corporation other than a State institution would be unconstitutional.

Looked at, if it may be so regarded, as a circuitous method of benefiting the public charitable corporation itself, such an act would violate the terms of Mass. Const. Amend. XLVI, the so-called "anti-aid" amendment, and would therefore be unconstitutional. Looked at from the viewpoint of the individual recipients of the pension, such an act would authorize the employment of public money for private purposes, and would therefore be unconstitutional. *Lowell v. Boston*, 111 Mass. 454; *Whittaker v. Salem*, 216 Mass. 483; *Opinion of the Justices*, 175 Mass. 599; *Loan Assn. v. Topeka*, 20 Wall. 655.

The pensioning of certain special classes of persons is clearly within the constitutional authority of the Legislature. Veterans of former wars are one example of a class to whom the Legislature may thus disburse public money. The constitutionality of such action rests, however, upon considerations quite apart from those involved in the present problem. It rests upon the power to reward unusual and distinguished public service, and because a public purpose is deemed involved, namely, the promotion of a spirit of loyalty and patriotism. See *Opinion of the Justices*, 211 Mass. 608; *Opinion of the Justices*, 190 Mass. 611.

State employees form another group, the constitutionality of whose pensioning appears never to have been questioned. Unusual and distinguished public service can here hardly be held the justification for State expenditures. The constitutional power of the Legislature to pension State employees probably rests, in part, upon one or both of the following considerations. It may be thought that by pensioning its own employees the State secures more efficient service, either because a contented employee may be expected to render better service than a discontented one; or because the prospect of recompense at the completion of a period of continuous service is likely to lead to a desire to remain in that service, and therefore to an effort to give satisfaction. On the other hand, a pension system may be looked upon perhaps simply as a part of the consideration which the State gives to secure the services which it needs. A dictum in *Opinion of the Justices*, 175 Mass. 599, appears to rest the power upon the latter basis.

"The questions, as we understand them, both assume that there was no provision of law in existence before the death of the officer by which the money in question would be payable as supposed. If such a provision should be enacted with regard to the widow, heirs, or legal representatives of a living officer, it naturally would be regarded as pledging the faith of the State to the officer himself, and thus as constituting part of the consideration for his future service."

Mass. Const. Amend. XLVI expressly exempts from the scope of its inhibition certain appropriations, and provides that "appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts."

The final inquiry made by you therefore resolves itself into the single question: Can the constitutionality of House Bill No. 784 be supported by reason of the phrase in the "anti-aid" amendment which authorizes appropriations for the maintenance and support of the Soldiers' Home?

If pensions to employees are in fact a part of the consideration of their contract of employment, it might be contended that a State pension to the civilian employees of the Soldiers' Home should be looked upon merely as a contribution towards the hiring of employees by the Home,—in other words, a contribution towards the support and maintenance of the Home, and hence within the exception to the "anti-aid" amendment.

After careful consideration I am of the opinion, however, that this line of argument, though plausible enough on its face, is untenable.

The primary object, the thing actually accomplished by extending the benefits of the present retirement system to the civilian employees of the Home, is not to benefit the Home by making it easier or cheaper for it to engage employees. As a practical matter, it may well be doubted whether the wages of employees would be a whit lower after the passage of the act than they were before. Certainly they would not be lower by the full amount of the money to be contributed by the Commonwealth. That money, either in whole or in part, would be expended for the support and maintenance, not of the Home, but of the Home's ex-employees. Such an expenditure of public money is unconstitutional. The principle which makes it so is the general one already referred to. Public money must be reserved for public purposes. That principle is wholly unrelated to the "anti-aid" amendment, and the saving clause in that amendment cannot be relied upon to warrant the expenditures in question. The clause can be no broader in scope than the general prohibition to which it is merely an exception.

Moreover, the phrase "for the maintenance and support of the Soldiers' Home" must be construed strictly. A broad, sweeping prohibition was enacted. A single specific exception was then inserted therein. Since this exception limits the application of the general policy evinced by the amendment as a whole, and is in the nature of a special privilege or grant, by familiar principles of interpretation it must be construed strictly and not extended by implication. *Butchers Slaughtering, etc., Assn. v. Boston*, 214 Mass. 254, 258. In my opinion, the words used go no farther than to authorize the Legislature

to continue in the future, as it had done in the past, to make voluntary contributions towards the support and maintenance of the Home. They did not contemplate, and cannot, I believe, be deemed to authorize, an act which purports to obligate the Commonwealth in the future to expend money as needed to pension ex-employees of the Home.

Further, House Bill No. 784 would impose the retirement system upon all employees of the Soldiers' Home, whether they desired it or not. Serious doubts might arise, in my opinion, as to the constitutionality of what would appear to be an impairment of the obligation of those contracts of service between the Home and its employees which might be in existence at the time the act becomes effective. In view of the conclusion arrived at above, however, I need not develop further this aspect of the problem.

I am constrained to advise you in reply to your fourth inquiry that, in my opinion, House Bill No. 784, if enacted, would be unconstitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Corporations — Stockholders — Right to inspect Corporate Records.

A proposed bill is constitutional which provides that, if an action for damages or a proceeding in equity is commenced for neglect or refusal to exhibit for inspection the stock and transfer books of a corporation, "it shall be a defence that the actual purpose and reason for the inspection sought are to secure a list of stockholders for the purpose of selling said list, or copies thereof, or of using the same for a purpose other than in the interest of the applicant, as a stockholder, relative to the affairs of the corporation."

MARCH 23, 1923.

HIS EXCELLENCY CHANNING H. COX, *Governor of the Commonwealth*.

SIR:— You request me to consider House Bill No. 620, entitled "An Act relative to the exhibition of certain corporate records for inspection by stockholders."

This bill contemplates an amendment of G. L., c. 155, § 22, under which a stockholder is given an absolute right to inspect the stock and transfer books of a corporation, regardless of his purpose in making such examination. Statutes of other jurisdictions confer upon stockholders a similar right, and have been upheld by the courts thereof. *Foster v. White*, 86 Ala. 467; *Johnson v. Langdon*, 135 Cal. 624; *State v. Middlesex Banking Co.*, 87 Conn. 483; *Stone v. Kellogg*, 165 Ill. 192; *Ellsworth v. Dorwart*, 95 Ia. 108; *Knox v. Coburn*, 117 Me. 409; *Wight v. Heublein*, 111 Md. 649; *Hub Construction Co. v. New England Breeders' Club*, 74 N. H. 282; *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 198; *Kimball v. Dern*, 39 Utah, 181; *Lewis v. Brainerd*, 53 Vt. 519.

It is well settled that the common law right of a stockholder to inspect the books of a corporation is a qualified and not an absolute right, the court having power to determine whether or not a stockholder's desire for examination not only is reasonable but "has reference to the interests of the corporation and his personal interest as a member of it." *Varney v. Baker*, 194 Mass. 239; *Butler v. Martin*, 220 Mass. 224.

At common law the procedure by which a stockholder obtained access to the books of a corporation, after having been refused the privilege of inspecting them, was by writ of mandamus. Ordinarily, relief by mandamus was not given under these circumstances unless it appeared to the court that the interests or rights of the petitioner as a stockholder were likely to be seriously prejudiced and affected. But since the enactment of G. L., c. 155, § 22, the Supreme Court of this Commonwealth has held that, unless the statute imposes restrictions or limitations, the right of examination thereby granted is absolute, and the motive or purpose of the stockholder in seeking to exercise it is not the proper subject of judicial inquiry. The courts of other jurisdictions have likewise so decided in interpreting similar statutes in their jurisdictions.

In construing the present statute, in the case of *Shea v. Parker*, 234 Mass. 592, the Supreme Court says, at page 594:—

“It may be presumed that before enacting the statute the Legislature considered the possibility that information thus obtained might as in the case at bar have a commercial value distinct and quite apart from the stockholder's interest as a corporate member, and undoubtedly could have made the right of examination dependent upon the motive actuating the stockholder. It has not however so done. The words conferring the right are unlimited, and the statute is mandatory. While a stockholder's right to examine the general books of account to ascertain the volume of business transacted, and the method and efficiency of corporate management is left as at common law, the stock and transfer books by the statute are at all times to be exhibited under reasonable conditions for his full examination. The right also includes making of copies and transcripts as well as the assistance of counsel and copyists for such purpose. The statute when viewed in the light of its origin should not be so construed as to reduce the right to a useless inquiry, which it necessarily would be in most cases unless the stockholder is permitted to copy the names, residences and numbers of shares of the stockholders. . . .

We are therefore of opinion that instead of being merely declaratory, or limiting the right to the sound discretion of the court, the statute was intended to do away with the restrictions imposed at common law on the examination of the stock and transfer books of a domestic corporation.”

Under the terms of the proposed bill, if an action for damages or a proceeding in equity is commenced under the statute for neglect or refusal to exhibit for inspection the stock and transfer books, “it shall be a defence that the actual purpose and reason for the inspection sought are to secure a list of stockholders for the purpose of selling said list, or copies thereof, or of using the same for a purpose other than in the interest of the applicant, as a stockholder, relative to the affairs of the corporation.”

The effect of this amendment would seem to restore, to a large measure, if not entirely, the common law rule, and would authorize and require the court to exercise its sound discretion as to whether or not damages are recoverable or an injunction should lie, if the defence provided for is introduced and maintained. It is, however, unquestionably within the power of the Legislature to thus amend the statute. See *Shea v. Parker*, *supra*.

I am accordingly of the opinion that the bill, if enacted, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Criminal Cases — Public Trial.

The right of persons accused of crime to have a public trial has always been recognized in this Commonwealth.

An act providing that the public be excluded from the trial of all criminal cases, or of all cases involving moral turpitude, would be unconstitutional. Under certain circumstances, and in certain cases, the general public may be excluded.

An act providing that the general public be excluded from the trial of criminal cases involving morals or chastity, where a minor is the person upon whom the crime has been committed, would be constitutional.

MARCH 23, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth*.

SIR:—You request me to consider House Bill No. 1219, entitled “An Act to protect witnesses under the age of seventeen at trials for certain crimes.”

The proposed bill is in effect a limitation of the right of persons accused of certain crimes to a public trial. This right is one of the most important safeguards in the prosecution of persons accused of crime. It exists for the protection of the accused; it enables the public to see that he is fairly dealt with and not unjustly condemned; it acts as a security for trustworthiness and com-

pletteness of testimony; and it keeps his triers, court, jury and counsel, alive to a strict conscientiousness in the performance of their duty.

This right, together with the right of trial by a jury of one's peers, to be informed of the nature of the accusation, to be confronted with the witnesses against him, to be heard fully in his own defence, to have compulsory process for obtaining witnesses in his favor, and to refuse to furnish evidence against himself, is the outgrowth of reforms brought about as a result of many grave abuses in England in the administration of criminal law, and became a part of the Constitution of the United States and of practically every State in the Union.

As far back as 1649 this right was claimed in England by a defendant placed on trial for treason. *Lithurme's Trial*, 4 How. St. Tr. 1269, 1273; *Cornish's Trial*, 11 How. St. Tr. 460 (1685).

In the case of *Daubney Cooper*, 10 B. C. 237, 240, the court said:—

"We are all of the opinion that it is one of the essential qualities of a court of justice that its proceedings should be public."

Though there is no express provision in the Constitution that persons accused of crime shall have a right to public trial, this right has always been recognized in this Commonwealth and accorded to persons accused of crime. Article XII of the Declaration of Rights provides, in part:—

". . . And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. . . ."

The court has held that "the law of the land" made an indictment or presentment by a grand jury essential to the validity of a conviction in case of prosecution for felonies. *Jones v. Robbins*, 8 Gray, 329. The secrecy of grand jury proceedings has been held to be included within the meaning of the term "law of the land." *Commonwealth v. Harris*, 231 Mass. 584; *Opinion of the Justices*, 232 Mass. 601. At page 604 of the opinion the justices said:—

"Mere rules of procedure practised by our ancestors at the time of the adoption of the Constitution did not become an inherent part of due process. But no change 'can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.' *Twining v. New Jersey*, 211 U. S. 78, 101."

An act providing that the public be excluded from the trial of all criminal cases would, in my opinion, be repugnant to article XII of the Declaration of Rights, and would be unconstitutional. The right to a public trial does not, however, mean that all persons who desire to attend criminal trials shall in all cases be permitted to do so. Bishop Crim. Proc. §§ 658, 659. Cooley, in his *Constitutional Limitations*, 7th ed., p. 441, speaking of this right, says:—

"The requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

The grounds generally recognized as justification for the exclusion of the general public have been the danger of overcrowding the court room, the risk of violence or brawls, the maintenance of order and decorum in the court room, and the protection of the public morals, especially the morals of the young. *People v. Swafford*, 65 Cal. 223; *People v. Kerrigan*, 73 Cal. 222; *People v. Hall*, 51 N. Y. App. 57; *Grimmett v. State*, 22 Tex. App. 36; *State v. Brooks*, 92 Mo. 542. This is the general rule, though not recognized in some jurisdictions. See *People v. Murray*, 89 Mich. 276; *People v. Yeager*, 113 Mich. 228. In the latter case the court held invalid an act of the Legislature which provided:—

"Whenever it shall appear that, upon the trial of any cause, evidence of licentious, lascivious, degrading, or peculiarly immoral acts or conduct will probably be given, the judge presiding at such trial may, in his discretion, require and cause every person, except those necessarily in attendance thereon, to retire and absent himself or herself from the court room during such trial, or any portion thereof."

In some States, by statute the court is given power to exclude the general public in cases where the evidence is vulgar and obscene and would tend to operate injuriously to the public morals, and in cases which relate to improper acts of the sexes, including such crimes as rape, assault with intent to rape, seduction, adultery, bastardy and divorce. Georgia Code (1895), § 5296; Utah Rev. Stat. (1898), § 696; Wis. Stat. (1898), § 4789.

In this Commonwealth the courts have frequently, on motion of counsel or on their own initiative, in the interest of good morals and decency, and in order to maintain proper order and decorum in the court room, excluded the general public from the trial of cases. By statute in this Commonwealth the court is given discretionary power to exclude the general public in cases where the defendants are children under seventeen years of age, and minors, unless their presence is necessary either as parties or as witnesses, must be excluded. G. L., c. 119, § 65. The court may also exclude minors as spectators from the court room during the trial of any cause, civil or criminal, if their presence is not necessary as witnesses or parties. G. L., c. 220, § 13.

The test in all cases where this general rule is recognized is its reasonableness under the particular circumstances, both as to the class of persons excluded and as to the grounds for exclusion.

The proposed bill is doubtless intended to be in the interest of public morals, and to protect minors against being compelled to testify in public in cases where the evidence would involve their morals or chastity, would be vulgar and obscene, and would tend to degrade the person testifying. Were it in terms limited solely to such cases, I am of the opinion that it would come within the general rule and would be constitutional. The proposed bill, however, goes much further in that it includes *all* crimes involving moral turpitude. "Moral turpitude," as legally defined, includes everything done contrary to justice, honesty, modesty or good morals. It includes every act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted or customary rule of right and duty between man and man.

In many such cases none of the recognized exceptions to the right of a defendant to a public trial could possibly obtain. In many of them, as in larceny, neither the protection of public morals nor of the witness could possibly warrant the exclusion of the public. To deny defendants a public trial under such circumstances, because the complainant is a child under seventeen years of age, would not be justified.

I am therefore of the opinion that the proposed bill, if enacted, would be unconstitutional. If the bill were amended by striking out the words "or other crime involving moral turpitude," and inserting in place thereof the words "or other similar crimes," the bill, if enacted in that form, would, in my opinion, be constitutional.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Taxation of Corporations—Interpretation of Statute—"Net Income."

Under the Federal Revenue Act of 1921, "net losses," as defined by section 204, are not deductible from "gross income" under sections 233 and 234, but are deductible from "net income" as defined by section 232.

"Net income," as defined by G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, means, with the modifications there specified, the net income required to be returned to the Federal government before the deduction of any sum as an allowance for net losses, and such losses are therefore not deductible under the corporation tax laws.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:— You request my opinion whether in determining “net income,” as defined in G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, “net losses,” as defined in section 204 of the Federal Revenue Act of 1921, are deductible.

G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, is as follows:—

“5. ‘Net income,’ except as otherwise provided in sections thirty-four and thirty-nine, the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act of nineteen hundred and eighteen or the federal revenue act of nineteen hundred and twenty-one, whichever of said acts may be applicable, and, in the case of a domestic business corporation, such interest and dividends, not so required to be returned as net income, as would be taxable if received by an inhabitant of this commonwealth; less, both in the case of a domestic business corporation and of a foreign corporation, interest, so required to be returned, which is received upon bonds, notes and certificates of indebtedness of the United States.”

“Net income” of a corporation is defined by section 232 of the Federal Revenue Act of 1921. Said section is as follows:—

“That in the case of a corporation subject to the tax imposed by section 230 the term ‘net income’ means the gross income as defined in section 233 less the deductions allowed by section 234, . . .”

“Gross income” of a corporation is defined by section 233, and section 234 provides for the allowance of deductions to be made in computing the net income of a corporation.

Section 204 (b) of the Federal Revenue Act of 1921 is as follows:—

“If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.”

Article 1602 of Regulations 62, 1922 edition, provides, in part, as follows:—

“A taxpayer sustaining a ‘net loss’ such as set forth in section 204, for any taxable year ending after December 31, 1920, may file a claim therefor with his return for the subsequent taxable year. . . . If the evidence furnished satisfies the Commissioner that the taxpayer has sustained a ‘net loss’ the amount of such net loss may be deducted from the net income of the taxpayer for the succeeding taxable year and if such net loss is in excess of the net income for such succeeding taxable year the amount of such excess shall be carried over and credited against the net income for the next succeeding taxable year.”

It is, in my opinion, plain that “net losses,” allowed as a deduction by section 204, paragraph (b), are deducted not from the gross income but from the net income, and that “net income,” as defined by section 232, includes no deduction for such net losses. The net income, therefore, which is referred to in G. L., c. 63, § 30, par. 5, as amended by St. 1922, c. 302, is the net income which is required to be returned by the corporation to the Federal government under the Federal Revenue Acts before the deduction of any sum as an allowance for net losses.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Jurisdiction over Non-residents — Operation of Motor Vehicles within the Commonwealth by Non-residents.

A statute providing that the operation of a motor vehicle within the Commonwealth by a non-resident shall be deemed equivalent to an appointment of the Registrar of Motor Vehicles as an attorney upon whom service of process may be made in any action growing out of an accident or collision in which such non-resident may be involved while operating a motor vehicle within the Commonwealth, would be constitutional.

MARCH 26, 1923.

Joint Committee on the Judiciary.

GENTLEMEN:— You have asked my opinion as to whether a proposed law, entitled "An Act further regulating the right of non-residents to operate motor vehicles within the Commonwealth," would be constitutional.

The proposed act provides, in substance, that the operating of a motor vehicle within the Commonwealth by a non-resident shall be deemed equivalent to an appointment by such non-resident of the Registrar of Motor Vehicles as an attorney upon whom service of process may be made in any action growing out of an accident or collision in which such non-resident may be involved while operating a motor vehicle within the Commonwealth.

In the case of *Kane v. New Jersey*, 242 U. S. 160, decided in 1916, the Supreme Court of the United States held constitutional a provision of a New Jersey statute regulating the operation of motor vehicles which provided that a non-resident owner of a motor vehicle must file with the Secretary of State an instrument constituting the Secretary of State an attorney upon whom process might be served in any action caused by the operation of such motor vehicle within the State. In delivering the opinion of the court Mr. Justice Brandeis said:—

"We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners."

The proposed act differs from the New Jersey statute with regard to the feature under consideration in two respects only,—first, in that it does not provide for the actual filing of a power of attorney by non-resident operators, but declares that the operation of a motor vehicle within the Commonwealth by a non-resident shall be deemed the equivalent of such action by him; and second, in that it applies to any non-resident operating a motor vehicle within the Commonwealth, irrespective of whether or not he is the owner thereof.

In the case of foreign corporations doing business within a State it has been repeatedly held that they have thereby consented to be sued in the courts of that State upon causes of action arising out of the business done by them within its borders. This is irrespective of whether there was any actual consent by them to such jurisdiction, and irrespective also of whether the particular statute involved required the filing of a power of attorney by the corporation or merely declared that doing business within the State should be deemed equivalent to the filing of such an instrument. *Lafayette Ins. Co. v. French*, 18 How. 404. It would seem no more difficult to apply this doctrine of implied consent to an individual non-resident than to a foreign corporation. The reasoning of the Supreme Court in *Kane v. New Jersey*, *supra*, does not suggest that the constitutionality of the provision in the New Jersey statute depended in any way upon the fact that it did not include all non-residents operating a motor vehicle upon the highways of the State, but was restricted to non-resident owners.

I am accordingly of the opinion that the proposed act, if enacted into law, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General.*

State Employee — Removal — Hearing — Veteran at State Infirmary — Civil Service.

The services of a State employee who is a veteran, but whose employment has not been approved by the board of trustees of the State Infirmary as required by G. L., c. 122, § 1, and who is not employed as the result of an appointment under civil service provisions, may legally be discontinued without hearing.

MARCH 27, 1923.

Mr. RICHARD K. CONANT, *Commissioner of Public Welfare.*

DEAR SIR:— My opinion has been requested as to whether or not the superintendent of the State Infirmary has the right to discontinue the services of an individual who is a veteran, whose employment has not yet been approved by the board of trustees of the infirmary, as required by G. L., c. 122, § 1, and who is not employed as the result of an appointment under civil service provisions.

G. L., c. 122, § 1, provides, in part, as follows:—

“The trustees (of the state infirmary) shall appoint a superintendent of the state infirmary . . . All other officers and employees shall be appointed by the superintendent subject to the approval of the trustees, who shall fix the compensation in each case.”

Not having received the approval of the trustees under this section, the man in question may be removed without a hearing unless he comes within the provisions of G. L., c. 31, § 26, which, so far as is pertinent to the present question, reads as follows:—

“No veteran holding office or employment in the public service of the commonwealth . . . shall be removed . . . except after a full hearing of which he shall have at least seventy-two hours' written notice, with a statement of the reasons for the contemplated removal . . . The hearing in case of a state employee shall be before the board of conciliation and arbitration, . . .”

From the information furnished me it does not appear that the man in question has passed the civil service examination or applied as a veteran for appointment without an examination; and he was not appointed under the civil service provisions relating to veterans.

The statute referred to, G. L., c. 31, § 26, was designed to protect only those persons who were appointed under the civil service law as veterans. As was said by Morton, J., in *Ayers v. Hatch*, 175 Mass. 489, 490:—

“It (the statute) was intended to prevent the removal or suspension or transfer without his assent and without a full hearing of a veteran who had been appointed under the statutes and rules relating to the civil service.”

The fact that the employee in the case at hand happens to be a veteran does not bring him within the protection of the statute. *Bates v. Selectmen of Westfield*, 222 Mass. 296.

Accordingly, in my opinion, the employment of the man in question may be discontinued without a hearing.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Taxation — Tax on Motor Vehicles.

A statute purporting to impose an excise tax on motor vehicles, measuring the tax by a percentage of their list prices and exempting them from local property taxation, would be unconstitutional because the tax in its essence would be a tax upon the mere ownership of property, which would not be proportional.

APRIL 2, 1923.

Committee on Taxation, House of Representatives.

GENTLEMEN:— You have submitted for my consideration a proposed bill, set out in Appendix W of House Document No. 1240, entitled "An Act to provide an excise tax on motor vehicles." The bill contains provisions material to the present inquiry as follows: It provides by section 7 for the levying of excises on motor vehicles owned or controlled by inhabitants of the Commonwealth or by persons or partnerships having a regular place of abode or business therein, or used therein in the business of corporations, measured by a percentage of the makers' list prices of such motor vehicles, to be paid to the treasurer of each city and the clerk of each town. By section 2 payment of such excise is required to be made before the motor vehicle can be registered. In section 1 the excise is said to be in lieu of a local property tax, and motor vehicles with respect to which the excise has been paid are exempt from taxation under G. L., c. 59. The bill provides in section 8 that moneys received from such excises shall be used for the general purposes of the city or town. You ask my opinion whether the proposed bill would be constitutional.

To be constitutional the bill must be based on the right to exercise one of the two following powers granted to the General Court by Mass. Const., c. I, § I, art. IV:—

"... to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; ..."

The provisions of the bill show that it is not intended thereby to lay a tax upon property within the first of the two clauses quoted. Regarded as a tax on property, the proposed tax would clearly be invalid because not proportional. It would not be proportional because it would be imposed upon certain property at a rate different from that at which other property in the Commonwealth is taxed. *Portland Bank v. Apthorp*, 12 Mass. 252, 255; *Oliver v. Washington Mills*, 11 Allen, 268, 275; *Gleason v. McKay*, 134 Mass. 419, 423, 424; *Opinion of the Justices*, 195 Mass. 607; *Opinion of the Justices*, 208 Mass. 616, 618; *Opinion of the Justices*, 220 Mass. 613, 620-623.

The bill would therefore be unconstitutional unless it could be supported as an exercise of the power granted by the second clause, "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within" the Commonwealth.

The question of the meaning and application of this clause was carefully considered by the justices in *Opinion of the Justices*, 196 Mass. 603, and their opinions were divergent. The chief justice and two associate justices in their opinion said (p. 622):—

"The power to levy excise taxes has been much restricted by our Constitution. Such taxes can no longer be levied upon the mere ownership of property. Taxation upon property is provided for in the earlier clause of the Constitution, and it must be proportional upon all property alike. Excise taxes upon 'produce, goods, wares or merchandise' can be imposed only when these articles are introduced, produced, manufactured, sold or used in a way of which the State may take cognizance, as having some relation to the government or affecting the public interests."

Three of the other justices thought that the power was broader, including the laying of imposts on domestic goods as property. Holding this view, they reached an opposite conclusion on the question submitted to them. The present chief justice, in a separate opinion, agreed with that conclusion; but with respect to the extent of the application of the clause under consideration he evidently was in agreement with the opinion expressed in the quotation above. His view on that matter is made plain in more recent opinions to which reference is hereinafter made.

The question has been considered in other cases. In *Portland Bank v. Apthorp*, 12 Mass. 252, 256, the court said:—

“The term *excise* is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited, in our Constitution, as to its operation, to produce, goods, wares, merchandise, and commodities. This last word will perhaps embrace everything, which may be a subject of taxation, and has been applied by our legislature, from the earliest practice under the Constitution, to the privilege of using particular branches of business or employment, as, the business of an auctioneer, of an attorney, of a tavern-keeper, of a retailer of spirituous liquors, &c.”

Again, in *Minot v. Winthrop*, 162 Mass. 113, 119, the court said:—

“The excises to which the inhabitants of the Province of Massachusetts Bay were accustomed were taxes in the nature of license fees for carrying on certain kinds of business, taxes on the sale of goods, wares, and merchandise, such as intoxicating liquors, tea, coffee, and chocolate, china ware, etc., and stamp taxes on legal papers. The words ‘produce, goods, wares, merchandise . . . brought into, produced, manufactured, or being’ within the Commonwealth, are words of definite meaning . . .”

In *Opinion of the Justices*, 195 Mass. 607, 611, 612, an opinion was requested whether a statute providing for a uniform tax of three mills in each dollar of the cash valuation of certain enumerated classes of intangible personal property and exempting such property from all other taxation, State and local, would be within the constitutional power of the General Court. The court answered the question in the negative. They held that the “mere right to own and hold property such as is referred to in the question cannot be made the subject of an excise tax.”

In *Opinion of the Justices*, 208 Mass. 616, 618, 619, the same principle was declared. The court stated:—

“The authority to levy an excise tax does not include a right to tax the mere ownership or possession of personal property of every kind. Such a tax cannot be laid upon money in one’s pocket, or on deposit in a bank, or on money at interest, or on credits of any kind.”

The question whether a special tax may be laid upon a particular class of personal property seems to have been settled in *Opinion of the Justices*, 220 Mass. 613. In that case the justices were asked whether a statute which should attempt to impose an excise on incomes derived from intangible personal property and exempt such property from other taxation would be unconstitutional because not proportional. With respect to that inquiry the justices said (pp. 623, 624):—

“Plainly it is laid as an excise. Such an imposition cannot be sustained under the clause of the Constitution relating to excises. A tax upon income from money on deposit or at interest, from bonds, notes or other debts due, and as dividends from stocks, coupled with exemption from all other taxation of the principal from which such income flows, is in substance and effect a tax upon the property from which it is derived. A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be changed by calling

it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. This was decided after most elaborate consideration, with affluent citation of authorities, in *Pollock v. Farmers' Loan & Trust Co.* 157 U. S. 429, 581; *S. C.* 158 U. S. 601. We do not need to review that ground or to re-state the arguments in its support. It follows that a tax upon such income is a property and not an excise tax. This point is covered also by *Opinion of the Justices*, touching the so-called three-mill tax, reported in 195 Mass. 607. We adhere to the principles there stated and to the conclusions there reached."

Shortly after the adoption of the Massachusetts Constitution a carriage tax was laid as an excise in Massachusetts. St. 1781, c. 17. A tax on carriages was also imposed by Congress, which was sustained in the case of *Hylton v. United States*, 3 Dall. 171, as a tax within the class of excises, duties and imposts, which, therefore, did not require apportionment. The reason why it was so regarded, however, was that it was not levied directly on property because of ownership thereof, but rather on the use of property. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 570-572; *S. C.*, 158 U. S. 601, 623-627; *Brushaber v. Union Pacific R.R. Co.*, 240 U. S. 1, 14.

I do not, of course, decide that an excise tax cannot be laid upon motor vehicles. The provisions in the present law requiring registration of motor vehicles and the payment of fees therefor (G. L., c. 90, §§ 33, 34) lay excise taxes. But the proposed tax, in my opinion, coupled with the exemption from other taxation, is in substance a tax upon property, and thus unconstitutional according to the principles stated in the decisions to which I have referred. I must advise you, therefore, that, in my opinion, the proposed bill would be unconstitutional because the tax in its essence would be a tax on property and would not be proportional within the constitutional requirement.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Legacy and Succession Tax—Interests of Non-resident under Agreements with Massachusetts Corporations.

Under G. L., c. 65, § 2, property passing by virtue of the exercise by will of a power of appointment derived from a disposition of property before September 1, 1907, is subject to a succession tax as property passing by the will of the donee of the power.

A gift of property to one for life and on his death to his executor, to be paid over as the life beneficiary shall by will direct, gives him a general power to appoint by will.

A general power of appointment is well executed, unless a contrary intention is shown, by a general residuary clause in the will of the donee of the power.

The obligation of a Massachusetts corporation on the death of a non-resident to pay over a sum of money, with accumulated interest, to his executor, where no trust was intended to be created and no right in any specific property passed by the will of the deceased, is not an interest in property belonging to a person not an inhabitant of the Commonwealth which is taxable under G. L., c. 65, § 1, as amended by St. 1922, c. 403.

Where a Massachusetts trust company receives a fund in trust to invest the principal in a general trust fund, and, after the death of a life beneficiary, to pay the principal sum and accumulations of income to his executor, to be paid and distributed as he should by will direct, by transferring a proportional part of the general fund or the value thereof in money at the option of the company, and the fund is invested accordingly, on the death of the life beneficiary, being a non-resident and leaving a will by which the power of appointment is exercised, the proportional interest passing thereby in Massachusetts real estate and mortgages, stock of national banks situated in Massachusetts and stock of Massachusetts corporations, in which the general trust fund was partly invested, was taxable as property belonging to a person not an inhabitant of the Commonwealth, under G. L., c. 65, § 1, as amended by St. 1922, c. 403.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:— Under certain instruments executed by the New England Trust Company and by the Massachusetts Hospital Life Insurance Company, prior to September 1, 1907, income was payable to a woman for life and principal was to be distributed after her death to her executors or administrators. She died a non-resident of the Commonwealth, after St. 1922, c. 403, took effect, leaving a will, as I am informed, by which her interest in said principal sums was disposed of.

The agreements with the New England Trust Company were each entitled "Agreement of Trust" and acknowledged the receipt of a principal sum, which the company agreed to manage as a trust fund to be invested with other funds held upon other trusts. The company agreed to pay to the beneficiary named her proportional share of the income for life, and sixty days after her decease to pay the principal sum and unpaid accumulations of income to her executor, to be paid and distributed as she should by will direct, or to her administrator, "by transferring a just and proportional part of the general fund, or the value thereof in money, to be ascertained and fixed by the directors, at the option of the company."

The agreements with the Massachusetts Hospital Life Insurance Company were each entitled "Annuity in Trust," and acknowledged the receipt of a principal sum, which the company agreed to invest. The company agreed to ascertain the income from all property in its possession and, after deducting expenses and losses, to apportion the net income pro rata and to pay to the beneficiary her proportion of the income during her life, with provisions that payment should be for her separate use, and that the right to receive the principal sum and interest should be inalienable and not subject to the claims of creditors; and the company agreed in sixty days after proof of the decease of the beneficiary to pay the amount of the principal sum and accumulations of interest to the executors or administrators of the beneficiary.

The general fund of the New England Trust Company at the date of the death of the deceased non-resident, of which the deposits referred to constituted a part, was invested in part in Massachusetts real estate, in part in mortgages of Massachusetts real estate, in part in stock of national banks situated in Massachusetts, and in part in stock of Massachusetts corporations. The general fund of the Massachusetts Hospital Life Insurance Company was also invested in part in each of the above-named four classes of property.

You ask my opinion whether, under these circumstances, real estate or any interest in real estate within this Commonwealth, or stock of Massachusetts corporations or of national banks, belonged to the deceased non-resident at the date of her death so as to be subject to inheritance tax under G. L., c. 65, § 1, as amended by St. 1922, c. 403.

Said section, as amended, is as follows:—

"All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth or any interest therein and all stock in any national bank situated in this commonwealth or in any corporation organized under the laws of this commonwealth belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the

property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

1. G. L., c. 65, § 2, provides, in part, as follows:—

“Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; . . .”

Under this section it is clear that property passing by virtue of the exercise by will of a power of appointment derived from a disposition of property before September 1, 1907, is taxable under G. L., c. 65, § 1, as amended, as property passing by the will of the donee of the power. *Minot v. Treasurer and Receiver General*, 207 Mass. 588.

2. It may be questioned whether a gift of property to one for life and on his death to his executor gives to the life beneficiary a power of appointment. No particular form of words need be used to confer a power of appointment. If the instrument shows an intention to give a power of appointment, one will be implied. It is a necessary inference that a power of appointment is intended by a gift of a remainder after a life estate to the life tenant's executor, since the right to provide by will for the passing of another's property is, in fact, a power of appointment. In the instrument executed by the New England Trust Company the intention is made plain by the further provision that the principal is to be paid and distributed as the beneficiary shall by will direct. *Bowen v. Dean*, 110 Mass. 438; *Todd v. Sawyer*, 147 Mass. 570; *Sands v. Old Colony Trust Co.*, 195 Mass. 575. The deceased had, therefore, a general power to appoint by will.

I am informed that the will of the deceased contains specific and pecuniary legacies for the satisfaction of which her own estate is ample, and a general residuary clause by which the remainder of her estate is given in trust for the benefit of her children and their issue. The will indicates an intention that the property passing to the trustees shall include the principal sums invested with the New England Trust Company and the Massachusetts Hospital Life Insurance Company. It is settled that a general power of appointment is well executed, in the absence of anything to show a contrary intention, by a general residuary clause in the will of the donee of the power. *Stone v. Forbes*, 189 Mass. 163; *Howland v. Parker*, 200 Mass. 204, 207; *Shattuck v. Burrage*, 229 Mass. 448, 450. In my opinion, therefore, the property payable to the executors under the instruments passed by virtue of an exercise of the power of appointment belonging to the deceased.

3. It follows that if the property passing under the instruments by virtue of the exercise of the power of appointment is properly such as is taxable under G. L., c. 65, § 1, as amended by St. 1922, c. 403, when passing by the will of a non-resident, then that property is subject to tax. Whether it is such property depends upon the nature of the obligations under the instruments of the respective companies arising upon the death of the life beneficiary.

By the terms of the “Annuity in Trust” executed by the Massachusetts Hospital Life Insurance Company the obligation of that company on the death of the life beneficiary is merely to pay over the principal sum deposited, with accumulations of interest, and is not to distribute any portion of any trust fund. It is true that the return to the life beneficiary is computed by a pro rata apportionment of income received from all the property of the company, and that there are provisions with respect to the receipt of principal

and income similar to those found in cases of so-called "spendthrift" trusts. But, on the other hand, there is no provision that the company shall receive, hold and invest the principal upon trust, the return to the beneficiary is denominated "interest," and the obligation of the company on the death of the life beneficiary is not to pay over the principal with all increment which may have accrued to it, but merely to pay over the amount of the principal sum with accumulations of interest. Furthermore, the company is not empowered to do the business of a trustee, but is empowered to make all kinds of contracts in which the casualties of life and interest of money are principally involved. See *St. 1818, c. 130, § 6*. These facts, in my opinion, show clearly that a trust was not intended to be created, that there was no trust *res* to which a trust could attach, and that no right in any specific property passed by the will of the deceased. See *Foley v. Hill*, 2 H. L. Cas. 28; *Pratt v. Tuttle*, 136 Mass. 233.

The "Agreement of Trust" executed by the New England Trust Company, on the other hand, purports to create a trust. The principal is referred to as a trust fund, and the company agrees to pay the income to the life beneficiary, and on her decease to pay the principal and unpaid accumulations of income to her executor. It is provided that the company may invest the principal with other funds, and you state that in the present instance the principal was invested in its general trust fund. There is also a provision that on the termination of the trust the company may pay the principal fund by transferring a just and proportional part of the general fund or the value thereof in money. The amount to be paid over is not the amount of the principal when deposited, with accumulations of income, but includes any increment or loss which may have accrued upon the investment of the principal with the general fund. The company by its charter (*St. 1869, c. 182, § 3*) was expressly given the power to receive and hold moneys or property in trust. The principal seems to have been deposited with the intention of establishing a trust, and the instrument should be construed as providing for the passing by the will of the deceased of rights in specific property in which the principal was invested, unless some difficulty is presented by the provisions for the deposit of the principal in a general trust fund and the provision that the principal may be paid over in money at the election of the company.

4. There can be no doubt of the general principle that trustees should not ordinarily mingle funds of different trusts in one investment. *McCullough v. McCullough*, 44 N. J. Eq. 313, 316; *Perry on Trusts*, 6th ed., § 463. But, on the other hand, where the parties to the creation of trusts have indicated an intention that the funds of the trusts shall be mingled, the trusts are not thereby defeated. See *Parkhurst v. Ginn*, 228 Mass. 159. *Cf. Lowe v. Jones*, 192 Mass. 94. The trust *res* in such a case is the whole trust fund, which is to be administered in such a way as to execute all trusts to which it is subject.

5. The provision that the principal fund may be paid over by transfer of a part of the general fund or the value thereof in money, in my opinion, does not make the obligation of the company a debt rather than a trust obligation to distribute specific property. It is a mere provision for an accounting by the trustee. See *Davis v. Coburn*, 128 Mass. 377; *Cathaway v. Bowles*, 136 Mass. 54; *Upham v. Draper*, 157 Mass. 292. Prior to such settlement, in my opinion, under this instrument there is a proportional interest in the general trust fund passing by virtue of the power.

6. I am therefore of the opinion that an interest in the fund of the New England Trust Company, by virtue of the instruments executed with that company, passed under the will of the deceased non-resident, and is subject to tax; but that no taxable interest passed in the funds of the Massachusetts Hospital Life Insurance Company.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Extradition — Fugitive from Justice — Physical Presence — Motive.

Before the Governor of an asylum State can lawfully comply with the demand for extradition, he must find as a fact that the accused is a fugitive from justice.

Physical presence in the demanding State at the time of the commission of the offence is necessary to constitute one a fugitive from justice.

The accused cannot be surrendered upon a theory of constructive presence.

The motive of the accused in leaving the demanding State is immaterial.

To constitute one a fugitive from justice it is not necessary that he should have done within the demanding State every act necessary to complete the crime.

APRIL 9, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth.*

SIR:— You have referred to this department for examination and report a requisition of the Governor of Connecticut, with accompanying papers, for the arrest and extradition of one _____, hereinafter called the defendant, an alleged fugitive from justice charged with the crime of manslaughter.

The complaint accompanying the requisition charged, in substance, that the defendant was president and treasurer of a corporation which conducted a moving picture theatre in the city of New Haven; that on or about June 1, 1921, the defendant ordered certain alterations and installations made in the building; that these alterations and installations were made in violation of the local ordinances; that on November 27, 1921, the defendant, knowing that the alterations were not made in accordance with the local ordinances, and knowing that the use of the building in its then condition was dangerous and unlawful, because of non-compliance with the ordinances, did, by his agents, give a public show in the theatre; and that fire occurred, and a member of the audience was fatally burned and died two days thereafter.

The facts as agreed upon are as follows:—

The defendant, during the whole of the time in question, was and still is a resident of the Commonwealth of Massachusetts, and was president and treasurer of a corporation which operated a theatre in New Haven. On or about June 1, 1921, the defendant was physically present in New Haven, and personally ordered that alterations and installations be made in the building. These alterations and installations were made *after* the defendant left Connecticut and while he was in Massachusetts. After the completion of the alterations and installations, the defendant was again in New Haven, during the month of August, 1921, and was in the theatre but did not inspect the alterations or installations. The theatre was used from that time up to and including November 27, 1921, when a fire occurred on the stage, made rapid progress throughout the building and destroyed it. A member of the audience was fatally burned and died as a result of his injuries shortly thereafter. It was conceded that the defendant was not physically present in New Haven on November 27, 1921, and that he was in New Haven only on or about June 1, 1921, and once during the month of August, 1921.

The State of Connecticut contends that the alterations and installations were made "in accordance with his general directions." The coroner for the County of New Haven, who held an inquest at the time, made a finding that a conference was held in New Haven on May 30, 1921, between the defendant, an agent of the corporation and a contractor; that at the conference "no definite plan was fixed upon" but that the defendant authorized his agent and the contractor to take the necessary steps for making the alterations, "leaving the practical details to their judgment"; and that the defendant directed the contractor "to take the necessary action with the building inspector to bring the proposed changes within his approval."

In the light of the view subsequently expressed, the question whether the alterations and installations were made in accordance with the defendant's

general directions or were made as the coroner found the facts becomes immaterial.

The chief issue is whether or not the defendant is a fugitive from justice. U. S. Const., art. IV, § 2, provides that a person charged in any State with crime, who shall flee from justice, and be found in another State, shall, on demand, be delivered up to the State having jurisdiction of the crime. This provision of the Constitution is not self executing, and requires the action of Congress in that regard. *Kentucky v. Dennison*, 24 How. 66, 104; *Hyatt v. Corkran*, 188 U. S. 691, 708. Congress did enact a statute, U. S. R. S., 1901, § 5278 (Comp. Stat. of U. S., 1916, § 10126), which provides, in part:—

“Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory *from whence the person so charged has fled*, it shall be the duty of the executive authority of the State or Territory *to which such person has fled* to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear...”

Before the governor of the asylum State can lawfully comply with the demand for extradition he must find as a fact that the accused is a fugitive from justice. *Duddy's Case*, 219 Mass. 548, 550; *Ex parte Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80; *Hyatt v. Corkran*, 188 U. S. 691. It is well established that the accused cannot be considered a fugitive from justice if he was not physically within the demanding State at the time of the commission of the alleged offence. He cannot properly be surrendered upon the theory of a constructive presence. *Duddy's Case*, 219 Mass. 548; *Hyatt v. Corkran*, 188 U. S. 691; *Appleyard v. Massachusetts*, 203 U. S. 222; *McNichols v. Pease*, 207 U. S. 100; *Strassheim v. Daily*, 221 U. S. 280. To be a fugitive from justice it is not necessary that the accused should have left the demanding State with intent to flee from its justice. If he was in the demanding State at the time the offence was committed, and thereafter left, no matter for what purpose or with what motive nor under what belief, he is a fugitive from the justice of that State. *Appleyard v. Massachusetts*, 203 U. S. 222; *McNichols v. Pease*, 207 U. S. 100; *Bassing v. Cady*, 208 U. S. 386. Nor is it necessary that the accused should have done within the State every act necessary to complete the crime.

In *Strassheim v. Daily*, 221 U. S. 280, 285, the court said:—

“We think it plain that the criminal need not do within the State every act necessary to complete the crime. If he does there an overt act *which is and is intended to be a material step toward accomplishing the crime*, and then absents himself from the State and does the rest elsewhere, he becomes a fugitive from justice, when the crime is complete, if not before. *In re Cook*, 49 Fed. Rep. 833, 843, 844. *Ex parte Hoffstot*, 180 Fed. Rep. 240, 243. *In re William Sultan*, 115 No. Car. 57. For all that is necessary to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State after having incurred guilt there, *Roberts v. Reilly*, 116 U. S. 80, and his overt act becomes retrospectively guilty when the contemplated result ensues.”

See also, *Taft v. Lord*, 92 Conn. 539.

It is conceded that the defendant was not in Connecticut on November 27, 1921, the date when the crime of manslaughter is alleged to have been committed. He cannot, therefore, be considered a fugitive from justice unless his act in ordering the alterations and installations on or about June 1, 1921, or his presence in the theatre in August without inspecting the alterations or in-

stallations, or both, constituted an overt act which was, and was intended to be, a material step toward accomplishing the crime of manslaughter.

It is nowhere suggested that the defendant caused the fire to be set, or contemplated on the occasion of either of his visits to New Haven that a fire should be started. The complaint does not so charge or intimate. There is no direct causal connection between the violation of the local ordinances and the death of a spectator at the theatre. The death was neither a natural nor a probable consequence of such violation. It was caused by fire, for which the defendant was not responsible, and at a time when the defendant was not in New Haven and was not personally operating the theatre. The defendant's order to make alterations and installations in the building, even if they were made in violation of the local ordinances, was not a material step in the commission of the crime of manslaughter.

Gross misconduct, gross negligence and wilful and unlawful neglect of duty on the part of the defendant lie at the foundation of the charge of manslaughter against him. The fact, if it be a fact, that he violated the city ordinances is proper evidence on the question of negligence, but is not in itself one of the acts "which was, or was intended to be, a material step in accomplishing the crime" of manslaughter. *Commonwealth v. Adams*, 114 Mass. 323; *Commonwealth v. Hawkins*, 157 Mass. 551.

I am therefore of the opinion that the defendant was not in the State of Connecticut at the time of the commission of the crime of manslaughter, that he did not do any act within that State which was a material step in accomplishing that crime, that he therefore is not a fugitive from justice, and that the request of the Governor of Connecticut for his extradition should be refused.

Very truly yours,

JAY R. BENTON, *Attorney General*.

On April 12, 1923, in compliance with an order adopted by the House of Representatives, the Attorney General rendered an advisory opinion concerning the then status of the litigation involving the validity of the national bank tax, concerning the then status of the remedial legislation pending in Congress, and gave advice as to whether, providing there was no change in the situation as it then existed, there was any legal bar to the collection of the national bank tax for 1923, and as to what was being done to protect the interests of the Commonwealth and of the cities and towns therein, and what further action, if any, was desirable. As the advisory opinion was printed as House Document No. 1441 of 1923, it is therefore not reprinted here.

Justice of the Peace — Notary Public — Residence in Massachusetts.

A person is ineligible for appointment as a justice of the peace or a notary public for Massachusetts unless he is a legal resident of Massachusetts.

APRIL 20, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth*.

SIR:— You have requested my opinion as to whether a person whose legal residence is outside of the Commonwealth may be appointed a notary public or a justice of the peace for Massachusetts.

The office of justice of the peace is one provided for in the Constitution (c. II, art. III; c. II, art. IX). It is a judicial office. *Opinion of the Justices*, 107 Mass. 604.

Mass. Const. Amend. IV provides that "notaries public shall be appointed by the governor in the same manner as judicial officers are appointed." See *Opinion of the Justices*, 165 Mass. 599.

It would seem, with respect to the question of the necessity of residence within Massachusetts, that both offices stand upon the same footing as that, for example, of justices of the Supreme Court. No express requirement exists in the case of judicial officers that they must be residents or citizens of Massachusetts. That such a constitutional qualification is to be found by implication, however, would hardly seem to admit of doubt. It can scarcely be

questioned, I think, that the constitutional offices of the Commonwealth have always been and still are open solely to its own citizens.

Article IX of the Declaration of Rights declares that "all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." In Mass. Const., c. I, § II, art. II, occur these words:—

"And to remove all doubts concerning the meaning of the word 'inhabitant' in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this state, in that town, district, or plantation where he dwelleth, or hath his home."

In commenting upon the significance of these declarations the Supreme Court has said (*Opinion of the Justices*, 240 Mass. 601, 608):—

"The words 'inhabitants' and 'inhabitant' as thus used mean 'citizens' and 'citizen.' All others who are not citizens are excluded from the scope of the meaning of those words. The words 'inhabitants' and 'inhabitant' have this meaning wherever used in the Constitution to describe the right to vote or to be elected to office. . . .

From the express provision that none except 'male inhabitants' or 'male citizens' possessed the right to vote under the Constitution as well as from unbroken usage, arose the implication that men alone were eligible for election or appointment to offices created or recognized by the Constitution. . . . When the fundamental law is silent as to the qualifications for office, it commonly is understood that electors and electors alone are eligible. Cooley, Cons. Law (3rd. ed.), 285. *State v. Smith*, 14 Wis. 497. *Attorney General v. Abbott*, 121 Mich. 540. *State v. Van Beek*, 87 Iowa, 569, 577. Except in the particulars already pointed out wherein definite qualifications are established as conditions of eligibility for office, there has been, under the Massachusetts Constitution and under Massachusetts custom equality among qualified voters as to eligibility for such offices as are recognized or created by the Constitution."

In my opinion, therefore, a person is ineligible for appointment as a justice of the peace or a notary public for Massachusetts unless he is an inhabitant, *i.e.*, a resident of Massachusetts; and the residence necessary for this purpose is the same as that necessary for citizenship, namely, a legal residence in the sense of a domicile in Massachusetts.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — An Act to ascertain the Will of the People — Eighteenth Amendment — Public Money.

An act to ascertain the will of the people with reference to the Eighteenth Amendment to the Constitution of the United States, known as the "prohibition" amendment, and with reference to the Federal statute known as the "Volstead act," would be constitutional.

Public money can be expended only for a public purpose.

The erection of town houses in which the inhabitants may assemble has been uniformly held to be a public purpose.

The right of the people peaceably to assemble and to discuss public topics is not confined to public meetings.

APRIL 26, 1923.

Committee on Bills in the Third Reading, House of Representatives.

GENTLEMEN:— You have requested my opinion as to the constitutionality of House Bill No. 314, entitled "An Act to ascertain the will of the people of Massachusetts with reference to the Eighteenth Amendment to the Constitution of the United States and the enforcement thereof," which reads as follows:—

"SECTION 1. There shall be submitted to the voters of each congressional district in the commonwealth at the next regular state election two questions

which shall be printed in the following form on the official ballot to be used at such election:—

1. Shall the senators from this commonwealth and the representative in congress from this district be requested to support a constitutional amendment to repeal the eighteenth amendment to the constitution of the United States known as the 'prohibition' amendment?

2. Shall the senators from this commonwealth and the representative in congress from this district be requested to support amendments of the federal statute known as the 'Volstead act,' in order to make legal the manufacture, transportation and sale of beer and wines having a limited alcoholic content?

SECTION 2. The secretary of the commonwealth shall tabulate the returns of votes upon the aforesaid questions, and shall transmit copies of such returns by congressional districts to each senator and representative in congress from this commonwealth. The vote under this act shall not be regarded as an instruction to said senators and representatives in congress, but shall be regarded as an expression of the opinion and will of the people of the several congressional districts of this commonwealth upon said questions."

By Mass. Const., c. I, § 1, art. IV, the Legislature is given full power and authority to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, not repugnant or contrary to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth. See also *Stoughton v. Baker*, 4 Mass. 522, 529; *Commonwealth v. Alger*, 7 Cush. 53, 101.

Is the proposed act repugnant or contrary to the Constitution? Manifestly the bill, if enacted, will involve an expenditure of public money for printing the questions on the ballot and tabulating the returns of votes. Public money can be expended only for a public purpose. *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Wheelock v. Lowell*, 196 Mass. 220; *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371; *Whittaker v. Salem*, 216 Mass. 483; *Duffy v. Treasurer and Receiver General*, 234 Mass. 42, 50. Unless the purpose of ascertaining the will of the people upon the proposed questions is a public purpose, the proposed bill, if enacted, would be unconstitutional.

Article XIX of the Declaration of Rights provides:—

"The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

This has always been regarded as one of the most valuable rights of the people.

Article XLVIII, II. *Initiative Petitions*, § 2, provides that the right of peaceable assembly shall not be the subject of an initiative or referendum petition. The First Amendment of the Constitution of the United States provides, in part, that Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Referring to article XIX of the Declaration of Rights, the court said, in *Commonwealth v. Porter*, 1 Gray, 476, 477:—

"This is recognized as a valuable right secured to the people by the constitution. . . .

This, like the similar declarations of other rights, essential to a free government, is expressed in general terms; but it not only gives authority to the legislature, but makes it their bounden duty, to make suitable laws from time to time, as the exigencies of the times may require, for the protection and enjoyment of such rights.

. . . Nothing more concerns the public good, than the election of good men, in all respects qualified, to public offices. The extended and almost unlimited

rights of suffrage, secured to the people of this commonwealth by the constitution and laws, assume and are founded on the right of voters, to have the fullest and freest discussion and consultation upon the merits and qualifications of candidates, for their information and the means of exercising a sound and enlightened judgment in regard to public men and political measures."

See also *Wheelock v. Lowell*, 196 Mass. 220, 225.

In *Fuller v. Mayor of Medford*, 224 Mass. 176, 178, the court said:—

"The purpose (of article XIX of the Declaration of Rights) in general is to enable the voters to have full and free discussion and consultation upon the merits of candidates for public office and of measures proposed in the public interests. Its importance in this respect is of the highest moment."

The erection of town houses in which the inhabitants may assemble has been uniformly held to be a public purpose, for which public money might legally be expended. *Wheelock v. Lowell*, 196 Mass. 220, and cases there cited. At page 227 the court said:—

"It is hard to overestimate the historic significance and patriotic influence of the public meetings held in all the towns of Massachusetts before and during the Revolution. No small part of the capacity for honest and efficient local government manifested by the people of this Commonwealth has been due to the training of citizens in the forum of the town meeting. The jealous care to preserve the means for exercising the right of assembling for discussion of public topics manifested in city charters by the representatives of the people, whenever providing for the transition from the town meeting to the city form of local government, demonstrates that a vital appreciation of the importance of the opportunity to exercise the right still survives. The practical instruction of the citizen in affairs of government through the instrumentality of public meetings and face to face discussions may be regarded quite as important as their amusement, edification or assumed temporal advancement in ways heretofore expressly authorized by statute and held constitutional. *Hubbard v. Taunton*, 140 Mass. 467. *Morrison v. Lawrence*, 98 Mass. 219. *Kittredge v. North Brookfield*, 138 Mass. 286. *Commonwealth v. Williamstown*, 156 Mass. 70. *Kingman v. Brockton*, 153 Mass. 255. *Attorney General v. Williams*, 174 Mass. 476.

It is only by a continuance of intelligent, persistent and honest interest in the cause of good government on the part of the great majority of citizens that the permanency of our institutions can be secured. Only by the abiding constancy of such interest will intelligence triumph over impulse and indifference in public affairs. In no other way can a government by free men continue, which shall in fact preserve the blessings of liberty."

The right of the people peaceably to assemble and to discuss public topics is not confined to public meetings. Where public meetings are inadequate for an expression of opinion, the voter may be given an opportunity to express his opinion through the medium of the ballot.

In *Fuller v. Mayor of Medford*, 224 Mass. 176, the charter of the city of Medford provided that any question of public interest, upon request in writing of twenty-five per cent of the qualified voters, might be placed upon the official ballot for a municipal election for the purpose of ascertaining the will of the people. The court in that case said, at page 179:—

"It may well have been thought that the machinery for the expression of an advisory opinion by the voters of a city at a public meeting was quite inadequate, in view of the inconvenience of gathering at a single hall a substantial proportion of the citizens, and that this should be supplemented by giving to any voter the privilege of expressing his view so that it would be counted. Advisory expressions of public opinion participated in by large numbers of people may have been deemed likely to be a sufficiently strong incentive to action by city officers. It is no idle form to secure a definite conception in this form of what the people think on any subject of general interest."

St. 1913, c. 819 (now G. L., c. 53, §§ 19-22), provides for the placing of questions of public policy upon the ballot, upon the fulfilment of certain requirements, for the purpose of instructing the members of the Legislature. St. 1920, c. 560 (now G. L., c. 53, § 18), provides for ascertaining the will of the people under certain circumstances upon the question whether the ratification of an amendment to the Federal Constitution is desirable, by placing such question upon the official ballot. Both of these acts indicate the general tendency of legislation to ascertain the will of the people through the medium of the ballot instead of through public meetings, in view of the inconvenience of the latter in many instances under present conditions.

The subject-matter of the questions to be submitted to the people under the proposed act is one of public interest, and affects the people generally. In *Commonwealth v. Porter*, 1 Gray, 476, 481 (1854), the court said:—

“The present case is that of a meeting of citizens assembled in the meeting-house for the discussion of the subject of temperance. This is a subject of great public interest, and has, we know, attracted the earnest attention of the people of this commonwealth, especially with a view to legislative action. For aught that appears, this was a meeting of people, and a discussion of the subject of temperance, which actually resulted in a petition or remonstrance to the legislature, with a view to ameliorate or alter, or to retain and confirm, the existing law upon the subject of temperance, and, as such, a meeting held in strict conformity to the right secured by the constitution.”

The fact that the proposed act provides for an expression of opinion upon an amendment to the Federal Constitution and to a Federal statute does not affect or alter the situation, since the question is one of public interest affecting the inhabitants of this Commonwealth.

The Legislature has very frequently, through resolutions, memorialized Congress and urged it to enact or refrain from enacting legislation affecting the interests of the inhabitants of this Commonwealth, and has sent copies of such resolutions to each senator and representative in Congress from this Commonwealth. In recent years the following resolutions were adopted:

1920.

(1) Resolution protesting against the passage of a bill by Congress relative to the importation of lobsters.

(2) Resolution urging Congress to pass an act repealing and removing all restrictions imposed for the duration of the war on freedom of speech, freedom of the press, and the right of the people peaceably to assemble.

(3) Resolution requesting Congress to pass a bill authorizing the Secretary of Agriculture to establish a forest experiment station in the White Mountain National Forest.

(4) Resolution expressing the hope that the ratification of the woman's suffrage amendment to the Federal Constitution would not further be delayed, and that every effort would be made by the legislators of the six remaining States to ratify the amendment immediately.

(5) Resolution expressing the hope that Congress would pass a resolution deprecating any interference on the part of the United States in respect to controversies concerning the boundaries of Italy and prohibiting the use of Federal troops in territory claimed by Italy.

1921.

(1) Resolution stating that the General Court is in favor of the creation of a federal agency to regulate the production and price of coal.

(2) Resolution urging Congress to reject all measures which depart from or infringe upon the traditional policy of the preservation of national parks.

1922.

(1) Resolution urging the members of Congress from this Commonwealth to use their influence with the Federal government to secure the transfer, for

repairs, to the Boston Navy Yard of the steamship "Leviathan," property of the Federal government.

(2) Resolution urging Congress to pass appropriate legislation to regulate further the use of narcotic drugs.

(3) Resolution urging the Senate of the United States to pass the Dyer Anti-Lynching Bill, so called.

(4) Resolution petitioning Congress to propose an amendment to the Federal Constitution which would give Congress the power to regulate the hours of labor of women and minors.

1923.

(1) Resolution favoring the passage by Congress of legislation placing an embargo on coal.

(2) Resolution urging Congress to enact legislation which would provide adjusted compensation for men and women who served in the Army, Navy and Marine Corps of the United States during the World War.

(3) Resolution favoring the passage of legislation to provide for the preservation and protection of public records, and for the erection of a fireproof building at Washington to serve as a repository of all national archives.

(4) Resolution entitled "In favor of a large proportion of funds for work at the Boston Navy Yard," which requested the Navy Department to assign a large share of the work of the department to the Boston Navy Yard.

In view of the foregoing, I am of the opinion that the expenditure of public money involved in the carrying of the proposed bill into effect would be a legal expenditure for a public purpose, and that the proposed bill, if enacted, would not be repugnant or contrary to the Constitution, and would be constitutional.

You have further requested my opinion whether the proposed bill, if enacted, would be constitutional if changed in section 1 by striking out all after the word "act" in line fourteen and inserting in place thereof the words "so changing its provisions, conformably to the Eighteenth Amendment to the Constitution of the United States, as to permit the manufacture, transportation and sale, for beverage purposes, of beer, wine and other beverages containing a greater percentage of alcohol than is at present permitted by said provisions." In my opinion, the proposed bill so changed, if enacted, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Public Work — Contract with Two or More Corporations, acting jointly — Partnership.

A contract for public work may not legally be made by the Commonwealth with two or more corporations, acting jointly.

Two or more corporations may not enter into a partnership.

APRIL 26, 1923.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You state that "the low bid on a contract was presented this week by the Alco Contracting Company, Inc., and the Middlesex Construction Company, Inc., as joint bidders. We have not previously had occasion to execute a contract under conditions where two corporations were appearing as partners, and are not sure that such an arrangement would be legal,"— and ask me two questions:—

"First: Can a contract legally be made between the Commonwealth and the Alco Contracting Company, Inc., and the Middlesex Construction Company, Inc., acting jointly as parties of the second part?

Second: If your reply to the first question is in the negative, can a contract legally be made with either of said corporations under their joint proposal of April 17, 1923?"

You further advise me that the board of directors of the Alco Contracting Company, Inc., on April 4, 1923, passed a vote, of which the following is a copy:—

"At a meeting of the Board of Directors of Alco Contracting Co., Inc., held this fourth day of April, 1923, all of the directors being present, Mr. Paul Caputo, President, Matthew Cummings, Treasurer, Andrew DiPietro, it was

Voted, That the Board of Directors be authorized to form a partnership with the Middlesex Construction Co., Inc., whenever in their judgment it is advisable in handling large contracts.

A true copy.

Attest: Matthew Cummings, Clerk."

Also that the directors of the Middlesex Construction Company, Inc., passed a similar vote.

I am further advised that in the proposal signed jointly by these companies the word "partnership" is not used; it being simply a proposal signed by both companies, presumably by the proper officer of each.

For reasons that will appear later, there seems to be no occasion for a precise and definite answer to your first question, but I deem it advisable to point out to you certain propositions of law in connection therewith.

"It is familiar law that a corporation cannot enter into a partnership" (*Williams v. Johnson*, 208 Mass. 544, 552), so that, if the entering into this contract generally by these corporations has the elements of a partnership, it may not legally be done, and such a contract would be *ultra vires*, and, if executed, unenforceable. Whether in this particular case it does amount to a partnership obligation, I am not called upon to decide; but I point out to you that apparently both companies felt they were entering into a partnership obligation, which is evidenced by the vote passed by each. Upon the facts in this particular case a court might well hold that the arrangement was a partnership matter, even though for a temporary purpose, and *ultra vires*. See *Kellu v. Biddle*, 180 Mass. 147, and the comment on that decision in *Williams v. Johnson*, *supra*, p. 552.

There is some authority, however, holding that while a corporation may not enter into a partnership, it may enter into a joint venture. See *Thompson on Contracts*, 2d ed., § 2337; *Salem-Fairfield Telephone Association v. McMahon*, 78 Ore. 477.

But there is no Massachusetts decision taking this view, and the language of the court in *Williams v. Johnson*, *supra*, p. 552, would seem to indicate that the Massachusetts court would hold that such a contract as this came within the condemnation of the rule laid down in that case. In so far, therefore, as an answer to your first question is necessary in view of the circumstances which have since been called to my attention, I advise you that such a contract should not be entered into by any department of the Commonwealth, in view of the cases above cited.

I am further advised, however, that this particular bid is considered by your department as most advantageous to the Commonwealth; also, that one of the corporations involved is willing to waive any rights it may have in the bid and, so far as it may do so, assent to the awarding of the contract to the other corporation. I am also advised that this is a work in which it is not necessary, as a matter of law, for your department to advertise for bids; that it might award the contract without bids; and that it might reject all bids now and award the contract without calling for new ones. In the light of these facts, therefore, I come to the answer to your second question, and advise you that it would seem to rest within your sound discretion to grant this contract to one of the two corporations mentioned upon the terms as outlined in the proposal. In such case there should be a new proposal signed by the single company and, for the purposes of your record, a proper waiver by the other company of any right it may possibly have in the premises. In so deciding, I do not intend that any precedent be established or any rule of law laid down as authority for such course in a situation where the contract is *required by law* to be let on competitive bids after advertisement.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Venue of Crimes — Jurisdiction — Vicinity.

The word "vicinity," as used in article XIII of the Declaration of Rights, is not synonymous with "county."

Common law courts have inherent power to order a change of venue to secure an impartial trial.

An act providing that a defendant shall not be discharged for want of jurisdiction if the prosecuting officer, before trial, petitions for leave to proceed, stating that he is in doubt as to the court's jurisdiction, and the court orders him to proceed, and the evidence at the trial discloses that the crime was committed without the county or territorial jurisdiction of the court, is constitutional.

MAY 1, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth.*

SIR:— You request me to consider House Bill No. 1419, entitled "An Act relative to the venue of crimes in general."

Article XIII of the Declaration of Rights provides:—

"In criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen."

The word "vicinity," as used in that article, is not synonymous with "county," nor is the article affirmative of the right of a citizen to be tried in any particular county.

In *Commonwealth v. Parker*, 2 Pick. 550, 553-554, the court said:—

"The word *vicinity* is not technical, with a precise legal meaning, as the word *county* or the ancient word *visne*, *vicinage*, would be held to be.

And considering that the declaration of rights was framed by men well acquainted with the common law, as well as with the colonial and provincial regulations and practice of Massachusetts, we may well presume that the use of a common and popular, instead of a technical word, in this article of the declaration, was not accidental. The form in which the principle is expressed is also worthy of consideration. It is not prohibitory of a trial of an offence, in any other county than that in which it happened; nor is it affirmative of a right in the citizen to be tried in any particular county. It is merely declaratory of the sense of the people, that the proof of facts in criminal prosecutions should be in the vicinity or neighbourhood where they happen. . . .

. . . It may be considered questionable whether those who framed the bill of rights intended to tie the hands of the legislature, with the history of parliamentary proceedings before them, from which they could perceive the expediency, if not the necessity, of leaving the legislature without any other restriction than that which would be derived from respect to the declared sense of the people, that trials in the vicinity were always desirable, when they could be had there without great inconvenience to the public. It must have been known also, that the principle of the common law limiting the trials of crimes to the county within which they were committed, had been necessarily departed from by our ancestors in the early history of the country; for all capital felonies were cognizable only in the Court of Assistants, which court held its sessions only in Boston for the whole colony, and it was expressly ordained that the jurors attending this court should be summoned from the counties of Suffolk and Middlesex; so that in whatever other county a capital offence was committed, it was necessarily tried in the county of Suffolk. *Vid. Ancient Charters and Col. Laws, &c., pp. 90, 144.*"

After referring to several Colonial statutes, the court also said, at page 554:—

"This being the state of things at the time of the adoption of the constitution, and the probable creation of new counties, whose population might not

justify the sending of the Supreme Court into them, being probably foreseen, it may well be supposed that the wise men who framed the declaration of rights, when they proposed to the people to declare, that in 'criminal trials, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the citizen,' intended to hold out a caution to all future legislatures to regard this principle, in their laws concerning crimes and punishments, but not to prohibit them from causing trials to be had in adjoining counties when the public interest should demand it. And that *this has been the contemporaneous, practical and uniform construction of this article by the legislature and courts of law, from the adoption of the constitution down to the present period, may be safely inferred from many statutes which have passed, and judicial decisions which have taken place, in relation to this subject.*"

The court, after referring to various statutes enacted between 1782 and 1795, providing for the trial of criminal cases outside of the county in which the crime had been committed, further said, at page 555:—

"These frequent acts of the legislature abundantly show the public sense of the intention of the people in the declaration referred to; and the judicial trials which have taken place out of the county in which the offences were committed have been numerous. Until the recent act, giving the Court of Common Pleas, when sitting in the county of Nantucket jurisdiction of all crimes committed there, excepting such as are capital, all crimes committed there not cognizable by the Court of General Sessions or the Court of Common Pleas, according to the former jurisdiction of these courts, have been tried before the Supreme Judicial Court in Suffolk."

St. 1795, c. 81, provided that the Supreme Judicial Court holden at Boston, within and for the County of Suffolk, should have original jurisdiction and cognizance of all crimes committed in the County of Nantucket which were not cognizable by the Court of General Sessions there, and provided, further, that in capital cases only, if the defendant so requested, the court should issue a venire for at least six jurors from the County of Nantucket.

R. S. (1836), c. 133, § 7, now G. L., c. 277, § 57, provided that any offence committed within one hundred rods of the dividing line between two counties might be prosecuted and punished in either county. In *Crocker v. Justices of the Superior Court*, 208 Mass. 162, the petitioners had been indicted for a felony, and the question was whether the Superior Court had jurisdiction to order a change of the place of trial from one county to another, if and when satisfied that a fair and impartial trial could not be had within the county where the venue was laid in the indictment. The court held that that court had such jurisdiction, and said, at pages 174-175:—

"In the light of the history of our common law and the jurisdiction of our courts, we are of opinion that these statutes, so far as they empower a transfer in order to secure an impartial trial, are but declaratory of the common law and confer no new power. . . . These statutes and this principle for securing an impartial trial in exceptional cases are in no way at variance with the general proposition of art. 13 of the Declaration of Rights as to the importance of the verification of facts in the vicinity where they happen.

The weight of opinion in those of the older States, whose judicial history is most nearly like our own, supports the view that it is an inherent power of common law courts to order a change for the purpose of securing an impartial trial."

The court further said at page 179:—

"A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial. Without such a power it might become impossible to do justice either to the *general public* or to the individual defendant."

The proposed bill provides, in substance, that when the Attorney General or the district attorney petitions to the court *before* proceeding with the trial of a criminal case for leave to proceed, stating that he is in doubt from the state of the evidence then in his possession as to whether or not the crime was committed within the county or territorial jurisdiction of the court, and the court, after hearing the petition, orders the trial to proceed, the defendant shall not be discharged for want of jurisdiction if the evidence as developed at the trial discloses that the crime was committed without the county or territorial jurisdiction of the court. Such an act is one that public good and necessity require, and, without it, it might be difficult to do justice to the general public.

The proposed bill is not, in my opinion, inconsistent with either the spirit or the letter of article XIII of the Declaration of Rights. I am therefore of the opinion that the proposed bill, if enacted, would be constitutional.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Intoxicating Liquors — Federal Permit.

An act providing that no person shall manufacture, transport, import or export intoxicating liquors or certain non-intoxicating beverages unless he shall have obtained the Federal permit required therefor by the laws of the United States, is constitutional.

MAY 8, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth*.

SIR:— You request me to consider House Bill No. 1433, entitled "An Act relative to intoxicating liquors and certain non-intoxicating beverages," which reads as follows:—

"No person shall manufacture, transport by air craft, water craft or vehicle, import or export spirituous or intoxicating liquor as defined by section three, or certain non-intoxicating beverages as defined by section one, unless in each instance he shall have obtained the permit or other authority required therefor by the laws of the United States and the regulations made thereunder."

Certain portions of the proposed bill were recommended by the Attorney General in his last annual report, on the unanimous request of the district attorneys and the district attorneys-elect of the various districts of the Commonwealth.

By Mass. Const., c. I, § I, art. IV, the Legislature is given full power and authority to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, not repugnant or contrary to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and for the government and ordering thereof. Legislative power is thereby vested exclusively in the General Court, except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated, or performed by any other agency. *Graham v. Roberts*, 200 Mass. 152; *Boston v. Chelsea*, 212 Mass. 127; *Dinan v. Swig*, 223 Mass. 516; *Opinion of the Justices*, 239 Mass. 606.

The question of the constitutionality of various provisions of law relative to intoxicating liquors (House Bill No. 1612 of 1921) was fully considered by the justices of the Supreme Judicial Court. *Opinion of the Justices*, 239 Mass. 606. At page 610, the justices said:—

"It is attempted by these sections and possibly by other sections to make the substantive law of the Commonwealth in these particulars change automatically so as to conform to new enactments from time to time made by Congress and new regulations issued pursuant to their authority by subsidiary executive or administrative officers of the United States. It purports to create offences and impose punishments therefor, not by definition and declaration, but by reference to what may hereafter be done in these particulars by the Congress of the United States and those by it authorized to establish regulations.

We are of opinion that legislation of that nature would be contrary to the Constitution of this Commonwealth."

At pages 611-612, the justices said:—

"By several sections of the proposed statute compliance with certain provisions of an act of Congress or valid regulations made pursuant to its authority is made a condition to the performance of conduct permitted by the proposed bill. Such conditions, even though the act of Congress may be changed, involve no modification of the law of Massachusetts. That stands as enacted. In this class fall §§ 11, 17, 19 and 23 of the proposed bill, which do not contravene any constitutional guaranty."

Section 11 of the bill of 1921 provided, in part, that no license issued by the Board of Registration in Pharmacy should be valid unless the licensee was lawfully authorized by the laws of the United States, and the regulations made thereunder, to sell intoxicating liquors for medicinal purposes. Section 17 of that bill provided, in part, that no manufacturer or wholesale druggist should sell or otherwise dispose of any liquor except to persons having permits required by the laws of the United States, and the regulations made thereunder, to purchase in such quantities. Section 19 of that bill provided, in part, that a carrier should deliver liquor only to persons who present a verified copy of a permit to purchase, in the form required by the laws of the United States, and the regulations made thereunder. Section 23 of that bill provided, in part, that it was unlawful for any person to advertise liquor or the price at which it might be obtained, but that manufacturers and wholesale druggists holding permits to sell liquor, required by the laws of the United States, and the regulations made thereunder, were not prohibited from furnishing price lists, with a description of the liquor for sale, to persons permitted to purchase liquor.

The four foregoing sections, in the opinion of the justices, did not contravene any constitutional guaranty. See also Attorney General's Report, 1921, p. 171.

The proposed bill provides that no person shall manufacture, transport, import or export intoxicating liquors or certain non-intoxicating beverages unless in each instance he had obtained the permits or other authority required therefor by the laws of the United States, and the regulations made thereunder.

Applying the test of constitutionality, as defined in *Opinion of the Justices*, 239 Mass. 606, I am unable to differentiate the provisions of the proposed bill from the provisions of the four sections of the bill of 1921, which were held to be constitutional.

There is no substantive difference between the bill now before me and the provisions of St. 1922, c. 427, § 1, sub-section 3 (an act to carry into effect, so far as the Commonwealth of Massachusetts is concerned, the Eighteenth Amendment to the Constitution of the United States). That there were no constitutional objections to those provisions was twice held by my predecessor.

In view of the foregoing, I am of the opinion that the proposed bill, if enacted, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Justice of the Peace — Notary Public — Tenure of Office — Removal from the Commonwealth.

During the period for which a person is commissioned a justice of the peace or a notary public he is authorized, while in this Commonwealth, to act as such unless and until he has been removed by action of the Governor and Council, as provided by the Constitution, although he cannot act as such when outside the jurisdiction of the Commonwealth.

A removal from the jurisdiction does not *ipso facto* terminate the tenure of office of a public official.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR:—You request my opinion on the following facts:—

"Under date of July 3, 1918, a man residing in Somerville, Mass., was commissioned as a justice of the peace and a notary public by the Governor and Council. The commissions, under the Constitution, were to expire July 3, 1925. About September, 1920, he left Massachusetts and became a resident of Maine, where he continued to live for a year and a half, during which period of time he exercised the voting privilege in that state. About one year ago he returned to Massachusetts and resumed residence in the city of Somerville.

Under the conditions referred to, can he now act as a justice of the peace and a notary public under the commissions of July 3, 1918, or is it your opinion that he must again be appointed by the Governor and Council so to act?"

Mass. Const., pt. 2d, c. III, art. I, as amended by Mass. Const. Amend. LVIII, provides as follows:—

"The tenure, that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: provided nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature: and provided also that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement."

Mass. Const., pt. 2d, c. III, art. III, provides for the tenure of commissions of justices of the peace as follows:—

"In order that the people may not suffer from the long continuance in place of any justice of the peace who shall fail of discharging the important duties of his office with ability or fidelity, all commissions of justices of the peace shall expire and become void, in the term of seven years from their respective dates; and, upon the expiration of any commission, the same may, if necessary, be renewed, or another person appointed, as shall most conduce to the well-being of the commonwealth."

In an opinion from a former Attorney General to His Excellency the Governor, under date of December 27, 1921 (Attorney General's Report, 1921, p. 359), it was stated:—

"Although the Constitution expressly provides that residence for a certain fixed period of time within the Commonwealth is a prerequisite to the election or appointment of many officers (for example, governor, Mass. Const., pt. 2d, c. II, § I, art. II; lieutenant-governor, Mass. Const., pt. 2d, c. II, § II, art. I; councillors, Mass. Const. Amend. XVI; senators, Mass. Const. Amend. XXII; representatives, Mass. Const. Amend. XXI; secretary, treasurer and receiver-general, auditor and attorney-general, Mass. Const. Amend. XVII), nevertheless, nowhere in the Constitution or in the General Laws is there to be found any requirement as to time of residence in Massachusetts before a person may become a justice of the peace or a notary public."

There is likewise no provision in the Constitution or statutes that removal from this Commonwealth shall *ipso facto* terminate the commission of a justice of the peace or a notary public. That a removal from the jurisdiction does not *ipso facto* terminate the tenure of office of a public official is evidenced by the fact that it has been deemed necessary or advisable by the Legislature to enact a statute declaring in certain cases that such removal shall terminate the office specified. For example, G. L., c. 41, § 109, provides, in part, that "if a person removes from a town he shall thereby vacate any town

office held by him." I am aware of no similar provision of law respecting justices of the peace or notaries public.

By the Constitution of the Commonwealth the office of justice of the peace is a judicial office. *Opinion of the Justices*, 107 Mass. 604. While the office of notary public is not a judicial office, nevertheless, the Constitution provides (Mass. Const. Amend. IV) that "notaries public shall be appointed by the governor in the same manner as judicial officers are appointed and shall hold their offices during seven years."

The Constitution, however, provides for the removal of justices of the peace and notaries public. Mass. Const. Amend. XXXVII, provides:—

"The governor, with the consent of the council, may remove justices of the peace and notaries public."

It accordingly follows that during the period for which a person is commissioned a justice of the peace or a notary public he is authorized, while in this Commonwealth, to act as such unless and until he has been removed by action of the Governor and Council, as provided by the Constitution, *supra*, although he cannot act as such when outside the jurisdiction of the Commonwealth. See V Op. Atty. Gen. 166.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law—Disposition of Land no longer adapted to Public Uses—Public Charity—Impairment of Obligation of Contract—Cy Pres—Sale of Obsolete Property—Payment of Moneys received into State Treasury.

Land acquired by the Commonwealth by eminent domain or through expenditure of public funds, held strictly for public purposes and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court, and may be transferred to an agency of the State government or devoted to some other public use by legislative mandate.

However, if land is subject to the terms of any gift, devise, grant, bequest or other trust or condition, the Legislature is not at liberty to dispose of the land or devote it to other purposes.

If it has become impracticable to administer a charitable trust according to its terms, a court of equity will exercise its power to devise some method of administering the charity *cy pres* to accomplish substantially the same result.

As an essential part of the duties of the Department of Public Welfare, it has the right to dispose, by sale, of dead and dying timber on land under its control.

The moneys received from the sale of such timber must be paid into the State treasury, in compliance with Mass. Const. Amend. LXIII, § 1.

MAY 14, 1923.

MR. RICHARD K. CONANT, *Commissioner of Public Welfare*.

DEAR SIR:—You request my opinion upon certain questions of law having to do with a tract of land in the town of Walpole, known as Robbins Farm, and under the control of your department.

Your first question is based on the following set of facts. Chapter 101 of the Resolves of 1911 authorized the State Board of Charity, whose powers and duties your department has since taken over, to receive and hold on behalf of the Commonwealth the right, title and interest in the said Robbins Farm, and to maintain the same, and to use it exclusively for and in connection with the care of minors. You state that your department is unable now to make any satisfactory use of this property for the purpose for which it was given to the Commonwealth, and the cost of the caretaker is, in your opinion, an unwarranted expense. You state that the heirs are willing to take the property

back or to have it sold and the proceeds applied, in pursuance of the trust, to any other charity. You inquire whether or not your department has the power to dispose of the property.

Land acquired by the Commonwealth, a city or a town by eminent domain or through expenditure of public funds, held strictly for public purposes and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court. It may be transferred to some other agency of government or devoted to some other public use by legislative mandate. Up to 1921 the question never had arisen, for express judicial determination in this Commonwealth, as to whether land once taken in fee for a public use could be sold and devoted to private uses when, through lapse of time or by reason of changed conditions, and under legislative authority, it had been decided that such land was no longer needed for public uses. By the case of *Wright v. Walcott*, 238 Mass. 432, it was decided that such a sale would be valid when authorized by the Legislature. As shown above, this does not hold where the land is subject to the terms of any gift, devise, grant, bequest or other trust or condition. The Robbins Farm, held by your department, is apparently subject to the terms of a trust, and if the charitable gift can be administered according to the directions of the donor, in my judgment, the Legislature is not at liberty to dispose of the land upon considerations of policy or convenience. If it has become impracticable to administer this charitable trust according to its terms, it may well be that a court of equity will exercise its power to apply the doctrine of *cy pres*; that is, to execute the charitable trust as nearly according to the intent of the donor as circumstances will permit.

Your second question arises out of the following set of facts. On this Robbins Farm there is standing timber which Chief Forester Cook, of the Department of Conservation, has reported to you is infested with gypsy moths, so that most of it is dead. You ask whether or not you have the power to cut this dead and dying timber and sell the same.

I find no special provision authorizing the sale of property by your department, but there can be no question that, under your general powers, you have the right to dispose of such property as you can no longer utilize. Such a right is incidental to and is an essential part of the duties given to you for the proper management and conduct of the properties under your control. These rights do not, however, confer upon you the right to expend the moneys received by you from the sale of such timber. Such moneys once received must be turned over to the Treasurer and Receiver General, in compliance with Mass. Const. Amend. LXIII, § 1, which provides that "all money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof." In addition, if you dispose of the aforesaid timber by sale, you should conform to such rules as the Commission on Administration and Finance has made affecting the "disposal of obsolete, excess and unsuitable supplies, salvage and waste material and other property," as provided by St. 1922, c. 545, § 12.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Taxation — Excise Tax — Tax upon the Sale of Gasoline for Consumption in the Operation of Motor Vehicles upon the Highways of the Commonwealth.

House Bill No. 1520 imposes an excise tax upon the privilege of driving motor vehicles upon the public highways of the Commonwealth, and not upon the privilege of selling gasoline.

An excise tax upon the privilege of driving motor vehicles upon the highways of the Commonwealth, which contains a provision that "no provisions of this chapter shall apply . . . to interstate commerce, except in so far as the same may be permitted under the . . . constitution of the United States and the acts of congress," is not in contravention of either the Federal or the State Constitution.

In an excise tax upon the privilege of driving motor vehicles upon the highways of the Commonwealth the amount of gasoline purchased for consumption in the operation of motor vehicles affords a fair criterion of the extent to which the highways are used, and the imposition of the tax upon the sale of gasoline for that purpose is a proper and convenient method of administration.

Quere, Whether an excise tax upon the privilege of selling gasoline generally would not be unconstitutional.

A tax imposed upon the sale of gasoline for consumption in the operation of motor vehicles is not an import duty, within the prohibition of U. S. Const., art. I, § 10.

MAY 14, 1923.

Hon. B. LORING YOUNG, *Speaker, House of Representatives*.

DEAR SIR:—I have the honor to acknowledge the receipt of an order of the House of Representatives in the following form:—

“*Ordered*, That the Attorney General be requested to furnish to the House of Representatives an opinion on the constitutionality of the bill to provide funds toward the cost of construction and maintenance of highways and bridges by means of an excise tax on gasoline and other fuel used for propelling motor vehicles over the highways of the Commonwealth” (House Bill No. 1520).

Your inquiry requires consideration of pertinent provisions of both the Constitution of Massachusetts and of the United States.

I. Has the Legislature the power, under the Constitution of Massachusetts, to pass an excise tax of the nature of the one under consideration?

If the tax be viewed as one imposed upon the privilege of selling gasoline, the question is not free from doubt.

Mass. Const., pt. 2d, c. I, § I, art. IV, provides:—

“And further, full power and authority are hereby given and granted to the said general court, . . . to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; . . .”

Prior to 1883 the court seemed inclined to construe very broadly the grant of power to levy excise taxes. In *Portland Bank v. Apthorp*, 12 Mass. 252, 256, Chief Justice Parker expounded the significance of this clause of the Constitution in a paragraph which has since become classic. He said:—

“The term *excise* is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited, in our constitution, as to its operation, to produce, goods, wares, merchandise and commodities. This last word will perhaps embrace everything, which may be a subject of taxation, and has been applied by our legislature, from the earliest practice under the constitution, to the privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern keeper, of a retailer of spirituous liquors, &c.

It must have been under this general term commodity, which signifies convenience, privilege, profit and gains, as well as goods and wares, which are only its vulgar signification, that the legislature assumed the right which has been uniformly and without complaint exercised for thirty years, of exacting a sum of money from attorneys, and barristers at law, vendue masters, tavern keepers and retailers. For every man has a natural right to exercise either of these employments free of tribute, as much as a husbandman or mechanic has to use his particular calling. The money required of them is not a proportional tax; nor is it an excise or duty upon produce, goods, wares or merchandise. It is a commodity, convenience or privilege, which the legislature

has, by cotemporaneous construction of the constitution, assumed a right to sell at a reasonable price: and by parity of reason it may impose the same conditions upon every other employment or handicraft."

This statement appears to have been accepted as the true exposition of the meaning of the clause for many years. *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428, 431.

Under these decisions an excise tax could be imposed upon the exercise of a so-called "natural right" as readily as upon one created or subject to regulation by law.

In 1883, however, the Supreme Court adopted a narrower view of the powers of the Legislature, and held that an act extending the excise tax previously laid on corporations so as to include unincorporated companies with a capital stock divided into transferable shares was unconstitutional. *Gleason v. McKay*, 134 Mass. 419.

The view put forward in *Gleason v. McKay*, *supra*, was severely criticized in the case of *Minot v. Winthrop*, 162 Mass. 113, but appears to have been at least partially readopted in *O'Keefe v. Somerville*, 190 Mass. 110.

In *Opinion of the Justices*, 196 Mass. 603, rendered in 1908, the question of the constitutionality of an act imposing a tax on sales of shares or certificates of stock in any domestic or foreign corporation or association was under consideration. A majority of the court held that such an act would be constitutional. The justices were divided in their opinion as to the true significance and effect of the earlier cases. Three of the justices were of the opinion that "the power of the General Court in imposing and levying an excise duty is not less extensive than that of Congress." Three dissented from this opinion, and held that the powers of the Massachusetts Legislature in this respect were narrower than those of Congress, and that an excise tax on the exercise of a purely natural right was unconstitutional. The present chief justice expressed the opinion that "although, speaking generally, the right to own property is absolute, the right to contract with reference to all sales of property is not equally absolute," and that a sale of an interest in an unincorporated association, when included in a legal, general classification, might be the subject of an excise tax.

That Congress has the power to impose an excise tax upon the sale of a commodity seems clear. *McCray v. United States*, 195 U. S. 27.

It is unnecessary, however, to hazard an opinion upon the point on which the court divided in *Opinion of the Justices*, 196 Mass. 603, in order to answer the inquiry propounded to me. Another line of reasoning suggests itself upon which, in my opinion, the validity of the proposed tax may be rested.

Many features of the act suggest that the privilege upon which the excise is imposed is in reality the privilege of driving motor vehicles upon the public highways of the Commonwealth, rather than that of selling gasoline; and that a tax is imposed upon the sale of gasoline merely as a convenient method of administration and because the amount of gasoline purchased affords a fair and workable, if rough, criterion of the extent to which the highways are used.

The title of the act is significant,— "An Act to provide funds toward the cost of construction and maintenance of highways and bridges by means of an excise tax on gasoline and other fuel used for propelling motor vehicles over the highways of the Commonwealth." The "fuel" upon the sale of which the tax is nominally imposed is defined in section 1 by reference to its suitability for use in propelling motor vehicles. In the same section "purchaser" and "sale" are so defined as to include within the act the transfer of fuel by a distributor into his own motor vehicle. Section 7 exempts from taxation sales of fuel subsequently consumed in any manner other than "in the operation of motor vehicles operated or intended to be operated over the highways of the commonwealth." Section 9 provides that the tax in every instance shall be borne by the purchaser; and that the exemption established by section 7 shall be effected by a rebate to the ultimate consumer, that

is, the motorist, himself, not to the original distributor or to any middleman. Finally, by section 13 the entire net yield of the tax is to be credited to a "gasoline-highway fund," and expended for the construction, improvement and maintenance of public ways and highways.

The power of the Commonwealth in the regulation of its own public ways is beyond question. *Commonwealth v. Slocum*, 230 Mass. 180; *Burgess v. Mayor and Aldermen of Brockton*, 235 Mass. 95. Viewed, therefore, as an excise tax, or toll, for the use of the public ways of the Commonwealth, the proposed act is, in my opinion, within the power conferred upon the Legislature by the Constitution of Massachusetts.

The constitutionality of the State registration law, under which the tax is graded by reference to horse power, rests upon a similar principle. *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. Titus*, 81 N. J. L. 594, 598; *Kane v. New Jersey*, 242 U. S. 160, 168.

The Constitution of the State of New Hampshire has no provision permitting the imposition of an excise tax; and it is beyond the constitutional power of the Legislature to impose any taxes other than "proportional and reasonable assessments, rates and taxes." *State v. Express Co.*, 60 N. H. 219; *Curry v. Spencer*, 61 N. H. 624. Yet the justices of the Supreme Court of New Hampshire have recently rendered an opinion based upon reasoning similar to that relied upon above, to the effect that "a gasoline tax collected from wholesalers on all sales of gasoline, with a provision for a rebate to consumers who use the gasoline for purposes other than the operation of automobiles," "amounts to the same thing, in substance, as a toll for the use of the highways, and may lawfully be imposed by the Legislature." *Opinion of the Justices*, 120 Atl. 629, 631.

The license required by section 2 appears to me an appropriate method of enforcing the proposed tax; one well adapted, at least, if not essential, to its efficient administration, and unobjectionable, provided the tax itself, to which it is merely incidental, is one which the Legislature is competent to impose. *Cf. Boston v. Schaffer*, 9 Pick. 415; *Dewey v. Richardson*, 206 Mass. 430.

II. The proposed act gives to persons who buy fuel, as defined therein, on which an excise has been paid, and who consume the same "in any manner except in the operation of motor vehicles operated or intended to be operated over the highways of the commonwealth," a right to be reimbursed the amount of the excise, and "motor vehicle" is so defined as to except "boats, tractors used exclusively for agricultural purposes, and such vehicles as run only on rails or tracks."

The question is presented whether these exemptions constitute an arbitrary discrimination and class legislation, in contravention of either the Federal or the State Constitution.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, a State anti-trust act excepting from its operation "agricultural products or live stock while in the hands of the producer or raiser," was held unconstitutional because it created an arbitrary discrimination and denied to others the equal protection of the laws. See V Op. Atty. Gen. 80. But this case has frequently been distinguished in more recent decisions of the Supreme Court of the United States, and the court has gone far in upholding classifications as reasonable, against attack on the ground of inequality or discrimination. *International Harvester Co. v. Missouri*, 234 U. S. 199; *Commonwealth v. Titcomb*, 229 Mass. 14. If, as I have indicated, the proposed tax is to be regarded as a toll for the use of the highways of the Commonwealth, then, clearly, the exemption from tax of sales of fuel for other purposes is fully justified.

III. The remaining question is whether in any other respect the proposed act conflicts with any provision of the Federal Constitution.

U. S. Const., art. I, § 10, provides: —

"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

U. S. Const., art. I, § 8, provides:—

"The congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ."

In my opinion, the first of these provisions, that forbidding any State to impose an import tax, is not violated by the proposed act. No tax is imposed upon the importation of gasoline into the State. It may be imported freely, kept for any length of time, and used by the importer for any purpose other than the propulsion of a motor vehicle, without subjecting the importer to any tax liability. In short, the tax, in my opinion, is not in any true sense an import duty.

So far as the question of possible encroachments upon Congress' power over interstate commerce, under section 8 of article I, quoted above, is concerned, the act is carefully drawn to avoid any such difficulty.

The sales forbidden by section 2 unless a license has first been procured by the distributor, are specifically restricted to exclude sales, the imposition of a tax upon which would be unconstitutional because a burden upon interstate commerce.

As previously stated, any person who consumes fuel on which an excise has been paid, "in any manner except in the operation of motor vehicles operated or intended to be operated *over the highways of the commonwealth*," by section 7 is entitled to be reimbursed the amount of the excise.

Section 8 provides:—

"No provisions of this chapter shall apply or be construed to apply to international or interstate commerce, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress."

And section 12 establishes appropriate machinery for the enforcement of this immunity. That section provides:—

"The supreme judicial court shall have jurisdiction in equity to restrain the collection, upon any sale exempted by the constitution and laws of the United States, of the excise imposed by this chapter. Said bill shall be brought against the commissioner, whether the question of the collection of the excise is in the hands of the attorney general or pending before the board of appeal or is still in the hands of the commissioner."

In view of these safeguards against encroachment upon the exclusive power which Congress possesses over interstate commerce, I am of the opinion that the proposed tax contravenes no provision of the Federal Constitution.

It follows that, in my opinion, House Bill No. 1520 is within the power of the Legislature to enact and, if so enacted into law, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Arbitrary Discrimination — Class Legislation — Marketing Contracts between Co-operative Agricultural Associations and their Members.

A statute providing for the incorporation of co-operative agricultural associations without capital stock, authorizing the making of marketing contracts between such corporations and their members for the sale of their products for a certain period of time exclusively to or through the corporation, and providing that such contracts should not be construed as in violation of the anti-trust laws contained in G. L., c. 93, §§ 1-7, unless they resulted in undue enhancement of prices, would not be unconstitutional as making an arbitrary discrimination in favor of a particular class.

MAY 15, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth*.

SIR:— You have transmitted to me for examination and report House Bill No. 1398, entitled "An Act to provide for the incorporation of co-operative agricultural associations without capital stock."

The purpose of the bill, as its title and its provisions indicate, is to authorize the incorporation without capital stock of associations engaged in any kind of farming business, to provide for the management of such corporations by the members thereof and to limit the membership to persons engaged in the production of products handled by the corporation, to permit the making of marketing contracts between such corporations and their respective members "by which the members shall agree to sell, for any period of time not exceeding ten years, all or any specified part of their products or of certain specified products exclusively to or through the corporation or any agency designated by it," and to make such marketing contracts effective by authorizing the fixing of liquidated damages for breach thereof and by providing that the corporation may be entitled to an injunction against a member for breach or threatened breach of the contract with reference to its provisions for sale or delivery of products. There is a provision that "such contract shall not be construed as a violation of any provision of sections one to seven, inclusive, of chapter ninety-three, unless it results in an undue enhancement of the price of the product to which the contract applies," and that such corporation shall not be liable to prosecution for any action, reasonable and proper, in the exercise of the rights conferred upon it by the act. There are further provisions imposing taxes on such corporations; and other provisions the object of which is to remove inconsistencies in other parts of the General Laws.

Some of the provisions of the proposed act in the form submitted by Your Excellency seem to me to be, if not actually unconstitutional, at least objectionable because in several respects they appear to run counter to the policy of our laws. Proposed amendments to the bill have been drafted which, in my opinion, if adopted, would cure the defects in the present bill which I have referred to.

The proposed amendments do not, however, attempt to deal with the possible objection to the bill because of the provisions authorizing the making of marketing contracts between the corporations and their members and excepting such contracts from the operation of the anti-trust laws contained in G. L., c. 93, §§ 1-7. The question, therefore, must be considered whether this authorization and exception constitute an arbitrary discrimination and class legislation, making the provisions unconstitutional.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, a State anti-trust act excepting from its operation "agricultural products or live stock while in the hands of the producer or raiser" was held unconstitutional because it created an arbitrary discrimination and denied to others the equal protection of the laws. On the authority of this case, one of my predecessors held, in an opinion to the Governor under date of May 24, 1917 (V Op. Atty. Gen. 80), that an act was unconstitutional, the object of which was "to prohibit combinations and monopolies to control prices of commodities in common use," which contained a provision excepting from its operation "agreements between farmers, or other persons engaged in agricultural or horticultural pursuits, relative to the sale of the products of their own farms." But the Connolly case has frequently been distinguished in more recent decisions of the Supreme Court of the United States, and the court has gone far in upholding classifications as reasonable, against attack on the ground of inequality or discrimination. *International Harvester Co. v. Missouri*, 234 U. S. 199; *C. A. Weed & Co. v. Lockwood*, 266 Fed. 785, 791, 792; *Commonwealth v. Titcomb*, 229 Mass. 14, and cases cited.

Indeed, Congress itself has excepted agricultural and other associations from the operation of anti-trust laws. Section 6 of the Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 731) provides that "nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in

restraint of trade, under the anti-trust laws"; and by Act of February 18, 1922, c. 57, 42 Stat. 388, entitled "An Act to authorize association of producers of agricultural products," Congress enacted that persons engaged in the production of agricultural products, including dairymen, may act together in associations, corporate or otherwise, in collectively marketing their products in interstate and foreign commerce and may make the necessary contracts to effect such purposes, with certain provisos, and subject to restraint by the Secretary of Agriculture and the courts, in case it appears that there is a monopoly or restraint of interstate commerce to such an extent that the price of an agricultural product is unduly enhanced by reason thereof. The constitutionality of those provisions, as far as I am aware, has not been questioned.

In the proposed act the thing which is the subject of the excepting provisions is the marketing contract. This contract is merely an agreement between the corporation and a member by which the member agrees to sell for a certain period of time all of a specified part of his products exclusively to or through the corporation. At common law the legality of an agreement by which one person agrees to sell a product to another person exclusively seems to depend upon the reasonableness of the agreement in the light of the circumstances under which it is made and its purpose and effect. Unless it creates or tends to create a monopoly or results in an undue restraint of trade, such an agreement is valid. *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 363; *Meyer v. Estes*, 164 Mass. 457, 464, 465; *N. Y. Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 403.

In the absence of statute authorizing the making of such a contract its legality may also be affected by G. L., c. 93, §§ 1 and 2. These sections are as follows:—

"SECTION 1. No person, firm, association or corporation doing business in the commonwealth, shall make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, association or corporation; but this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of, goods, wares or merchandise. . . .

SECTION 2. Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void."

Section 1, however, would not be applicable because of the proviso that the making of contracts for the exclusive sale of goods, wares or merchandise is not prohibited. *Commonwealth v. Strauss*, 191 Mass. 545. Section 2 would be applicable only in so far as the contract might create or maintain a monopoly in dealings in the Commonwealth in the product, or might restrain competition in the Commonwealth in the supply or price of the product, or might restrain trade in the Commonwealth for the purpose of creating or maintaining such monopoly, or might unduly enhance within the Commonwealth the price of the product. Cf. *Commonwealth v. North Shore Ice Delivery Co.*, 220 Mass. 55.

The proposed act limits the exception from the operation of section 2 to cases where the marketing contract does not result in an undue enhancement of the price of the product to which the contract applies, and limits the corporation to exemption from prosecution only in so far as its action in the exercise

of rights conferred by the act is reasonable and proper. Whether it is intended by the bill to permit the corporations which it authorizes to create and maintain monopolies in farming products, and incidentally to restrain competition in the supply and price of such products in the Commonwealth, does not clearly appear; but such monopolies or restraints of competition, so long as they do not result in undue enhancement of prices, cannot seriously harm the public.

The question is not whether the marketing contracts authorized may not conceivably be such as to come under the ban of the common law or the anti-trust statute, but whether the provisions authorizing them are so arbitrary in their discrimination as to be constitutionally invalid. One may readily infer that the object of the bill in permitting organizations of farmers through which their products may be exclusively marketed is to enable the farmer to dispose of his products in a way which will be beneficial not only to the farmer, but, by encouraging him to greater production, to the community at large. Similar enactments, which apparently have not been challenged, have been passed by Congress, and I am informed in other States. I therefore advise you that the provision in question would not be unconstitutional as making an arbitrary discrimination in favor of a particular class.

The provisions authorizing the making of marketing contracts do not expressly limit them to transactions merely in intrastate commerce. So far as appears, members of the corporations authorized to be formed may reside and do business in other States, and the marketing contracts for which the bill provides may affect interstate trade. Of course, the proposed act cannot make valid contracts in restraint of interstate trade and monopolies of such trade which are illegal by Federal law; nor would the act be construed as attempting so to do. But, while I am not called upon to decide that question, it seems that the Federal statutes to which I have referred expressly permit the organization of corporations and the making of marketing contracts such as are authorized by the bill.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Labor — Hours of Employment — Women and Children — Applicability of G. L., c. 149, § 56, to Laundries of Private Boarding Houses and Hospitals — Eight-hour Day — Engineers — Laundries at State Hospitals.

G. L., c. 149, § 56, limiting the hours of labor of women and children applies to laundries of private boarding houses and hospitals, and the hours of employment of women and children, regularly and exclusively employed therein, are limited as provided for in said § 56.

The service of engineers employed in State hospitals, whose duties deal with furnishing power to laundries, is restricted to eight hours in any one day, and to forty-eight hours in any one week, except in cases of extraordinary emergency.

MAY 15, 1923.

E. LEROY SWEETSER, Esq., *Commissioner of Labor and Industries.*

DEAR SIR:— You request my opinion on the following questions:—

1. Are laundries maintained in private boarding houses and in hospitals included within the requirements authorized by G. L., c. 149, § 56, or do such requirements apply only to laundries engaged in doing work for the general public?

2. Are engineers employed in State hospitals, whose duties deal with furnishing power to laundries, restricted to eight hours in one day or forty-eight hours in a week, except in cases of extraordinary emergency?

G. L., c. 149, § 56, as amended by St. 1921, c. 280, so far as it pertains to your first inquiry, provides as follows:—

“No child and no woman shall be employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment,

telegraph office or telephone exchange, or by any express or transportation company, or in any laundry, hotel, manieuring or hair dressing establishment, motion picture theatre, or as an elevator operator, or as a switchboard operator in a private exchange, more than nine hours in any one day, . . .”

Statutes limiting the hours of employment of children were first enacted in 1842. This statute (St. 1842, c. 60) was limited to children under the age of twelve employed in laboring in any manufacturing establishment. In 1867, by St. 1867, c. 285, mechanical establishments were added, and in 1874 (St. 1874, c. 221) women were first included.

As the avenues of employment for women and children expanded, the Legislature extended the scope of inhibitions, in 1913, so as to include any factory or workshop, any mercantile establishment, telegraph office or telephone exchange, and any express or transportation company. St. 1913, c. 758. Finally, in 1921, the statute was amended by adding the words: “any laundry, hotel, manieuring or hair dressing establishment, motion picture theatre, or . . . elevator operator, or . . . switchboard operator in a private exchange.” St. 1921, c. 280.

Prior to the passage of the 1921 amendment to G. L., c. 149, § 56, the Legislature recognized the need for regulation and inspection of conditions of employment in laundries by including them within its definition of the phrase “buildings used for industrial purposes.” St. 1912, c. 726, § 5.

G. L., c. 149, § 17, provides as follows:—

“For the enforcement of the provisions of this chapter, the commissioner, the director of the division of industrial safety and inspectors may enter all buildings and parts thereof used for industrial purposes and examine the methods of protection from accident, the means of escape from fire, the sanitary provisions, the lighting and means of ventilation, and make investigations as to the employment of women and minors and as to compliance with all provisions of this chapter.”

G. L., c. 149, § 1, defines “buildings used for industrial purposes” as including “factories, workshops, bakeries, mechanical establishments, laundries, foundries, tenement house workrooms, all other buildings or parts thereof where manufacture is carried on, and mercantile establishments as defined in this section.”

Your first inquiry raises the question as to whether the words “in any laundry,” as used in St. 1921, c. 180, and the word “laundries,” as used in the definition of the phrase “buildings used for industrial purposes” (G. L., c. 149, § 1), are limited to establishments primarily and exclusively conducted as laundries by way of trade, that is, as an independent industry or business, or whether they can be said to include such establishments when maintained and operated as subsidiary to and as an adjunct of some other business or commercial pursuit.

In *Duggan v. Bay State Street Ry. Co.*, 230 Mass. 370, 374, the court said:—

“It is a principle of general scope that a statute must be interpreted according to the intent of the makers, to be ascertained from its several parts and all its words construed by the ordinary and approved usage of the language, unless they have acquired a peculiar meaning in the law, considered in connection with the cause of its enactment, the subject-matter to which it applies, the pre-existing state of the common and statutory law, the mischief or imperfection to be remedied, and the main object to be accomplished, to the end that it be given an effect in harmony with common sense and sound reason. . . .”

The manifest purpose and intent of the Legislature in enacting these particular statutes were the limitation of the hours of employment of women and children, so as to protect them, because of their age and sex, from physical and moral dangers of certain occupations and certain places of employment, as enumerated therein; and to regulate and inspect certain places in which

certain employment was carried on, because of the conditions under which the employment was performed, in order to protect the employees engaged therein from danger to health, life and limb. *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *Commonwealth v. Riley*, 210 Mass. 387.

A "laundry" is defined by the Standard Dictionary as — "An establishment or a room for washing and ironing clothes." Laundry work, i.e., washing and ironing, is the same whether performed for the general public or for a limited or particular group. The work may be just as arduous and confining, and the evils from long and continued hours of employment just as great, when performed in a laundry which is maintained and operated as subsidiary, or incidental, to some other principal commercial or industrial enterprise, as in one whose sole and principal business is that of laundering. The same kind of apparatus and machinery may be, and generally is, in use in one as in the other. The same evil conditions may abound, and the same degree of effort must be employed.

As a matter of fact, there are any number of private boarding houses or hospitals where, because of the number of persons residing or confined therein, the daily or weekly wash is larger, and the number of persons specially employed in the laundry attached to the private boarding house or hospital is much greater, than in many so-called public laundries, i.e., laundries which do washing and ironing for the general public.

There can be no question but that the Legislature, in including laundries within the list of inhibitions, had in mind not the particular business carried on by them, but rather the nature and kind of employment performed therein and the conditions under which the employment was performed. As these are primarily the same in a laundry attached to a private boarding house or hospital, where the washing and ironing are done for the residents or inmates thereof, as in a laundry engaged in doing work for the general public, I am of the opinion that laundries attached to private boarding houses or hospitals, in which the employees are regularly and exclusively employed in the performance of work therein, are included within the requirements authorized by G. L., c. 149, § 56, as amended, and that the hours of employment of women and children, regularly and exclusively employed therein, would be limited as provided for in said section 56.

As to your second inquiry, G. L., c. 149, § 30, provides, in so far as it applies to your particular inquiry, as follows: —

"The service of all laborers, workmen and mechanics now or hereafter employed by the commonwealth . . . is hereby restricted to eight hours in any one day and to forty-eight hours in any one week. No officer of the commonwealth . . . shall require or permit any such laborer, workman or mechanic to work more than eight hours in any one day, or more than forty-eight hours in any one week, except in cases of extraordinary emergency."

Section 36 of said chapter 149 provides: —

"Sections thirty, thirty-one and thirty-four shall not apply to the preparation, printing, shipment and delivery of ballots to be used at a caucus, primary, state, city or town election, nor during the sessions of the general court to persons employed in legislative printing or binding; nor shall they apply to persons employed in any state, county or municipal institution, on a farm, or in the care of the grounds, in the stable, in the domestic or kitchen and dining room service or in store rooms or offices. . . ."

The term "domestic" has a widely varying meaning. Its significance must be determined with reference to the subject-matter and the relation in which it appears. As used in said section 36, I am of the opinion that it was intended to apply only to that particular group or class of employees who perform such work or employment as is usually performed by domestics or house servants, men or women.

Even if it were to be said that persons employed in the laundry of a State institution could be considered domestics, and therefore within the meaning

of the term "domestic service," as used in said section 36, I am of the opinion that the term would still be limited to such employees as perform the principal and particular work carried on in a laundry, namely, washing and ironing, and that it would not include employees like engineers, whose duties deal merely with furnishing power to laundries,—work and employment which is clearly incidental to the operation of the laundry.

I am therefore of the opinion that engineers employed in State hospitals, whose duties deal with furnishing power to laundries, are restricted to eight hours in one day, or forty-eight hours in one week, except in cases of extraordinary emergency.

Yours very truly,

JAY R. BENTON, *Attorney General*.

*Marriages—Authority to solemnize—Officers of The Salvation Army—
"Ministers of the Gospel"—"Denomination"—"Ordained."*

The phrase "minister of the gospel," in G. L., c. 207, § 38, signifies one who expounds a system of belief based, at least primarily, upon the teachings of Christ.

The word "denomination," in G. L., c. 207, § 38, may be defined as a religious sect united upon a common creed or system of faith, which, if it holds that creed in common with other sects, is further distinguished from these by its belief in matters of polity or discipline.

An ordained minister, in the sense in which the word "ordained" is employed in G. L., c. 207, § 38, is one who has been set apart as a public teacher of religion according to the forms of the particular sect to which he belongs.

An officer of The Salvation Army is not "a minister of the gospel, ordained according to the usage of his denomination," within G. L., c. 207, § 38, and is not authorized to solemnize a marriage within the Commonwealth.

MAY 15, 1923.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:—You have asked my opinion on a number of questions involving the authority of certain persons to solemnize a marriage in this Commonwealth.

The resolution of questions of fact is, of course, no part of the duty of this department, and my answers to the inquiries propounded by you are therefore based exclusively, in so far as questions of fact are concerned, upon data supplied by you.

Authority to solemnize marriages within the Commonwealth is governed by G. L., c. 207, § 38, which provides as follows:—

"A marriage may be solemnized in any place within the commonwealth by a minister of the gospel, ordained according to the usage of his denomination, who resides in the commonwealth and continues to perform the functions of his office; by a rabbi of the Israelitish faith, duly licensed by a congregation of said faith established in the commonwealth, who has filed with the clerk or registrar of the town where he resides a certificate of the establishment of the synagogue, the date of his appointment thereto and of the term of his engagement; by a justice of the peace if he is also clerk or assistant clerk of a town, or a registrar or assistant registrar, in the town where he holds such office, or if he is also clerk or assistant clerk of a court, in the city or town where the court is authorized to be held, or if he has been designated as provided in the following section and has received a certificate of designation and has qualified thereunder, in the town where he resides; and it may be solemnized among Friends or Quakers according to the usage of their societies; but no person shall solemnize a marriage in the commonwealth unless he can read and write the English language."

The questions before me are exclusively questions of statutory interpretation. Whether authority to solemnize marriages should be given to others than those enumerated in the existing statute is, of course, for the Legislature alone to determine;

and if at any time it deems it for the public good to do so, it can readily provide such authority by an amendment to the statute.

Under the act in its present form, however, no person, other than a rabbi of the Israelitish faith, a justice of the peace, a Quaker or a member of the Society of Friends, is authorized to solemnize a marriage within the Commonwealth unless he possesses the following qualifications:— (1) He must be “a minister of the gospel”; (2) he must be a member of some “denomination”; (3) he must have been “ordained” according to the usage of such denomination; (4) he must be a resident of Massachusetts; (5) he must be a minister of the gospel of whom it may fairly be said that he “continues to perform the functions of his office”; and (6) he must be able to read and write the English language.

In my opinion, the phrase “minister of the gospel” imports a requirement that the person be one who expounds a system of belief based, at least primarily, upon the teachings of Christ. *Attorney General v. Wallace*, 7 B. Mon. (Ky.) 611.

A “denomination” is technically a religious sect, and involves the idea of a common creed or system of faith. See *State v. Township 9*, 7 Ohio St. 64. It is thus defined in the New Standard Dictionary:—

“A sect or school having a distinguishing name; especially a body of Christians united by a common faith and form of worship and discipline.”

It may be that the distinguishing feature of a denomination is not its creed, which it may hold in common with other denominations, but its belief in matters of polity and discipline. See *The Dublin Case*, 38 N. H. 459, 543; *Hale v. Everett*, 53 N. H. 9, 92. But in any event, a denomination is a religious sect distinct from other sects in belief or in methods of discipline. See *Lawrence v. Fletcher*, 8 Met. 153, 162. In my opinion, therefore, the word “denomination,” as used in G. L., c. 207, § 38, may be defined as a religious sect united upon a common creed or system of faith, which, if it holds that creed in common with other sects, is further distinguished from these by its belief in matters of polity or discipline.

The verb “to ordain” is defined as follows in the New Standard Dictionary:—

“To appoint and consecrate or set apart for some special work; specifically, in church use, to invest with ministerial or priestly functions, with the laying on of hands or other ceremonies; as, to ordain a minister.”

An ordained minister is one who has been set apart as a public teacher of religion according to the forms of the particular sect to which he belongs. *Londonderry v. Chester*, 2 N. H. 268. The ordination of a minister has always been a proceeding of great importance and solemnity, and marks the entrance of the person ordained upon the profession of religious teaching. *Kibbe v. Antram*, 4 Conn. 134, 139; *Charleston v. Allen*, 6 Vt. 633. It would seem that thereafter he can be removed from office only by due action of the constituted authorities of his denomination; and then, ordinarily, only upon the ground of an essential change of doctrine, or of a wilful neglect of duty, or of immoral or criminal conduct. *Burr v. The First Parish in Sandwich*, 9 Mass. 277; *Sheldon v. Congregational Parish in Easton*, 24 Pick. 281; *Reformed Dutch Church v. Bradford*, 8 Cowen, 457. In the course of the opinion in the first case cited above, on page 298, it was said:—

“The consequence would be, either that the parish had no remedy . . . or that they might dissolve the ministerial contract by their own vote, thus reducing the office of a minister to a mere tenure at will, which would be repugnant to the nature of the office.”

Two, at least, of the essential features of ordination would therefore appear to be the solemn and ceremonial nature of the proceeding, and the fact that its consummation insures thereafter a certain degree of permanency in office. See Buck: Mass. Ecclesiastical Law, c. VII.

Turning now to the specific questions propounded by you.

"1. Are the officers of The Salvation Army ordained ministers, and have they authority to solemnize a marriage in this Commonwealth?"

The Salvation Army appears to be an organization formed upon a quasi-military pattern, for the revival of religion among the masses. It was founded in England by the Methodist evangelist, William Booth, about 1865, under the name of the Christian Mission; the present name and organization were adopted about 1878. . . . Its work is carried on by means of processions, street singing, preaching, and the like, under the direction of officers entitled generals, majors, captains, etc. Besides its religious work, it engages in various reformatory and philanthropic enterprises. Its doctrines appear to bear a general resemblance to those common to all Protestant evangelical churches, and especially to those of Methodism.

Upon joining the organization a "recruit" signs what are called the "Articles of War," some of which are as follows:—

"1. Having received with all my heart the Salvation offered to me by the tender mercy of Jehovah, I do here and now publicly acknowledge God to be my Father and King, Jesus Christ to be my Saviour, and the Holy Spirit to be my Guide, Comforter and Strength; and that I will, by His help, love, serve, worship and obey this glorious God through all time and through all eternity.

2. Believing solemnly that The Salvation Army has been created by God and is sustained and directed by Him, I do here declare my full determination, by God's help, to be a true soldier till I die.

3. I do here and now, and forever, renounce the world with all its sinful pleasures, companionships, treasures and objects, and declare my full determination boldly to show myself a soldier of Jesus Christ in all places and companies, no matter what I may have to suffer, do, or lose by so doing.

4. And I do here and now call upon all present to witness that I enter into this undertaking of my own free will, feeling that the love of Christ, who died to save me, requires from me this devotion of my life to His service for the salvation of the whole world."

The signing of these "Articles of War" is apparently accompanied by appropriate ceremonies, and there are prescribed by "The Orders and Regulations for Field Officers" ceremonies for funerals and marriages, and for the making of covenants, as, for instance, the "General Holiness Covenant" and the "War Covenant." There are, in addition, orders and regulations in great detail for the instruction and drill of the "soldiers" and for the conduct and behavior of the "field officer" in various situations and under different circumstances.

It is unnecessary to decide whether The Salvation Army may properly be termed a "denomination," because I am of the opinion that an officer of that organization, authorized by it to solemnize marriages, is not "an ordained minister," within the meaning of the statute. Whatever title an officer of The Salvation Army may have to be considered an ordained minister would seem to be derived from his "commission." This is a document which sets forth that—

"I,, as Representative of, and on behalf of, the said General William Booth, do hereby appoint and officially commission our faithful and trusted comrade with the title of, to act for me and on behalf of the American Headquarters in all matters that are involved in the faithful, honorable and efficient discharge of that office, ever bearing in mind the furtherance and prosperity of the said Salvation Army."

It further contains the following clause:—

"And further, it is fully understood and agreed that this Commission shall only remain in force so long as the holder of it carries out its provisions, and during my will and pleasure, and that the holder of the same faithfully promises to deliver it up whenever requested to do so by the said William Booth,

General, his successor . . . or other commissioner duly appointed by him,—when it shall become void, and the same is revocable at the pleasure of the said . . . , such commissioner, or his successor.”

The apparent lack of any solemn or ceremonial proceedings connected with the issuance of these commissions, and more especially the fact that the officer so appointed apparently holds his office solely at the pleasure of the commanders of The Salvation Army, are, in my opinion, fatal to the claim that this method of commissioning officers amounts to or is the equivalent of ordination. The conception that one man may at his pleasure ordain ministers, and, again, at his pleasure reduce them to laymen, is, I believe, contrary to the whole idea of ordination as it was and is understood in this Commonwealth.

“2. What constitutes a denomination for the purpose of ordination of ministers who may perform a marriage in this Commonwealth?”

I have already stated my opinion upon this point while considering the general principles to be applied to the other more specific questions which you ask.

“3. Do pastors of unincorporated, independent religious bodies unconnected with any central governing body or conference, have authority to perform a marriage, within the meaning of G. L., c. 207, § 38?”

In the general form in which you state it, it is, I believe, impossible to answer this question “yes” or “no.” There is nothing in the various facts supposed by you in your question which would, of itself, prevent such a religious body from being a denomination, within the meaning of the statute. Each case, however, must be determined on its specific facts. Obviously, some form of organization, some established rules and some established usage must exist in order that it could be said that a representative of such a society was “a minister of the gospel ordained according to the usage of his denomination.”

“4. Is an ordained clergyman who has resigned his pastorate and retired, but who occasionally officiates at funerals and like ceremonies, authorized to perform a marriage?”

“5. Is an ordained clergyman who has given up his pastorate to engage in business other than that connected with the ministry, but who sometimes acts at funerals and like ceremonies, authorized to perform a marriage?”

Your fourth and fifth inquiries may be considered together. In each the issue is the same: Can the clergyman in question, upon all the facts of the case, fairly be said to be one “who resides in the Commonwealth and continues to perform the functions of his office?” In my opinion, it is not sufficient that he remain in good standing upon the records of his church. In addition, it must appear that he is in fact continuing to perform the functions of his office. The mere fact that he engaged in other pursuits would not, of course, prevent him from coming within the terms of the statute. In your fourth inquiry, however, you use the word “retired,” and in your fifth inquiry the expression “who has given up his pastorate to engage in business.” This would suggest that in neither case could it fairly be said that the clergyman in question was continuing to perform the functions of his office. The issue is, however, in each case whether this can or cannot fairly be said, in the light of all the concrete circumstances of that particular case.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Education — College — Degrees — Instruction by Professors of Institutions chartered under the Laws of a Foreign State.

The provisions of G. L., c. 266, § 89, prevent institutions chartered under the laws of a foreign State from coming into Massachusetts for the purpose of enrolling students to receive personal class instruction here for which degrees are offered, even though the instructors are visiting professors from the institutions in question.

Such method of instruction is not interstate commerce within the principle laid down in the case of *International Textbook Co. v. Pigg*, 217 U. S. 91, and accordingly constitutes doing business within this Commonwealth, and therefore is subject to its laws.

MAY 15, 1923.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:—You request my opinion on the following questions:—

“1. May institutions chartered under the laws of a foreign State come into Massachusetts for the purpose of enrolling students to receive personal class instruction here for which degrees are offered, even though the instructors are visiting professors from the institutions in question?

2. Does this method of instruction come within the principle laid down in the case of the *International Textbook Co. v. Pigg*, 217 U. S. 91?”

G. L., c. 266, § 89, provides as follows:—

“Whoever, in a book, pamphlet, circular, advertisement or advertising sign, or by a pretended written certificate or diploma, or otherwise in writing, knowingly and falsely pretends to have been an officer or teacher, or to be a graduate or to hold any degree, of a college or other educational institution of this commonwealth or elsewhere, which is authorized to grant degrees, or of a public school of this commonwealth, and whoever, without the authority of a special act of the general court granting the power to give degrees, offers or grants degrees as a school, college or as a private individual, alone or associated with others, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. Any individual, school, association, corporation or institution of learning, not having power to confer degrees under a special act of the general court, using the designation of ‘university’ or ‘college’ shall be punished by a fine of one thousand dollars; but this shall not apply to any educational institution whose name on July ninth, nineteen hundred and nineteen, included the word ‘university’ or ‘college.’”

A literal interpretation of this statute would seem to forbid any individual, school, association, corporation or institution of learning, not having the power to confer degrees under a special act of the General Court of this Commonwealth, from offering or granting degrees as a school, college or private individual, and would also seem by its terms to prohibit the use of the designation of “university” or “college” by any individual, school, association, corporation or institution of learning not having the power to confer degrees under a special act of the General Court, subject to the exception therein contained relative to an educational institution whose name on July 9, 1919, included the word “university” or “college.”

This statute has been construed in the case of *Commonwealth v. New England College of Chiropractic*, 221 Mass. 190, wherein the court says:—

“Its obvious purpose is to suppress the kind of deceit which arises from the pretence of power to grant academic degrees, and to protect the public from the evils likely to flow from that variety of misrepresentation and imposition. . . . It aims to ensure to the people of the Commonwealth freedom from deception, when dealing with those who put forward professions of educational achievement such as ordinarily is accompanied by a collegiate degree from an institution authorized to grant it and to make certain that those who use such symbols have had the opportunity of being trained according to prevailing standards in some school of recognized standing, under teachers of reputation for learning. . . .

The statute should be interpreted in the light of its design to effectuate its purpose so far as the words used reasonably construed permit of this result.”

I am accordingly of the opinion that your first question must be answered in the negative.

The Supreme Court of the United States has decided, in the case of *International Textbook Co. v. Pigg*, *supra*, that where there was a continuous interstate traffic in text books and apparatus for a course of study, pursued by means of correspondence, the movements in interstate commerce bring the subject-matter within the domain of Federal control, and exempt it from the burden imposed by State legislation. (See opinion of Attorney General to Commissioner of Education, dated February 23, 1923.) In this respect the method of instruction outlined in your first question does not come within the principle laid down in the case of *International Textbook Co. v. Pigg*, *supra*, and would accordingly constitute "doing business" within this Commonwealth, and therefore be subject to its laws. See *International Textbook Co. v. Connelly*, 124 N. Y. Supp. 603; *International Textbook Co. v. Gillespie*, 229 Mo. 397; *International Textbook Co. v. Lynch*, 81 Vt. 101; *International Textbook Co. v. Peterson*, 133 Wis. 302; *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.* 252 U. S. 436, and cases cited.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Credit Unions — Small Loans — License.

A credit union is not engaged in the business of making small loans, within the meaning of G. L., c. 140, § 96, and is not required to obtain a license from the Commissioner of Banks.

MAY 17, 1923.

Hon. FRANK H. POPE, *Supervisor of Loan Agencies*.

DEAR SIR:—You request my opinion upon the following question: Do credit unions fall within the provisions of the small loans act, and are they required to secure a license from the Commissioner of Banks, under G. L., c. 140, § 96?

The act authorizing the incorporation of credit unions was approved May 21, 1909 (St. 1909, c. 419). Section 25 of said chapter provides, in part, that "the provisions of chapter six hundred and five of the acts of the year nineteen hundred and eight shall apply." St. 1908, c. 605, is an act entitled "An Act to regulate further the business of making small loans." Section 1 of that act provides:—

"No person, firm or corporation shall engage in the business of making small loans of two hundred dollars or less upon which a rate of interest greater than twelve per cent per annum is charged, and for which no security, other than a note or contract with or without an endorser is taken, without first obtaining a license for carrying on such business in the city or town in which the business is to be transacted. . . ."

Sections 2 and 3 of said chapter 605 regulate the amount of the loan and interest.

Considering these two acts together, it is clear that the Legislature intended to require of credit unions the securing of a license before making loans, and to place a limitation on the amount of interest to be charged.

From the opinion of the Attorney General to the then Supervisor of Loan Agencies dated August 16, 1912, to which my attention has been called, it appears that the Attorney General was of the opinion that credit unions were required to secure a license under St. 1911, c. 727, § 3 (now G. L., c. 140, § 96), which provided:—

"No person, partnership, corporation, or association shall directly or indirectly engage in the business of making loans of three hundred dollars or less, . . ."

It also appears that that opinion was based upon the fact that St. 1909, c. 419, expressly made St. 1908, c. 605, applicable to credit unions. But Gen. St. 1915, c. 268, entitled "An Act relative to the incorporation and management of credit unions," repealed St. 1909, c. 419, and also St. 1914, c. 437, the latter chapter relating to rural credits. Gen. St. 1915, c. 268 (now G. L., c. 171—Credit

Unions), contains no provision, as did the statute of 1909, which in any way connects the small loans act with credit unions, unless it be G. L., c. 140, § 96 (St. 1911, c. 727, § 3), above referred to.

The question presented, therefore, is: Is a credit union engaged in the business of making loans, and thereby required to secure a license?

G. L., c. 171, § 5, provides:—

“A credit union may receive the savings of its members in payment for shares or on deposit; may lend to its members at reasonable rates, or invest, as hereinafter provided, the funds so accumulated; and may undertake such other activities relating to the purpose of the association as its by-laws may authorize. Section forty-eight of chapter one hundred and seventy shall not apply to credit unions.”

Section 13 provides that the directors shall determine the rate of interest on loans and deposits. Section 11 provides that the *members* shall fix the maximum amount to be loaned any one member. Section 11 also provides that the *members* may at any annual or special meeting review any decision of the credit committee or of the board of directors by a three-fourths vote of the *members* present and entitled to vote. Section 20 provides the amount of interest that may be charged on farm lands, but no limitation is placed upon other loans. Section 23 provides for a distribution of dividends among the *members*. A credit union can lend to *members* only. V Op. Atty. Gen. 40.

It is significant that the former statutory provision that the small loans act should apply to credit unions was specifically repealed in 1915. It is obvious that loans to members of a credit union will, in many instances, be \$300 or less, but, in my judgment, such transactions cannot be construed as “being engaged in the business of making small loans.” A credit union is not carried on for profit. In fact, money earned is divided among the members in the way of dividends.

In my opinion, the small loans act does not now apply to credit unions, and it follows that a license is unnecessary.

I am also of the opinion that G. L., c. 140, § 114, does not include credit unions.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Firearms — Minors — Rifle Clubs.

Under G. L., c. 140, § 130, as amended by St. 1922, c. 485, § 8, rifle clubs made up of minors may be supplied with firearms and directed in their proper use by competent adult instructors, without violation of law.

MAY 18, 1923.

Brig. Gen. JESSE F. STEVENS, *The Adjutant General*.

DEAR SIR:—You state that the Ordnance Department, Massachusetts National Guard, is interesting itself in the organization of junior rifle clubs, and you request information as to whether the formation of such rifle clubs, made up of minors, for target practice only, under responsible adult supervision, in any way violates any existing law of this Commonwealth.

G. L., c. 140, § 130, as amended by St. 1922, c. 485, § 8, provides as follows:—

“Whoever sells or furnishes to a minor under the age of fifteen, or to an unnaturalized foreign born person who has not a permit to carry firearms under section one hundred and thirty-one, any firearm, air gun or other dangerous weapon or ammunition therefor shall be punished by a fine of not less than ten nor more than fifty dollars, but instructors and teachers may furnish military weapons to pupils for instruction and drill.”

I am accordingly of the opinion that under this statute such junior rifle clubs may be supplied with firearms and drilled in their proper use by competent adult instructors, without violation of law.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Board of Conciliation and Arbitration — Jurisdiction — Middlesex & Boston Street Railway Company.

The question whether an employer, by entering into an agreement with his employees, had limited his right, as a matter of law, to discharge his employees, is a judicial question; and the Board of Conciliation and Arbitration has no jurisdiction, under G. L., c. 150, § 5, to take any action upon such question.

MAY 19, 1923.

EDWARD FISHER, Esq., *Chairman, Board of Conciliation and Arbitration.*

DEAR SIR:— You have requested my opinion as to whether the Board of Conciliation and Arbitration has jurisdiction to hear and consider certain matters under G. L., c. 150, § 5, relative to a controversy between the Middlesex & Boston Street Railway Company and its employees. You state that the facts are as follows:

An agreement entered into between the company and its employees provides, in part, that whenever any questions arise which cannot be mutually adjusted they shall be submitted, at the request of either party, to a board of arbitration, to be selected in a certain manner. Prior to this agreement, the company had promulgated a rule relative to liability for collision of cars, which was posted on the company's premises and which provided that any person violating the rule would be discharged. The agreement made no reference to the rule. An employee was discharged by reason of a car operated by him colliding with another car, and a controversy arose relative to his discharge. The employees requested the company to submit the rule itself to arbitration, and the company refused. Under G. L., c. 150, § 5, the employees petitioned the Board of Conciliation and Arbitration to give a hearing and make a decision upon the responsibility for the collision and upon the severity of the penalty. The company contends that the agreement was made in the light of the said rule and was modified by it, and that the board has no jurisdiction to consider the question whether the penalty imposed upon the employee was too severe.

The precise question upon which you request my opinion is whether the board has jurisdiction to give a hearing and make a decision upon the rule itself, assuming that the employee was responsible for the collision.

G. L., c. 150, § 5, confers jurisdiction, under certain circumstances, upon the board to give a hearing and make a decision in a controversy "not involving questions which may be the subject of an action at law or suit in equity." This controversy involves the question whether the company, by entering into an agreement with its employees, had limited its right as a matter of law to discharge its employees. That is a judicial question.

I am therefore of the opinion that the controversy involves a question "which may be the subject of an action at law or suit in equity," and that you have no jurisdiction to take any action with respect to the rule itself against the will of the company.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Police Power — Registration of Dealers in Milk.

The right of the Legislature, under the police power, to regulate the lawful business of individuals is subject to the limitations that it must be reasonable and not arbitrary, and that the regulation must be for the benefit of the public at large.

The question whether a statute interfering with the right to carry on business is a proper exercise of the police power is subject to judicial review.

A statute requiring persons engaged in the business of distributing milk to secure a rating by some credit agency, or to give a bond upon such terms as a State official may require, or to furnish a sworn financial statement of condition and to be subject to a public rating, as a prerequisite to doing business, would be unconstitutional, if enacted.

Committee on Agriculture, House of Representatives.

GENTLEMEN:— You ask my opinion as to the constitutionality of House Bill No. 396, entitled "An Act to require registration of contractors and dealers in milk." The bill proposes to amend G. L., c. 94, by inserting after section 39 a new section, called Section 39A, which is, in part, as follows:—

"All dealers and contractors engaged in the business of buying, handling, selling or delivering milk or cream, except producers who sell and deliver only milk produced by cows on their own farms, shall each year register with the commissioner of agriculture on or before the first day of February. Every application for registration shall be made on a form furnished by the commissioner and shall be accompanied by either evidence satisfactory to the commissioner that the applicant has a rating by a credit agency acceptable to said commissioner, or a bond in such terms and for such amount as the commissioner may require, or a sworn financial statement of the condition of the business of the applicant on the first day of January of the year for which the application is made."

The section further provides that the information so submitted shall be held confidential, that the Commissioner shall refuse to register an applicant until the requirements for registration have been met, and that the Commissioner shall annually send to the inspector of milk in each city and town a copy of the list of registered contractors and dealers in milk. The section continues:

"... No inspector of milk shall issue any license under the following two sections to contractors or dealers except those whose names are included in the list furnished by the commissioner. The commissioner shall prepare a rating list of those registered dealers and contractors not rated by any acceptable credit agency or not bonded, and shall furnish a copy of such list to any citizen upon application. . . ."

The section concludes with provisions for fines and penalties for failure to comply with the requirements of the section.

The right to pursue any lawful occupation to obtain a livelihood is secured to every one under the Constitution of Massachusetts and the Constitution of the United States. This right, however, is subject to reasonable regulation by the State in the exercise of the police power, in the interest of the public health, the public safety, the public morals and, in a more limited sense, in the interest of the public welfare. This general principle has been affirmed in innumerable decisions. *Commonwealth v. Alger*, 7 Cush. 53, 84-86; *Commonwealth v. Strauss*, 191 Mass. 545, 553; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 478; *Dewey v. Richardson*, 206 Mass. 430; *Lawton v. Steele*, 152 U. S. 133, 136, 137; *McLean v. Arkansas*, 211 U. S. 539; *Hall v. Geiger-Jones Co.*, 242 U. S. 539; 27 Harvard Law Review, 297.

There are many kinds of business the doing of which in this Commonwealth is regulated by statutes requiring persons engaged in the business to obtain a license from some public authority. Occupations so regulated include those of auctioneers (G. L., c. 100, § 2), transient vendors, hawkers and pedlars (G. L., c. 101, §§ 3, 22), brokers engaged in selling securities (St. 1921, c. 499, § 8), physicians and others whose profession or occupation is closely connected with the public health (G. L., c. 112), innholders, keepers of intelligence offices, dealers in second-hand automobiles, pawnbrokers and persons engaged in the business of making small loans (G. L., c. 140, §§ 2, 42, 59, 70, 96), and insurance agents (G. L., c. 175, § 163). Such requirements have been sustained by a number of decisions of our court. *Commonwealth v. Roswell*, 173 Mass. 119 (insurance agents); *Commonwealth v. Danziger*, 176 Mass. 290 (pawnbrokers); *Commonwealth v. Hana*, 195 Mass. 262 (pedlars); *Commonwealth v. Porn*, 196 Mass. 326, 329 (physicians); *Dewey v. Richardson*, 206 Mass. 430 (makers of small loans). See also *Brazee v. Michigan*, 241 U. S. 340 (employment agen-

cies); *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (dealers in securities). Dealers in milk are now required, for the protection of the public, to obtain a license to sell milk (G. L., c. 94, § 40). Such a requirement is clearly constitutional. Cf. *Commonwealth v. Titcomb*, 229 Mass. 14.

In a few instances our statutes require persons engaged in certain occupations to give bonds for the protection of the public. Requirements of that sort are to be found in statutes relating to collection agencies (G. L., c. 93, §§ 24, 25), pilots (G. L., c. 103, § 14), public warehousemen (G. L., c. 105, §§ 1, 3) and private bankers (G. L., c. 169, §§ 2, 3). A statute of the State of New York requiring persons engaging in the business of receiving deposits of money for safe keeping or for transmission to obtain a license and give a bond was upheld in *Engel v. O'Malley*, 219 U. S. 128.

There seem to be two limitations upon the right of the Legislature, under the police power of the State, to regulate the lawful business of individuals. The first of the two limitations is that the statute must have been passed as a reasonable and appropriate exercise of the police power, and must not be an arbitrary interference with the right of the individual to do business. *Commonwealth v. Strauss*, 191 Mass. 545, 553; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474; *Opinion of the Justices*, 220 Mass. 627; *Lochner v. New York*, 198 U. S. 45, 56; *McLean v. Arkansas*, 211 U. S. 539; *Smith v. Texas*, 233 U. S. 630; *Adams v. Tanner*, 244 U. S. 590. The second of the two limitations is that the regulation must be for the benefit of the public at large. *Commonwealth v. Strauss*, 191 Mass. 545, 553; *Opinion of the Justices*, 220 Mass. 627, 632. In the former case the court said:—

“The question is whether, at the time of the passage of this statute, there were conditions actually existing or reasonably anticipated which called for such legislative intervention in the interest of the general public.”

The rule that the police power of a State is subject to the two limitations stated is clearly enunciated in the case of *Lawton v. Steele*, 152 U. S. 133, 137, in the following language:—

“To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.”

The question whether a statute interfering with the right to carry on business is a proper exercise of the police power is subject to judicial review. *Wyeth v. Cambridge Board of Health*, 200 Mass. 474; *Lawton v. Steele*, 152 U. S. 133, 137; *Lochner v. New York*, 198 U. S. 45, 56, 57; *Adams v. Tanner*, 244 U. S. 590, 596.

An exception to the general rule that a restriction of the right to carry on a lawful occupation must be for the benefit of the general public seems to be made in *Engel v. O'Malley*, 219 U. S. 128. The court there held that the statute was constitutional, although passed, apparently, for the benefit of a particular class, that class being ignorant and helpless depositors, largely foreign, and peculiarly in need of protection by the Legislature. The court said (pp. 136, 137):—

“The quasi-paternal relations shown in argument and by documents to exist between those following the plaintiff's calling and newly-arrived immigrants justifies a supervision more paternal than is needed in ordinary affairs.”

In my judgment, no general principle by which different classes of the community may be singled out for special benefits is to be deduced from this case.

Milk dealers are already required to take out licenses, issued by milk in-

spectors, for the protection of the general public from danger of impure milk. The obvious purpose of the proposed statute is to impose further restrictions upon dealers for the protection of producers of milk by paternalistic provisions requiring persons engaged in the business of distributing milk to secure a rating of some credit agency, or to give bonds the conditions of which are entirely within the discretion of the Commissioner, or to make statements disclosing the condition of their business and then to be subject to a public rating by the Commissioner. If such requirements are constitutional, they may be applied to many industries carried on in the Commonwealth. They are not for the benefit of the community at large, but for the class of milk producers only.

A somewhat similar statute enacted by the Legislature of the State of Maine was held to be unconstitutional in *State v. Latham*, 115 Me. 176. The court there held a statute, requiring persons purchasing cream or milk for the purpose of reselling or manufacturing into other products to pay the producers semimonthly, to be unconstitutional. They said it gave the milk producer a strong club to aid in the collection of debts which is not given to other creditors, that there was no reasonable ground of discrimination between producers of milk and producers of hay, potatoes, oats or other products; that grocery men and dealers in dry goods might with equal reason be given similar aid in collecting their bills; and that the statute was class legislation, with discriminations not based upon any real difference in situation or condition.

I am of opinion that these considerations are equally applicable to the bill before me. If, for the benefit of the milk producers, milk dealers should be required to furnish information as to their financial standing, or a bond, then there is no reason why similar disclosures and undertakings should not be given by dealers in other commodities for the benefit of producers and manufacturers. Such requirements, however, would in large measure hamper the doing of lawful business and arbitrarily restrict persons in their right to carry on such business. In my opinion, such restrictions are outside the line of what is permissible.

The bill may be criticised also because it makes no provision whatever as to the amount of the bond and the conditions under which it is to be given, and because the other requirements could not be met by any person not having an established business. I do not, however, base my ruling on these objections to the proposed measure, but on the fundamental objections which I have stated.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Delegation of Legislative Powers to Administrative Officials — Unfair Discrimination — Regulation of Dealers in Milk and Cream.

- An act authorizing the secretary of the Department of Agriculture to make such rules and regulations as he sees fit for dealers in milk and cream, without other limitation upon the power delegated than that such rules and regulations should be "in the interest of the public health and welfare," would amount to a delegation to an administrative official of the power to enact legislation, and would be contrary to the Constitution of Massachusetts.
- An act for the regulation of dealers in milk and cream, that applies only to dealers "who buy, purchase, receive or collect said milk or cream to be sold, delivered or exposed for sale at a point more than six miles from the point of collection or receipt or purchase," makes an unreasonable and arbitrary discrimination, which would render the act unconstitutional.
- An act, the dominant purpose of which is to impose restrictions upon milk dealers for the financial protection of milk producers, by requiring the former to secure a license and give a bond, the terms of which are wholly within the discretion of an administrative official, would be unconstitutional; that purpose being one which it is beyond the constitutional powers of the Legislature to effectuate.

MAY 22, 1923.

Hon. B. LORING YOUNG, *Speaker, House of Representatives.*

DEAR SIR:— There has been transmitted to me a copy of the order adopted by the House of Representatives requesting my opinion as to whether House Bill No. 334, if enacted into law, would be constitutional. In my opinion, it would not.

The bill is in the following terms:—

“AN ACT TO AUTHORIZE THE SECRETARY OF THE DEPARTMENT OF AGRICULTURE TO MAKE RULES AND REGULATIONS IN REGARD TO THE COLLECTING, RECEIPT AND PURCHASE OF MILK OR CREAM IN CERTAIN INSTANCES.

SECTION 1. The secretary of the department of agriculture shall make and issue rules and regulations to all dealers in milk or cream, who buy, purchase, receive, or collect said milk or cream to be sold, delivered, or exposed for sale, at a point more than six miles from the point of collection or receipt or purchase.

SECTION 2. The secretary of the state board of agriculture may make such examination as he deems fit, into the financial responsibilities of dealers of milk or cream who come under the provisions of this act. And shall by the issuing of a license, or permit to do business, or the requiring of a bond, secure the obedience to such rules and regulations as he may make in the interest of the public health and welfare.

SECTION 3. Any person, firm, partnership or association who shall collect, receive, or buy, cream or milk, the same to be sold, delivered, or exposed for sale, at a point not less than six miles from the point of collection, receipt or purchase, who has not first received from the secretary of the state board of agriculture such license or permit, as the secretary may demand, shall forfeit a sum not to exceed five hundred dollars for each offence.”

The bill purports to give to the secretary of the Department of Agriculture what appears to be undefined and almost unlimited power to “make such rules and regulations” as he sees fit, for dealers in milk and cream. No limitation is imposed upon his discretion beyond the provision contained in the last sentence of section 2, that the rules and regulations made by him shall be “in the interest of the public health and welfare.”

The power to enact laws is vested exclusively in the General Court, except so far as modified by the initiative and referendum amendment, and cannot be surrendered or delegated to any other agency. *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 481; *Opinion of the Justices*, 239 Mass. 606. As was said in the latter opinion (pages 610–611):—

“It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws.

There are no exceptions to the principle that the General Court cannot delegate, surrender or transfer to any other power the function of enacting statutes general in their scope and operation.”

It is true that the Legislature may confer upon administrative officials the power, in the execution of a law, to formulate rules, determine facts and exercise a limited discretion in matters of detail; but the power so granted is not to frame a general rule of law, but to apply a rule, when enacted, to particular situations. In my judgment, the proposed legislation in this respect goes far beyond the permitted line, and would be contrary to the Constitution of this Commonwealth.

Furthermore, the bill is applicable only to dealers “who buy, purchase, receive, or collect said milk or cream to be sold, delivered, or exposed for sale,

at a point more than six miles from the point of collection or receipt or purchase." There appears to be no sound basis for such a distinction between dealers. In my opinion, the discrimination thus made is unreasonable and arbitrary, and therefore unconstitutional. *Commonwealth v. Hana*, 195 Mass. 262, 266, 267; V Op. Atty. Gen. 56.

A further ground of invalidity is that it is manifest, from section 2, that the dominant purpose of the proposed act is to impose restrictions upon milk dealers for the financial protection of milk producers, by requiring persons engaged in the business of distributing milk to secure a license and give a bond, the terms of which are wholly within the discretion of an administrative official. That purpose is one which, in my opinion, it is beyond the constitutional power of the Legislature to effectuate. The matter is considered at length in an opinion rendered by the Attorney General on the constitutionality of House Bill No. 396, at the request of the committee on agriculture.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Insurance — Broker's License — Fee — Veteran — Service in the Army or Navy of the United States "in Time of War or Insurrection" — Punitive Expedition into Mexico.

An applicant for an insurance broker's license under G. L., c. 175, § 166, is not exempt from paying the fee prescribed by said section, on the ground that he was a member of the Massachusetts National Guard, which was in the service of the Federal government during the punitive expedition into Mexico in 1916.

Such service does not constitute service in the Army or Navy of the United States "in time of war or insurrection," within the meaning of said statute.

MAY 22, 1923.

HON. CLARENCE W. HOBBS, *Commissioner of Insurance*.

DEAR SIR: — You request my opinion as to whether a certain applicant for an insurance broker's license under G. L., c. 175, § 166, is exempt from paying the fee prescribed by said section, on the ground that the applicant in question was a member of the Second Regiment, Company C, of the Massachusetts National Guard, which was in the service of the Federal government during the punitive expedition into Mexico several years ago. The applicant contends that his service in this regiment on this occasion entitles him to exemption from the fee.

G. L., c. 175, § 166, provides, in part, as follows: —

"The commissioner may, upon the payment of a fee of ten dollars, issue to any suitable person of full age resident in the commonwealth, or resident in any other state granting brokers' licenses or like privileges to residents of the commonwealth, a license to act as an insurance broker to negotiate, continue or renew contracts of insurance or annuity or pure endowment contracts, or to place risks, or effect insurance with any qualified domestic company or its agents, or with the lawfully constituted and licensed resident agents in this commonwealth of any foreign company duly admitted to issue such policies or contracts therein upon the following conditions: . . . No fee for a license issued hereunder shall be required of any soldier, sailor or marine resident in this commonwealth who has served in the army or navy of the United States in time of war or insurrection and received an honorable discharge therefrom or release from active duty therein, if he presents to the commissioner satisfactory evidence of his identity."

The decision of your question accordingly rests upon whether or not the service of the applicant on the Mexican border constitutes service in the Army or Navy of the United States "in time of war or insurrection," within the meaning of said statutes.

U. S. Const., art. 1, § 8, prescribes the methods of declaring war in the following language:—

“The congress shall have power . . . to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;—to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;—to provide and maintain a navy;—to make rules for the government and regulation of the land and naval forces;—to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;—to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress; . . .”

It is evident that at the time of this emergency in 1916 the Congress of the United States never declared war on Mexico as prescribed in the Constitution. The language of Congress, contained in Public Laws, 1916, c. 211, is indicative of how the emergency was considered at the time, namely:—

“Joint Resolution to authorize the president to draft members of the National Guard and of the organized militia of the several states, territories, and the District of Columbia and members of the National Guard and Militia Reserves into the military service of the United States under certain conditions, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in the opinion of the Congress of the United States an emergency now exists which demands the use of troops in addition to the regular army of the United States and that the President be, and he is hereby, authorized to draft into the military service of the United States . . . any or all members of the National Guard and of the organized militia of the several states, territories and the District of Columbia and any and all members of the National Guard and organized militia reserves, to serve for the period of the emergency, . . .

SEC. 4. That whenever in time of war or public danger or during the emergency declared in section one of this resolution, . . .

Approved, July 1, 1916.”

It is to be observed that in said resolution Congress refers to the 1916 Mexican border service as an emergency and not a war. The wording of U. S. Public Laws, c. 143, enacted July 9, 1918, at page 873, is likewise significant of the manner in which the United States government considers the Mexican border service. This section reads, in part, as follows:—

“That the Secretary of War be, and he is hereby, authorized and directed to procure a bronze medal, . . . to be presented to each of the several officers and enlisted men, . . . of the National Guard who, under the orders of the President of the United States, served . . . in the war with Spain, . . . and who served on the Mexican border in the years nineteen hundred and sixteen and nineteen hundred and seventeen and who are not eligible to receive the Mexican service badge heretofore authorized by the President; . . .”

The phraseology used in bestowing honors upon those who participated in the Mexican border service indicates that a distinction is made between that service which our National Guard performed under the call of the President in 1916, and the service in a war. The statute designates specifically a medal for service “in the war with Spain,” while the medal for those who went into Mexico is called “the Mexican service badge,” and the medal for those who served on the border is specified as the medal for those “who served on the Mexican border.”

There appears to be a sound distinction between the existence of “a state

of war" and "time of war," especially as relating to the government of soldiers and the jurisdiction of military law. Accordingly, it was held in a report of the Judge Advocate General, dated March 21, 1905 (c. 17609), approved by Secretary Taft, that the operations of the expeditionary force in China constituted a condition of war, so that a soldier, who deserted during said operations, deserted in time of war, and therefore was not entitled to the benefit of the statute of limitations.

While it was not contended that at any time the United States and the Imperial Government of China were at war, it was held that we were prosecuting our right to protect our representatives from the body of Chinese who were seeking to capture or kill them, and, accordingly, a state of war existed within the meaning of the statutes; the parties to the war, so far as concerned us, being on the one side the United States and on the other a certain proportion of the inhabitants of the Chinese Empire who were, from representation of the Imperial Chinese Government, in revolt.

Similarly, after the ratification of the treaty of peace with Spain, the United States was regarded as at peace, except locally in the Philippine Islands, where a state of war legally continued until peace was proclaimed therein by the President. See opinion of the Attorney General to Mr. Richard K. Conant, Commissioner of Public Welfare, dated February 28, 1922 (Attorney General's Report, 1922, p. 34).

In an opinion of the Judge Advocate General, dated May 9, 1916, to the Adjutant General (Opinions Judge Advocate General, 99-001), on the following question: "Before what tribunal should a member of the expedition in Mexico be tried for murder or rape?" Judge Advocate General E. H. Crowder says:—

"I am therefore of the opinion that while war is not recognized as existing between the United States and Mexico, the actual conditions under which the field operations in Mexico are being conducted are those of actual war; that within the field of operations of the expeditionary force in Mexico, it is 'time of war' within the meaning of the 58th Article of War; and that the crimes mentioned in that article should therefore be tried by general court-martial in accordance with its provisions. The opposite ruling would give immunity for the capital crimes specified in the 58th Article of War, since it could not have been intended that, under such conditions, United States soldiers would be turned over to the authorities of Mexico for trial."

A similar question arose in California where, in construing section 11¼ of art. XIII of the California State Constitution,—which provides: "The property to the amount of one thousand dollars of every resident in this state who has served in the Army, Navy, Marine Corps or Revenue Marine Service of the United States in time of war, and received an honorable discharge therefrom; . . . shall be exempt from taxation,"—the Attorney General of the State of California ruled that "the trouble on the Mexican border was not a 'war' within the meaning of that constitutional provision." See Digest of Opinions, Judge Advocate General, p. 119, 1919.

I am accordingly of the opinion that the military service of the applicant for the insurance broker's license under G. L., c. 175, § 166, as outlined in your communication, does not exempt him from paying the fee prescribed by said section, inasmuch as said service did not constitute service in the Army or Navy of the United States "in time of war or insurrection," within the meaning of the statute.

Yours very truly,

JAY R. BENTON, Attorney General.

Taxation—Exemption—Property of Grand Army of the Republic.

Under G. L., c. 59, § 5, cl. 5th, as amended by St. 1921, c. 474, and by St. 1922, c. 222, portions of a building belonging to a post of the Grand Army of the Republic, which are let to tenants, are not exempt from taxation, and should be separately valued and taxed.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:— You have requested my opinion, under the provisions of G. L., c. 58, § 1, whether real estate belonging to a post of the Grand Army of the Republic Corporation located in Springfield, the total valuation of which is below \$100,000, is exempt from taxation under G. L., c. 59, § 5, cl. 5th, as amended. The assessors report to you that the income from said real estate "is used entirely in the care and upkeep of the property, interest on loans, insurance, etc." By a subsequent communication you have been advised that the real estate consists of a brick block divided into a number of rooms, some of which are leased at a monthly rental to other fraternal organizations and others are rented at times when not in use.

G. L., c. 59, § 5, cl. 5th, as amended by St. 1921, c. 474, and by St. 1922, c. 222, is as follows:—

"The real and personal estate belonging to or held in trust for the benefit of incorporated organizations of veterans of any war in which the United States has been engaged, to the extent of one hundred thousand dollars, if actually used and occupied by such association, and if the net income from said property is used for charitable purposes; but it shall not be exempt for any year in which such association or the trustees holding for the benefit of such association wilfully omit to bring in to the assessors the list and statement required by section twenty-nine."

Clause 5th is an offshoot from the provisions appearing in G. L., c. 59, § 5, cl. 3rd, which, omitting the exceptions, is as follows:—

"Personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated in the commonwealth, the real estate owned and occupied by them or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase, except as follows: . . ."

In the Public Statutes the provisions corresponding to the above-quoted portion of clause 3rd (P. S., c. 11, § 5, cl. 3rd) were as follows:—

"The personal property of literary, benevolent, charitable, and scientific institutions incorporated within this commonwealth, and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated; but such real estate, when purchased by such a corporation with a view to removal thereto, shall not, prior to such removal, be exempt for a longer period than two years: . . ."

This clause was amended and a provision exempting personal property and real estate of Grand Army and veteran associations was first made by St. 1889, c. 465. Section 1 of that statute is as follows:—

"The personal property of literary, benevolent, charitable and scientific institutions and temperance societies incorporated within this Commonwealth, and the real estate belonging to such institutions occupied by them or their officers for the purposes for which they were incorporated; but such real estate when purchased by such a corporation with a view to removal thereto, shall not, prior to such removal, be exempt for a longer period than two years; but none of the real or personal estate of such corporations organized under general laws shall be exempt when any portion of the income or profits of the business of such corporations is divided among their members or stockholders or used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes. The personal property and real estate belonging to grand army and veteran associations incorporated within this Commonwealth for the purpose of owning property for the use and occupation by posts of the grand army of the republic shall, to the extent of twenty thousand dollars, if the same shall be in actual use and occupation by such associations,

be deemed to be the property of charitable institutions, and exempt from taxation, provided the net income from said property is used for charitable purposes in aid of needy soldiers of the war of the rebellion, and their dependents."

The last sentence, exempting from taxation under the circumstances stated personal property and real estate belonging to Grand Army and veteran associations, appears as a reenactment in R. L., c. 12, § 5, cl. 5th. That provision has reached its present form by successive amendments. So far as I have knowledge, G. L., c. 59, § 5, cl. 5th, has not been construed either by the court or by the Attorney General. Cases involving the construction of the provisions of clause 3rd have, however, frequently been before the court, and the language of the two clauses is sufficiently similar so that those decisions have a considerable bearing on the question concerning which you have asked my opinion.

The particular phrases of the two clauses which, for present purposes, should be set opposite each other and compared are these:—

Clause 3rd. "The real estate owned and occupied by them or their officers for the purposes for which they are incorporated."

Clause 5th. "The real . . . estate belonging to incorporated organizations of veterans . . . , if actually used and occupied by such association, and if the net income from said property is used for charitable purposes."

The cases of which I have spoken emphasize two conditions which must be met in order that real estate may be exempt under clause 3rd. The first is that it must be owned and occupied by the institution, and the second is that it must be occupied for the purpose for which the institution is incorporated. Cases applying to the latter condition are the following: *Chapel of the Good Shepherd v. Boston*, 120 Mass. 212; *Mount Hermon Boys' School v. Gill*, 145 Mass. 139; *Salem Lyceum v. Salem*, 154 Mass. 15; *Phillips Academy v. Andover*, 175 Mass. 118; *Emerson v. Trustees of Milton Academy*, 185 Mass. 414. This condition, obviously, has no application to clause 5th.

But other cases under clause 3rd have dealt with the question— what is a sufficient occupation by an institution to exempt its real estate; and these cases, it seems to me, are directly applicable to the question before me. In *Charlesbank Homes v. Boston*, 218 Mass. 14, the plaintiff was a charitable corporation owning a large model apartment house containing apartments which it leased to tenants for small rents. The court held that the tenants were strictly tenants, who were themselves the occupants of their apartments, that "there must be an actual occupation by the corporation or its officers before the purpose of that occupation can be considered," and that the real estate upon which the tax was imposed was not exempted from taxation, because it was not occupied by the plaintiff corporation but was occupied by its tenants. This case was followed and applied in *Babcock v. Morse Home for Infirm Hebrews*, 225 Mass. 418.

In my opinion, these cases are decisive of the present question. Indeed, the language of clause 5th in that respect is somewhat stronger, because the real estate to be exempt must be "actually used and occupied by such association." It is not sufficient that the net income from the property is used for charitable purposes. That is a second condition imposed by clause 5th to be considered after the first has been met. Cf. *Chapel of the Good Shepherd v. Boston*, 120 Mass. 212; *Salem Lyceum v. Salem*, 154 Mass. 15. But an occasional letting of a hall or other part of a building which is occupied by an institution or association is not inconsistent with an actual occupancy of that part of the building by the institution or association, so long as it remains in control of the premises. *Salem Lyceum v. Salem*, 154 Mass. 15, 17; *Emerson v. Trustees of Milton Academy*, 185 Mass. 414.

For the purpose of taxation those portions of the building which are let to tenants can be separated from the remaining parts occupied by the corporation, and separately valued and taxed. *Cambridge v. County Commissioners*, 114 Mass. 337.

I must advise you, therefore, that, in so far as any of the rooms in the building in question are let to other organizations as tenants, the property so occupied by them is not exempt, but that otherwise the property is exempt from taxation.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Constitutional Law — Drainage Law.

The power of the State to provide for the improvement of low lands and swamps and the assessment of the expense on the owners, either in the exercise of the police power, where the benefits conferred are merely private, or in the exercise of the power of eminent domain and the taxing power, where a public purpose is served, has long been recognized.

MAY 24, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth*.

SIR:— You have transmitted to me for examination and report a bill, entitled "An Act concerning the improvement of low lands and swamps," which amends G. L., c. 252, as amended by St. 1922, c. 349, by striking out sections 1 to 14A, inclusive, and inserting in place thereof sixteen new sections. The general purpose appears to be to make adequate provision for the financing of improvements of wet lands by the formation of reclamation districts, and by giving to such districts authority either to request the county commissioners to pay, in the first instance, the expense involved in making proposed improvements, by issues of county bonds or notes, or to finance such expense by assessments upon the members of the districts or the issuing of district notes or bonds.

The power of the State to make provision for the improvement of meadows and low lands and the assessment of the expense on the owners, either in the exercise of the police power, where the benefits conferred are merely private, or in the exercise of the power of eminent domain and the taxing power, where a public purpose is served, has long been recognized. *Talbot v. Hudson*, 16 Gray, 417; *Lowell v. Boston*, 111 Mass. 454, 464-471; *Turner v. Nye*, 154 Mass. 579; *Wurts v. Hoagland*, 114 U. S. 606; III Op. Atty. Gen. 538. See Mass. Const. Amend. XLIX. In my opinion, the bill, if enacted into law, would be constitutional.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Department of Agriculture — Oleomargarine — Inspection — Peaceable Entry — Search Warrant.

Employees of the Department of Agriculture may, for the purpose of inspection, peaceably enter dwelling houses actually used in the manufacture, transportation or sale of oleomargarine.

Force may probably not be used to gain such entry.

When peaceable entry has been made, reasonable force may probably be used to make inspection.

A search warrant may not be issued to search for oleomargarine.

MAY 24, 1923.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:— You have requested my opinion upon certain questions relative to the powers of employees of your department, under the provisions of G. L., c. 128, § 14, which provides, in part, as follows: —

"The department and its employees shall have access to each place used in the manufacture, transportation or sale of dairy products or imitations thereof, and to each vessel and can used in such manufacture, transportation and sale, . . ."

Under these provisions the department and its employees have access only to places actually used in the manufacture, transportation or sale of dairy products or imitations thereof.

In my opinion, if a dwelling house is used for any of the purposes enumerated in the statute, the department and its employees have a right to enter for the purpose of inspection. *Dunn v. Lowe*, 203 Mass. 516, 517; G. L., c. 94, § 56. This applies, however, only to dwellings actually used for such purposes, and does not apply to dwellings merely suspected of being so used. The cases sustaining the right of officers authorized by statute to make entry for the purpose of inspection refer to peaceable entry. They do not hold that entry may be made by force against the will of the owner or occupant. Whether such entry would be lawful is left in doubt. (See Attorney General's Report, 1921, p. 279.) If, however, peaceable entry in the place used for the manufacture, transportation or sale of oleomargarine has been obtained, the court seems to intimate that an inspection can be made even against the will of the owner. *Commonwealth v. Smith*, 141 Mass. 135, 139. This question, however, is not free from doubt.

By statute, search warrants may be issued to search for certain property. There is no provision authorizing the issuing of a search warrant to search for oleomargarine.

Answering your questions specifically, I am of the opinion that —

(1) Employees of your department may enter dwelling houses used in the manufacture, transportation or sale of oleomargarine for the purpose of inspection, but may not enter dwellings which are merely suspected of being, but are not actually, so used.

(2) Employees may probably not use force to gain entry to a dwelling so used against the will of the owner or occupant.

(3) Employees who gain peaceable entry to a dwelling so used may probably use reasonable force for the purpose of making an inspection when they are within the premises used for the manufacture, transportation or sale of oleomargarine.

(4) Under existing statutes, a search warrant may not be issued to search for oleomargarine.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Bridge over Highway — Ownership of Fee in Public Way.

It is within the constitutional power of the Legislature to enact a law conferring upon a city or town within this Commonwealth the power to grant permits or privileges to private individuals to erect structures which will bridge the public streets connecting premises owned on both sides of the street.

The Legislature has the power to authorize encroachments upon a public street if they deem it proper so to do, whether the municipality or the person seeking the permit or consenting thereto owns the fee of the street.

MAY 24, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth*.

SIR: — You have transmitted to me for examination and report House Bill No. 1491, entitled "An Act authorizing Lever Brothers Company to maintain a bridge over Burleigh Street in the city of Cambridge." The proposed act is as follows: —

"SECTION 1. Upon petition, after seven days' notice inserted in at least one newspaper published in the city of Cambridge and a public hearing thereon, the city council of said city may, by a two thirds vote, with the approval of the mayor, issue a permit to Lever Brothers Company of Cambridge, its successors and assigns, to build and maintain a bridge over Burleigh street in said city, for the purpose of connecting the buildings owned and occupied by said company on said Burleigh street. Said permit shall be granted upon such conditions

and subject to such restrictions as the city council may prescribe. Any permit so issued may be revoked by vote of said city council, with the approval of the mayor.

SECTION 2. Any bridge built under a permit granted as aforesaid shall be constructed and maintained at a height not less than twenty-seven feet, six inches above the grade line of said street, and shall not be more than twenty feet in width, and no part of said bridge or its supports shall rest on the surface of the street.

SECTION 3. If a person sustains bodily injury or damage in his property by reason of the construction or maintenance of said bridge, he may recover damages therefor in an action of tort brought in the superior court against said Lever Brothers Company, or its successors or assigns, within one year after the date of such injury or damage; provided, that such notice of the time, place and cause of the said injury or damage be given to said Lever Brothers Company, or its successors or assigns, by, or on behalf of, the persons sustaining the same as is, under the provisions of chapter eighty-four of the General Laws, valid and sufficient in cases of injury or damage sustained by reason of a defect or a want of repair in or upon a way, if such defect or want of repair is caused by or consists in part of snow or ice, or both. The remedy herein provided shall not be exclusive, but shall be in addition to any other remedy provided by law.

SECTION 4. This act shall take effect upon its passage."

The question is presented whether such an act is within the constitutional power of the Legislature.

In 1911 the House of Representatives, having under consideration certain bills to authorize the construction of bridges over streets in the city of Boston, requested the opinion of the justices of the Supreme Judicial Court on several questions, of which one was whether it was "within the constitutional power of the Legislature to enact a law conferring upon a city or town within this Commonwealth the power to grant permits or privileges to private individuals to erect structures which will bridge the public streets connecting premises owned on both sides of the street." *Opinion of the Justices*, 208 Mass. 603, 604. To this question the justices answered (p. 606): "Yes, if the private individuals own all the land upon or over which the structures are to be erected."

In the course of their opinion the justices gave the following reasons for their answer (pp. 605, 606):

"The Legislature represents the public, and at any time it may enlarge or limit public rights thus acquired, having due regard to private rights of property secured by the Constitution to all the people. *New England Telephone & Telegraph Co. v. Boston Terminal Co.* 182 Mass. 397, 400. So far as the rights of the public in the street or way are concerned, the Legislature can do anything referred to in any of the questions, if the proposed legislation seems reasonable and proper.

So far as the abutters are concerned, the Legislature, without their consent, can do or authorize nothing that takes away or impairs any valuable right in their property, unless the taking is for a public use, with compensation for that which is taken.

As against an adjoining landowner, one has no right to have the adjacent premises remain open for the admission of light and air. In the cases referred to in the first three questions, we assume that the owners of abutting land, upon or over which the structure would be erected, would desire the erection and would consent to it. It would, therefore, be made in their right, as well as with authority from the Legislature to make an encroachment upon the previously existing public right. The existence of this private right of the owner of the fee of the land over which the structure would be erected would preclude the owners of adjacent lands from having damage for an obstruction of light and air, possibly affecting their property abutting on other adjacent parts of the street."

The reasons thus stated involve three fundamental propositions: First, that so far as the rights of the public are concerned the Legislature can authorize the granting of a permit to private individuals to erect a bridge across a public street, if it seems to them reasonable and proper so to do (see *Union Inst. for Savings v. Boston*, 224 Mass. 286); second, that the Legislature cannot authorize the taking of private rights in property unless the taking is for a public use, with adequate provision for compensation; and third, that no taking of any such right is made by the erection of a bridge across a public street except as against owners of the land upon or over which the structure is erected, and, that interference with light, air and prospect does not constitute the taking of an easement in adjoining land for which compensation must be made. See *Peabody v. Boston & Providence R.R. Corp.*, 181 Mass. 76; *McKeon v. New England R.R. Co.*, 199 Mass. 292, 295, 296.

Upon receipt of the answer of the justices the House of Representatives propounded further questions to them. *Opinion of the Justices*, 208 Mass. 625. Two of their questions were as follows (p. 627):—

"6. Would the provisions of said House Bill No. 817 be constitutional and would the provisions of the bill which forms the subject of the last question be constitutional if these bills were amended by striking out section three of the former bill and section four of the latter bill and substituting in the place of each of said sections the following section: 'Any person owning property, or doing business in property abutting on Avon Street, whose property or business is damaged either through interference with light and air or otherwise by the construction or maintenance of a bridge constructed in accordance with the provisions of section one of this act, may have damages therefor determined by a jury upon petition to the Superior Court filed against the grantees of said permit within one year after the permit for the erection of said bridge is approved by the mayor, as provided in section one of this act.'

7. If at any time after the enactment of such a bill and the issue of such permit and the construction or beginning of construction of such bridge under said permit any person using said street and passing under said bridge shall suffer any injury either to his person or to his property on account of the construction or maintenance of said bridge, as by the falling of material used in the construction of said bridge or by the falling of snow or ice from said bridge, will the city of Boston be liable for said injury?"

To these questions the justices answered, in part, as follows (p. 630):

"The law covering the matters to which these questions relate was very fully stated in an *Opinion of the Justices* communicated to the House of Representatives on April 17, 1911, *ante*, 603, which appears by your order to be before the Honorable Senate.

It is elementary doctrine that such an amendment as is proposed, providing that the damages to persons injured in their property shall be paid by the grantees of the permit, who are private parties, would not secure compensation to such persons in the manner required by the Constitution and as to them, in reference to damages to which they might be entitled under the Constitution, would render the statute invalid. It is equally elementary law that cities and towns are not liable in damages to persons for injuries received from unsafe conditions, while travelling on a highway, unless there is a statute imposing a liability for such conditions."

In fact, the substituted section proposed in the sixth question was open not only to the objection pointed out by the justices, but also to the objection that since the buildings, on opposite sides of the street, to be connected by the proposed bridge were owned by the petitioners, there could be no person entitled to damages by reason of any taking, as the justices showed in their former opinion.

A bill containing similar provisions was held by my predecessor to be open to the objections stated in the latter opinion. Attorney General's Report, 1921, p. 50. Section 3 of that bill provided:—

"Any person whose property is damaged by reason of the construction or maintenance of the bridge as aforesaid may have his damages determined by a jury, upon petition filed in the superior court within one year after the approval of the permit by the mayor as above provided, and the damages when so determined shall be paid by the said George L. Brownell."

The form of the bill was afterwards amended, and as so amended was approved by Your Excellency. St. 1921, c. 330. Section 3 of the act as passed is in form precisely similar to section 3 of the bill before me. It does not purport to provide for recovery of compensation by any one for a taking in the exercise of the power of eminent domain, but merely to provide for the recovery of damages in an action of tort against the petitioner, occasioned to any person who suffers an injury to a legal right by reason of the construction or maintenance of the bridge.

In *Opinion of the Justices*, 208 Mass. 603, 606, their affirmative answer was on the hypothesis that the private individuals who were the petitioners owned all the land upon or over which the structures were to be erected. The justices assumed, apparently, that they owned the fee in the street. So in the case to which St. 1921, c. 330, relates, the petitioner was authorized to build and maintain a bridge over such portions only of the street as were owned by him or by the corporation owning the land on the opposite side of the street, to whose written consent the permit was subject. In the proposed act it does not appear that the petitioner owns the fee of the street. In my opinion, however, it is not necessary that it should. In accordance with the general principle stated by the justices in the first opinion referred to, the Legislature has power to authorize encroachments upon a public street if it deems it proper so to do, whether the municipality or the person seeking the permit or consenting thereto owns the fee of the street. St. 1921, c. 331, authorizes a permit for the erection of a bridge across a street for the purpose of connecting buildings owned and occupied by the corporation on opposite sides of the street, without any reference to the ownership of the fee in the street.

I advise you, therefore, that, in my opinion, there is no constitutional defect in the proposed act.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Legislative Power as to Courts — District Judges sitting in the Superior Court.

It is within the constitutional power of the Legislature to modify, enlarge, diminish or transfer the jurisdiction of all courts subordinate to the Supreme Judicial Court.

An act providing that district judges shall sit at the trial of certain criminal cases in the Superior Court, when designated by the chief justice thereof, is constitutional.

MAY 25, 1923.

His Excellency CHANNING H. COX, *Governor of the Commonwealth*.

SIR:— You request me to consider House Bill No. 1466, entitled "An Act to provide for the more prompt disposition of criminal cases in the Superior Court."

Mass. Const., c. I, § I, art. III, provides, in part:—

"The general court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be held in the name of the commonwealth, for the hearing, trying, and determining of all manner of crimes, offences, pleas, processes, complaints, actions, matters, causes, and things, whatsoever, arising or happening within the commonwealth, . . . whether the same be criminal or civil, . . ."

Article IV of that section, provides, in part:—

" . . . full power and authority are hereby given and granted to the said general court, . . . to set forth the several duties, powers, and limits, of the

several civil and military officers of this commonwealth, . . . so as the same be not repugnant or contrary to this constitution; . . ."

In *Dearborn v. Ames*, 8 Gray, 1, 14, the court said:—

"The power to erect courts and judicatories, coupled with an authority to define and limit the powers and duties of all civil officers, gives power to the legislature to fix and limit the jurisdiction of all such courts and judicatories. . . .

Under this power to erect judicatories, we think it has been the practice of the legislature, from the adoption of the Constitution, to erect and establish new judicatories, other than the supreme judicial court, to transfer jurisdiction from one court to another, in part or in whole, and to enlarge, restrain and regulate the jurisdiction of all courts."

In *Russell v. Howe*, 12 Gray, 147, 153, the court said:—

"The probate court was a judiciary under the Constitution, and its jurisdiction might be modified, enlarged, diminished or transferred, *in the same manner as the jurisdiction of all other courts subordinate to the supreme judicial court.*"

The proposed bill enlarges the jurisdiction of justices of district courts when assigned by the chief justice of the Superior Court. It is within the constitutional power of the Legislature so to provide. I am therefore of the opinion that the proposed bill, if enacted, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Public Health — Licenses — Cold Storage Warehouse.

G. L., c. 94, § 66, providing that "no person shall maintain a cold storage or refrigerating warehouse without a license issued by the department of public health," requires a separate license for each plant operated.

Whether a group of buildings may fairly be considered to constitute but a single plant, and therefore to require but a single license, is a question of fact to be decided upon the concrete circumstances of each case.

MAY 31, 1923.

EUGENE R. KELLEY, M.D., *Commissioner of Public Health.*

DEAR SIR:—My opinion is requested relative to the licensing of cold storage warehouses under the provisions of G. L., c. 94, § 66.

The text of this act is as follows:—

"No person shall maintain a cold storage or refrigerating warehouse without a license issued by the department of public health. Any person desiring such a license may make written application to such department, stating the situation of his plant. Upon receipt of the application the said department shall cause an examination of the sanitary condition of the plant to be made, and if it is found to be in a sanitary condition and otherwise properly equipped for the business of cold storage, said department upon receipt of a license fee of ten dollars shall cause a license to be issued authorizing the applicant to maintain therein a cold storage or refrigerating warehouse for one year. If any warehouse or any part thereof, licensed under this section, is deemed by said department to be conducted in an unsanitary manner, it shall close such warehouse or part thereof, until it has been put in sanitary condition, and said department may also suspend the license if the required changes are not made within a reasonable time. Each such licensee shall submit to the department of public health on or before the fifteenth day of each month, a report on a printed form to be provided by said department, stating the quantities of articles of food placed in cold storage during the month preceding, and also the quantities of articles of food held on the first day of the month in which the report is filed or such other day as the commissioner of public health may from time to time fix."

The act does not provide specifically for a case where the same person maintains more than one cold storage warehouse. Under the statute, however, the licensee, in order to secure a license, must state in his application "the situation of his plant," in order that the department may then "cause an examination of the sanitary condition of the plant to be made." "If any warehouse or any part thereof, licensed under this section, is deemed by said department to be conducted in an unsanitary manner, it shall close such warehouse or part thereof, until it has been put in sanitary condition, . . ."

In my opinion, these provisions indicate that a separate license is required for each plant operated. Whether a group of buildings may fairly be considered to constitute a single plant, and therefor to require but a single license, is a question of fact, to be decided upon the concrete circumstances of each case. When all the buildings in question are operated from a single power plant, this fact would, in my opinion, be of importance in determining whether or not they may properly be looked upon as a single plant. It cannot be said, however, that the absence of this feature necessarily and as a matter of law would require a finding that the buildings were not fairly to be deemed a unit. The question is one of fact in each instance.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Prisoners — Minimum and Maximum Sentences — Parole.

A sentence for a minimum and maximum term is in effect a sentence for the maximum term.

A prisoner in the Reformatory for Women, under a sentence of not less than five years and not more than eight years, is eligible for parole after serving three years and eleven months.

JUNE 1, 1923.

Hon. SANFORD BATES, *Commissioner of Correction*.

DEAR SIR:— You have requested my opinion as to when a female prisoner is eligible for parole upon the following facts: A female was committed to the Reformatory for Women on two separate commitments, one upon a sentence of not less than five years and a day and not more than eight years, for larceny, and the other upon a sentence of two years, for forgery and uttering. The two sentences run concurrently.

I am of the opinion that she is not eligible for parole upon the sentence of two years, since at the same time she is serving the longer sentence, upon which, under the present rules, she would not be eligible for parole at any time within the two-year period.

G. L., c. 279, § 18, provides:—

"A female sentenced to the reformatory for women for larceny or any felony may be held therein for not more than five years, unless she is sentenced for a longer term, in which case she may be held therein for such longer term; . . ."

A sentence for a minimum and maximum term is in effect a sentence for the maximum fixed by the court. *Commonwealth v. Brown*, 167 Mass. 144, 146; *Oliver v. Oliver*, 169 Mass. 592, 593; *Ex parte Spencer*, 228 U. S. 652, 661; *Adams v. Russell*, 229 U. S. 353, 362. In *Oliver v. Oliver*, *supra*, where the sentence was for not less than three nor more than six years, the court said, at page 594:—

"The sentences must be deemed to be, for the purpose contemplated by this statute, either for the maximum or for the minimum term. They are indeterminate, and they cannot be treated as sentences for any intermediate term. In the interval between the two dates fixed is the convict under sentence to imprisonment or not? He is all the time in the custody of the law under his sentence. He is in confinement at hard labor, unless for good reasons a permit to be at liberty on certain terms and conditions is given to him by the commissioners of prisons. If he obtains such a permit, it may be revoked at any time, and if any of its terms or conditions are broken it becomes *ipso facto*

void. He is certainly under sentence during the whole of the maximum term. After the expiration of the minimum term the rigor of the sentence is mitigated by the law. If he obtains a permit, which is not revoked, and observes its terms and conditions, he is not confined at hard labor, but it seems more nearly correct to say that his sentence to confinement at hard labor is for the maximum term than to say that it is only for the minimum term."

G. L., c. 127, § 136, provides:—

"If it appears to the board of parole that a prisoner in the reformatory for women . . . has reformed, it may grant her a permit to be at liberty during the remainder of the term for which she might be held therein."

Acting under this statute, the Board of Parole established Rule 10 for prisoners in the Reformatory, which provides:—

"An inmate committed to the Reformatory upon a sentence of over five years shall have the right to make an application for a hearing on the question of his parole one month before he shall have served one-half of his sentence."

I am therefore of the opinion that the prisoner's sentence is eight years, and that under the present rule she may apply for a hearing on the question of parole after serving three years and eleven months.

I call your attention to G. L., c. 127, § 131, which provides that a prisoner in the State Prison may be paroled after he has served two-thirds of the minimum term, provided he has served at least two and one-half years. In the instant case, if the prisoner were a male, sentenced to the State Prison, he would be eligible for parole in three years and four months. Women cannot be sent to the State Prison, and it would seem that the intent of the Legislature was to make them subject to parole sooner than prisoners in the State Prison. Under the existing rule, however, it may frequently happen that women must serve a proportionately longer period of time before being eligible for parole.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Civil Service — Veteran — Service in the Army or Navy of the United States — Discharge from Draft.

A person is not a "veteran," within the meaning of G. L., c. 31, § 21, who was discharged from the draft at Camp Devens, on October 12, 1917, by reason of physical disability, such person having been inducted into the service from the jurisdiction of the local board for No. 21, Boston, on October 1, 1917.

Discharge from the draft is not the equivalent of an honorable discharge from service in the Army of the United States.

JUNE 11, 1923.

PAYSON DANA, Esq., *Commissioner of Civil Service*.

DEAR SIR:— You request my opinion on the following question: Is a person a "veteran," within the meaning of G. L., c. 31, § 21, who was discharged from the draft at Camp Devens, on October 12, 1917, by reason of physical disability, said person having been inducted into the service from the jurisdiction of the local board for No. 21, Boston, on October 1, 1917?

G. L., c. 31, deals with the civil service. Section 21 thereof defines a "veteran" as follows:—

"The word 'veteran' as used in this chapter shall mean any person who has served in the army, navy or marine corps of the United States in time of war or insurrection and has been honorably discharged from such service or released from active duty therein, or who distinguished himself by gallant or heroic conduct while serving in the army or navy of the United States and has received a medal of honor from the president of the United States, pro-

vided that such person was a citizen of the commonwealth at the time of his induction into such service or has since acquired a settlement therein; and provided further that any such person who at the time of entering said service had declared his intention to become a subject or citizen of the United States and withdrew such intention under the provisions of the act of congress approved July ninth, nineteen hundred and eighteen, and any person designated as a conscientious objector upon his discharge, shall not be deemed a 'veteran' within the meaning of this chapter."

The answer to your question turns upon what is meant by "service" in the Army, Navy or Marine Corps of the United States in time of war or insurrection, and "honorable discharge" therefrom; in other words, does the phrase "honorably discharged" mean an honorable discharge as that expression is commonly understood in military terms, or does it mean any discharge other than a dishonorable one?

The meaning of such expressions as "entering the service," "drafted into the service" or "actually mustered into the service" has been interpreted and decided in several cases immediately following the Civil War.

In the case of *French v. Sangerville* (1867), 55 Me. 69, the court said:—

"It is contended that a drafted man is actually mustered into the military service as soon as drafted and notified of the fact. In a certain sense he is, undoubtedly, under martial law, so far that he may be treated as a deserter if he does not report himself to the provost marshal's office. But is he thereby actually mustered in, within the meaning of the statute? . . . When a drafted man reports himself, he must first be examined by the surgeon, as to his physical fitness. If found sound and able-bodied, he is then mustered actually into the military service . . . Would it be seriously contended that a drafted man who had simply reported and been found unfit for the service, and had thereupon been released from all claim on him under the draft, had been actually mustered into the military service, and was therefore entitled to be paid, under this provision of the act of ratification? . . . The legislature certainly intended something beyond a mere drafting into service, or they would have simply said 'all drafted men' . . . We are satisfied that the case before us is not within the clause of ratification, because the plaintiff has not shown that he was ever 'actually mustered into the military service of the United States.'"

See also *Mahoney v. Lincolnville* (1868), 56 Me. 450.

In *Reed v. Sharon* (1868), 35 Conn. 191, it was held that one was not drafted into the service until he had had a physical examination and had been accepted by the board of enrollment; and that one was not so drafted merely because he was notified by the proper authorities that he had been drafted into the military service of the United States and required to appear at a specified date for examination. See also *Gregg v. Jamison* (1867), 55 Pa. 468.

Under a statute authorizing a bounty to men "drafted into the military service of the United States and serving therein," it was held that one was not entitled to a bounty who was drafted in February, 1865, reported to the deputy provost marshal, was examined and held to service, and then furloughed, and discharged in April, 1865, at the close of the war, without being mustered into service. See *Flynn v. Allen* (1865), 26 Phila. Leg. Int. 37.

In *Bickford v. Brooksville* (1867), 55 Me. 89, it was held that one was not entitled to a bounty, who, at the time he was drafted from the town, was working in the navy yard, reported to the provost marshal's office, where he was examined and accepted, was furloughed, returned to the navy yard and remained at work, and was finally discharged because the town's quota was filled by volunteers, such person not being a "drafted" man within the meaning of a vote of a town awarding \$350 "for each drafted man to fill our quota."

The proposition that one is not mustered into the military or naval service of the United States merely because he is drafted, reports pursuant to a notice to report at a certain rendezvous under pain of being deemed a deserter and

subject to the penalty prescribed therefor by the rules and articles of war, is apparently well settled.

In construing the soldiers' bonus law this department has ruled that the provisions of Gen. St. 1919, c. 283, granting a war bonus to men honorably discharged from the service of the United States in the World War do not apply to drafted men who were passed by the draft board, sent to Army camps and there discharged because physically disqualified, or to men discharged on account of bad conduct or similar ground. See V Op. Atty. Gen. 405. In said opinion the following language was used:—

"In my judgment, . . . it cannot be said that the class of men to which you refer was enlisted in or had been enrolled in or had been mustered into the Federal service, within the meaning of this statute. These men were never in the army of the United States to a sufficient extent to be discharged from it. In my opinion, it cannot be said that they performed 'services . . . in the army . . . of the United States' of the character intended by this statute to be recognized. Accordingly, I must advise you that men of the class to which you refer are not entitled to the benefits of the statute."

So also this department has ruled that, in view of the express provision of Gen. St. 1919, c. 290, § 9, which incorporates into said section 9 the limitations prescribed by section 3 of said act, a man enrolled in the United States naval reserve force, who is called for active duty but who is almost immediately discharged for a disability not incurred in said service, is not entitled to military aid in the first, second, third or fourth classes defined by said section 9. See V Op. Atty. Gen. 471.

A former Attorney General has also ruled that the exemption from all poll taxes granted by Gen. St. 1919, c. 9, does not include persons who were summoned in the draft and reported for duty but were discharged before they were mustered into the Federal service. See V Op. Atty. Gen. 601.

A similar conclusion was reached by the Supreme Court of Rhode Island on substantially the same set of facts as those involved in the case under consideration. In the case of *Gilbert John Bannister v. Soldiers' Bonus Board*, 43 R. I. 346, decided February 11, 1921, the court held that a draftee who, in obedience to orders from the War Department, presented himself at the designated place for induction into the service, is not, where he is sent to a military camp and rejected from the draft ten days later because of physical disability, within the operation of a statute providing a bonus for each enlisted man "who is mustered into the Federal service and reports for active duty." In that case the court used the following language:—

"We assume that the petitioner was passed by the local draft board, and, from the above order directing him to present himself at the State House, it would appear that he was inducted into the military service, but it was the intention of the Selective Service Law (U. S. Comp. Stat. §§ 2044a-2044k, 9 Fed. Stat. Anno. 2d ed. pp. 1136-1163) that each person inducted into the military service should be finally examined and accepted or discharged upon his arrival at the mobilization camp. Section 166 of the Selective Service Regulations prescribed by the President under the authority vested in him by the terms of the Selective Service Law provides that all men inducted into the service shall at the mobilization camp be finally accepted or rejected within fifteen days after the date of the registrant's induction into service. The petitioner was 'inducted' into the military service, but he was not 'mustered' into the service.

To entitle the petitioner to a bonus from the state he must have been recognized by the War or Navy Department as an enlisted man; he must have been 'mustered into the Federal service' and he must have reported for active duty. The petitioner never had an opportunity to report for active duty. His experience with the draft never brought him to the stage where it was possible for the Army or Navy Department to order him to attack the enemy or endure other perils of war. He was not called for active duty.

His name was selected by lot as were the names of all other persons who were called by the draft, and he, like the others, was ordered to report to a camp for final examination to determine his fitness for active duty. Had the petitioner successfully passed the physical examination, he probably would have been enrolled as a member of the Army and assigned to active duty in a training camp.

When the petitioner was drafted, or, in other words, inducted into the service, he became subject to military law and regulations. Section 6 of the Act of May 18, 1917, entitled 'An Act to authorize the President to increase temporarily the military establishment of the United States,' provides that any person who fails or neglects to perform any duty required of him in the execution of said act shall 'if subject to military law . . . be tried by court-martial and suffer such punishment as a court-martial may direct.' It was the intention of Congress, as expressed in the two acts last above cited, that a person should be subject to the military law during the time intervening between his induction into the service and his final acceptance or rejection. The purpose evidently was to prevent the government, in the emergency, from being hampered by the delays incident to procedure in the civil courts. A person, however, may be subject to military law and regulations without being a member of the Army, and it does not follow that a man must be a member of the Army to be the subject of court-martial."

I am consequently of the opinion that the "discharge from draft" which was received by the person referred to in your inquiry is not the equivalent of an honorable discharge from service in the Army of the United States, and that the person is accordingly not a "veteran," within the meaning of G. L., c. 31, § 21.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Prisoners — Application for Parole — Hearings.

A prisoner alone may apply for a permit to be at liberty.

Whether the Board of Parole will hear persons other than the prisoner, in his behalf, is a matter within its own discretion.

JUNE 12, 1923.

Board of Parole.

GENTLEMEN:— You have requested my opinion as to whether, under the provisions of G. L., c. 127, §§ 131 and 132, any person other than the prisoner may make application for a permit to be at liberty, and whether any person other than the prisoner may appear before the Board of Parole to speak in his behalf.

G. L., c. 127, § 131, confers power upon the Board, under certain circumstances, to grant a special permit to be at liberty to a prisoner confined in the State Prison.

Section 132 provides:—

"Any prisoner eligible for a release in accordance with the preceding section may apply for a permit to be at liberty as therein provided. The application shall be transmitted to the board of parole by the warden of the state prison or the superintendent of the Massachusetts reformatory, who shall send with it a report of the prisoner's conduct and industry, a statement concerning the prisoner's health, and any other information respecting the case which the warden or superintendent can supply; and the board shall not entertain any other form of application or petition for the release of a prisoner under the preceding section."

I am of the opinion that the prisoner alone may apply for a permit to be at liberty, and that an application from any other source may not be entertained by the Board. There is nothing in the statute which prohibits the

Board from permitting persons other than the prisoner to appear before it and speak in his behalf, *after* his application for a permit to be at liberty has been transmitted to the Board, in accordance with section 132. Whether the Board will hear such persons is within its own discretion.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Savings Banks — Savings Departments of Trust Companies — Authorized Investments — Construction of Indenture with Relation to Bond Issues.

Certain railroad bonds, the authorized issue of which, by the terms of the indenture, can never exceed, with all outstanding debts, three times the value of the capital stock, are a legal investment for savings banks and savings departments of trust companies.

JUNE 23, 1923.

MR. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR:— You have requested my opinion as to whether the Louisville & Nashville Railroad Company first and refunding mortgage bonds, dated Aug. 1, 1921, are a legal investment for the savings banks and savings departments of trust companies of this Commonwealth, in view, more particularly, of the fact that an indenture, dated Nov. 21, 1922, supplemental to the said first and refunding mortgage, has been made by the Louisville & Nashville Railroad Company and the trustee named in the original mortgage.

For the purposes of your question, the savings departments of trust companies stand in the same position as savings banks, as it is provided by G. L., c. 172, § 61, that all investments of the savings departments of trust companies shall be made in accordance with the law governing the investment of deposits in savings banks.

Prior to 1908 all the railroads whose bonds were then authorized for investment of the character considered here were mentioned specifically in the statutes, with the exception of the general laws for the authorization of bonds of railroads incorporated in this State and in New England. A committee, consisting of the Bank Commissioner, the Treasurer and Receiver General and the Commissioner of Corporations, made a report, with suggestions of changes in the general laws of this State relating to savings banks. They completely redrafted the paragraph relating to railroad bonds in three divisions, all of which were entirely general in their terms, viz.: (1) Massachusetts railroads; (2) New England railroads; (3) other railroads. Referring to the third division, the committee said:—

“In providing for the admission of the bonds of railroads operating in any of the United States we have felt it necessary to make much stricter requirements than in the case of railroads in New England, where railroad conditions are more established. Severe tests have, therefore, been provided for both the corporation and the bonds themselves.”

The statutory provisions as enacted by the 1908 Legislature, based upon the aforesaid report, appear practically verbatim in the General Laws in force at this time.

G. L., c. 168, § 54, subdivision 3rd, (g) (3), authorizes the investment by savings banks in refunding mortgage bonds complying with certain conditions. Said section 54, subdivision 3rd, (e) (5), provides as follows:—

“No bonds shall be made a legal investment by subdivision (g) in case the mortgage securing the same shall authorize a total issue of bonds which, together with all *outstanding prior debts* of the issuing or assuming corporation, including all bonds not issued that may legally be issued under any of its prior mortgages or of its assumed prior mortgages, after deducting therefrom, in case of a refunding mortgage, the bonds reserved under the provisions of said mortgage to retire prior lien debts at maturity, shall exceed three times the outstanding capital stock of said corporation at the date of such investment.”

Section 1 of article one of the Louisville & Nashville first and refunding mortgage provides as follows:—

"The authorized issue of bonds under this indenture is limited so that the amount thereof at any one time outstanding, *together with all other then outstanding prior debt, as hereinafter defined*, of the Railroad Company, after deducting therefrom the amount of all bonds reserved under the provisions of this indenture to retire prior debt at or before maturity, shall never exceed three times the par value of the then outstanding fully paid capital stock of the Railroad Company or of a successor corporation."

The second paragraph following defines "prior debt" as follows:—

"In determining at any time and from time to time the limit of the authorized issue of bonds hereunder, the prior debt so to be added is that which at the time may remain unpaid on the principal of the bonds specified in Section 3 of Article Three of this indenture, and of the bonds which hereafter shall be included in prior debt under Sections 4 and 5 of said Article Three (but not including any of either class of said bonds deposited with and held by the Trustee as provided in Section 6 of said Article Three) and the 'reserved bonds' to be deducted are the bonds, issuable under this indenture, which at that time are reserved for the purpose of refunding prior debt as provided in said Article Three. The term 'prior debt,' wherever used in this indenture, means the aggregate bonded indebtedness ascertained and determined in accordance with this paragraph of this Section 1 of Article One of this indenture."

The answer to your inquiry rests upon the interpretation of the words "outstanding prior debts" as found in the statute [G. L., c. 168, § 54, subdivision 3rd, (e) (5) and (6)]. Are these words to be construed to mean all pre-existing debts or debts prior in time, or do they mean prior lien debts; in other words, debts secured by a prior lien on the property covered?

The bonds specified in section 3 of article three of the Louisville & Nashville first and refunding mortgage are bonds for the retirement of which bonds under the mortgage are reserved, amounting to \$176,260,500, being all, with the exception of one, underlying mortgage bonds secured by prior lien on the property covered by the refunding mortgage.

The present outstanding capital stock of the Louisville & Nashville Railroad being \$72,000,000, the authorized issue under the mortgage, under the interpretation that the words "prior debts" mean "prior lien debts," following the method described in subdivision (e) (5) of the Massachusetts statute, would be: Authorized issue X, plus all outstanding prior debts (\$176,260,500), minus the bonds reserved to retire prior lien debts (\$176,260,500), equals three times the capital stock, or \$216,000,000. In other words, the total amount of bonds that may be issued under the mortgage is \$216,000,000. However, it is to be noted that in addition to the \$176,260,500 underlying bonds for which bonds are reserved under the mortgage in question, the Louisville & Nashville Railroad has outstanding the following issues of bonds:

\$3,500,000 Southeast & St. Louis Division first 6s, 1971.

3,000,000 Southeast & St. Louis Division second 3s, 1980.

These bonds are direct obligations of the Louisville & Nashville Railroad secured by mortgage on the property of the Southeast & St. Louis Railway, which is a separate corporation. As the property is not owned by the Louisville & Nashville Railroad, the mortgage in question does not cover the property, and therefore the railroad is not obliged to reserve bonds under the mortgage for their retirement. But if the words "prior debts," as found in our statute, are to be construed as meaning pre-existing debts or debts prior in time, these outstanding bonds would have to be considered in computing the authorized issue of the mortgage. Construing the words to mean pre-existing debts, the authorized issue would be as follows: Authorized issue X, plus all outstanding prior debts (\$176,260,500 plus \$3,500,000 Southeast & St. Louis

Division first 6s, plus \$3,000,000 Southeast & St. Louis Division second 3s), minus bonds reserved to retire prior lien debts at maturity (\$176,260,500), equals three times the capital stock, or \$216,000,000. This amount is \$209,500,000, as follows:—

Authorized issue X	\$209,500,000
Plus prior debts	182,760,500
	<hr/>
	\$392,260,500
Minus amount reserved to retire prior lien debts	176,260,500
	<hr/>
	\$216,000,000

In my opinion, the Legislature intended that there should be a fixed relation of the total debts of a railroad corporation to its capital stock, and not merely the prior lien debts to the bonds in question; that the words "outstanding prior debts" mean all pre-existing debts of the railroad corporation; that, in the given case, this interpretation requires that the outstanding issue of the Southeast & St. Louis Division railroad bonds, totalling \$6,500,000, are to be included in the debts in computing the amount of bonds authorized by the terms of the mortgage. Following this interpretation, the Louisville & Nashville Railroad Company mortgage authorizes \$6,500,000 of bonds in excess of the limit set down by subdivision (e) (5) and (6).

In view of the foregoing considerations, I am of the opinion that the bonds in question were not legal investments for the savings banks nor for the savings departments of trust companies of this Commonwealth under the terms of the first and refunding mortgage as originally drawn. However, the indenture made on Nov. 1, 1922, already referred to, completely changes the situation. In this supplemental indenture an attempt has been made by the Louisville & Nashville Railroad to cure the defect in the position of its bonds by modifying the terms of the first mortgage so that the words "prior debts," used in said mortgage, shall be interpreted in their natural significance as "antecedent debts," and not as defined in section 1 of article one (p. 58) of the first mortgage itself, so as to mean only debts "superior" to others because secured by a lien on the property of the railroad, and in this attempt the railroad appears to have been successful.

The supplemental indenture appears to have been properly issued, for, under the provisions of article eleven of the first mortgage, the railroad company, when authorized by its board of directors and the trustee under such mortgage, had the authority to enter into a supplemental indenture which shall thereafter form part of the original indenture and which may deal with almost any portion of the indenture itself.

"(a) To convey, transfer and assign to the Trustee and to subject to the lien of this indenture, with the same force and effect as though included in the granting clause hereof, additional railroads or leases thereof, bonds, shares of capital stock, equipment and any other property then owned by the Railroad Company, acquired by it through consolidation or merger or by purchase, or otherwise. The prior debt secured by mortgage to which any lines of railroad so conveyed shall be subject, shall be specified and described and the amount thereof stated in such supplemental indenture; and the prior debt so specified and described shall thereupon and thereafter be deemed and taken to be included in Section 4 of Article Three hereof.

(b) To specify and state the bonded indebtedness, and the amount thereof, of any company which hereafter shall be consolidated with or merged into, or whose railroad property hereafter shall be acquired by, the Railroad Company, although such bonded indebtedness may not be secured by mortgage, which bonded indebtedness is to be regarded as forming a part of the prior debt of the Railroad Company, and to retire which, at or before maturity, bonds are to be reserved as provided in Section 5 of Article Three hereof.

(c) To evidence the succession of another corporation to the Railroad Com-

pany, or successive successions, and the assumption by a successor corporation of the covenants and obligations of the Railroad Company under this indenture.

(d) To make provision for the appointment of a co-trustee as hereinafter provided for in Section 6 of Article Twelve of this indenture.

(e) To make such provision as may be necessary or desirable with respect to any series of bonds, if any, issued under this indenture, convertible into shares of the capital stock of the Railroad Company.

(f) To provide for the creation and maintenance of a sinking fund for the redemption before maturity, or the payment, of all or any part of any series of bonds issued hereunder, and to constitute a default in respect of such sinking fund an event of default with the same force and effect as if the same had been so denominated in Section 2 of Article Seven hereof.

(g) To add to the limitations on the authorized amount, issue and purposes of issue of bonds issuable under Section 7 of Article Three of this indenture, other than the limitations herein provided for.

(h) To make provision in regard to matters or questions arising under this indenture as may be necessary or desirable and not inconsistent with this indenture." (P. 156, first mortgage.)

These provisions are certainly broad enough to permit the supplemental indenture to deal with the limitation of the amount of bonds which may be issued.

The supplemental indenture so made is of interest only because it modifies the first mortgage by altering the definition of the words "prior debts" as it was contained in the first draft, so that the words are specifically said to include every outstanding prior debt, whether a prior debt as defined by the first mortgage or not. It further stipulates that the authorized total issue of bonds "shall at all times be limited to an amount, which, together with all outstanding prior debts (including every outstanding prior debt, whether or not included within the definition of prior debt contained in this Indenture) . . . shall never at any time exceed three times the then outstanding capital stock of the Railroad Company. All certificates delivered to the Trustee by the Railroad Company, upon requisitions for the certification of bonds, shall, in addition to the other statements therein required to be contained by this Indenture, contain a statement of the amount of all outstanding prior debts, of the Railroad Company in this section 1a referred to after deducting therefrom the bonds reserved under the provisions of this Indenture to retire prior debts at maturity; such statements shall constitute sufficient evidence to the Trustee, as to the facts therein stated, and the Trustee shall be fully protected in acting upon the faith thereof." (Article one, section 1, supplementary indenture.)

This change by the supplemental indenture, defining the words "prior debts," the source of the adverse view of the bonds for savings bank investment, to a definition so inclusive as to cover the bonds of the Louisville & Nashville Southern 4% (first indenture, p. 72), clears away the existing difficulty. The authorized outstanding issue under the new provisions can never exceed, with all outstanding debts, three times the value of the capital stock. This places these bonds in a position where they will be a legal investment for savings banks and savings departments of trust companies as soon as they have been properly executed.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Wrentham State School — Admission and Discharge of Pupils or Other Inmates.

The Trustees of the Wrentham State School are not authorized to receive those who themselves ask admission.

The trustees are authorized to receive those for whom application is made by parent or guardian.

Such parent or guardian has no right to take away such person from the school without the consent of the trustees, except upon application to the court.

If in the opinion of the trustees inmates over the school age will receive benefit from school instruction, the trustees are authorized to place such inmates in the school department.

A minor placed in the school by his parent or guardian may be discharged after reaching his majority only in the discretion of the trustees or upon application to the court.

A minor committed to the school may be held in the custody of the school after reaching his majority without a recommitment.

JUNE 27, 1923.

Dr. GEORGE M. KLINE, *Commissioner of Mental Diseases.*

DEAR SIR:—My opinion is requested on certain questions relative to the duties of the board of trustees of the Wrentham State School.

I understand the first question presented is as follows: Are the trustees of the Wrentham State School authorized to receive in the institution persons who themselves ask admission?

G. L., c. 123, § 66, provides for commitment to the school by a judge of probate. Sections 46 and 47 of said chapter are as follows:—

“SECTION 46. Persons received by the Massachusetts school for the feeble-minded and by the Wrentham state school shall be classified in said departments as the trustees shall see fit, and the trustees may receive and discharge pupils, and may at any time discharge any pupil or other inmate and cause him to be removed to his home.

SECTION 47. The trustees of either of the state schools mentioned in the two preceding sections may, at their discretion, receive any feeble-minded person from any part of the commonwealth upon application being made therefor by the parent or guardian of such person, which application shall be accompanied by the certificate of a physician, qualified as provided in section fifty-three that such person is deficient in mental ability, and that in the opinion of the physician he is a fit subject for said school. The physician who makes the said certificate shall have examined the alleged feeble minded person within five days of his signing and making oath to the certificate. The trustees of either of said state schools may also, at their discretion, receive any person from any part of the commonwealth upon the written request of his parent or legal guardian, and may detain him for observation for a period not exceeding thirty days, to determine whether he is feeble minded.”

The statute makes no provision for admission of those who themselves ask admission. I am of the opinion that the trustees are authorized to receive only those persons who have been committed by the Probate Court or those who have been placed there upon application by the parent or guardian.

The second question I understand to be as follows: Are the trustees authorized to receive those for whom application is made by parent or guardian?

Section 47 of said chapter 123 expressly provides for such admission upon compliance with the requirements therein set forth.

The third question presented is as follows: Can those who have been placed in the school upon application by a parent or guardian be taken from the school at any time the parent or guardian sees fit?

St. 1909, c. 504, codified the law relative to insane persons. Section 62 thereof (now, in substance, G. L., c. 123, § 46) provided:—

“Persons received by the Massachusetts School for the Feeble-Minded and by the Wrentham state school shall from time to time be classified in said departments as the trustees shall see fit, and the trustees may receive and discharge pupils at their discretion, and may at any time discharge any pupil or other inmate and cause him to be removed to his home or to the place of his settlement.”

There is no other provision in the statute for their release except upon application to the court. This clearly shows that the release of such persons, subject to the foregoing exception, is entirely within the discretion of the board of trustees.

It is to be noted that under section 62 of said chapter 504 the trustees were authorized to receive pupils. This statute did not authorize the trustees to receive persons into the custodial department. Gen. St. 1917, c. 223, § 2, however, enlarged the right of the trustees so as to receive persons into the custodial department. The power of the trustees to discharge is the same whether the inmate is in the school or in the custodial department. I therefore advise you that, in my opinion, the parent or guardian has no right to take away such person from the school without the consent of the trustees.

Your fourth question is as follows: Have the trustees the right to expend the money of the Commonwealth in giving instruction in the school department to persons over the school age?

G. L., c. 123, § 45, reads as follows:—

“The Massachusetts school for the feeble-minded and the Wrentham state school shall each maintain a school department for the instruction and education of feeble minded persons who are within the school age or who in the judgment of the trustees thereof are capable of being benefited by school instruction, and a custodial department for the care and custody of feeble minded persons beyond the school age or not capable of being benefited by school instruction.”

It is clear from this section that it is discretionary with the trustees whether or not a person over the school age shall be placed in the school department. If, in the opinion of the board of trustees, such person will receive benefit from school instruction, they are authorized to place such person in the school department, irrespective of age.

Your fifth question is as follows: May any person who, while a minor, was placed in the institution by his parent or guardian be retained in the school against his will after reaching the age of twenty-one?

This question falls under G. L., c. 123, § 46, and such a person may be discharged from the school only in the discretion of the board of trustees, except, of course, that such a person or his parent or guardian may apply to the court for discharge.

Your sixth question is as follows: Can a person who was committed to the school while a minor be held in the custody of the school after reaching the age of twenty-one, without a recommitment?

G. L., c. 123, § 66, provides for commitment, and authorizes custody of the person until he shall be discharged by order of the court or otherwise in accordance with law. Without a court order such person may be held by the school until such time as, in the opinion of the trustees, he should be discharged. The fact that he arrives at the age of majority in no way concerns this question.

Very truly yours,

JAY R. BENTON, *Attorney General*.

National Guard—Practising Rifle or Pistol Shooting on Rifle Ranges on Sundays.

The discharge of firearms on Sunday for sport or in the pursuit of game is prohibited.

Members of the National Guard may legally practise rifle or pistol shooting on a rifle or pistol range on Sundays, in the course of their military training.

JUNE 28, 1923.

Brig. Gen. JESSE F. STEVENS, *The Adjutant General*.

DEAR SIR:—You request my opinion as to whether it is legal for members of the National Guard to practise rifle or pistol shooting on any rifle or pistol range within the Commonwealth on Sundays. You state that this practice constitutes an important part of their military training, and that, owing to the limited amount of time at the disposal of the members of the National Guard, it is desired that this duty shall be performed on Sundays.

G. L., c. 136, § 17, provides, in part:—

“Whoever on the Lord’s day discharges any firearm for sport or in the pursuit of game, . . . shall be punished by a fine of not more than ten dollars. . . .”

The discharge of firearms *for sport or in the pursuit of game* is thereby prohibited. The discharge of firearms by members of the National Guard, under the circumstances to which you refer, is not a discharge for sport or in the pursuit of game. Rifle and pistol practice is in the line of military duty and, as you state, is an important part of the military training.

I am of the opinion that members of the National Guard may legally practise rifle and pistol shooting on a rifle or pistol range within the Commonwealth on Sundays in the course of their military training.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Standard Box for Farm Produce—Requirements as to marking Boxes—Use of Risers in packing Apples.

An apple grower who uses boxes which are standard according to St. 1921, c. 248, must mark said boxes, if they contain apples, in accordance with the requirements of both said chapter 248 and G. L., c. 94, § 104.

The dimensions of the standard box for farm produce sold at wholesale, as defined in St. 1921, c. 248, are not affected by the fact that in some instances, where such box is used for the packing of apples, risers, so called, about five-eighths of an inch thick, are placed on the ends of the box; if the box contains the dimensions required by statute it constitutes a standard box.

JUNE 28, 1923.

DR. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:—You request my opinion as to whether an apple grower who uses boxes which are standard according to St. 1921, c. 248, is obliged to mark such boxes both in accordance with the apple grading law and in accordance with the standard box law. You also request my opinion as to whether a box of the same dimensions as the standard box is to be considered standard if the ends are built higher than the sides, or if risers are added to the ends, in order properly to pack apples so as to fill the standard box even full and permit covering, or whether in either or both cases the boxes are not to be considered standard, and thus not subject to marking as prescribed in chapter 248, *supra*.

St. 1921, c. 248, § 1, provides as follows:—

“ . . . The Massachusetts standard box for farm produce sold at wholesale, except as otherwise provided, shall contain two thousand one hundred fifty and forty-two one hundredths cubic inches and shall be of the following dimensions by inside measurements: seventeen and one half inches in length by seventeen and one half inches in width and seven and one sixteenth inches in depth. The Massachusetts standard half box for farm produce sold at wholesale shall contain one thousand seventy-five and twenty-one one hundredths cubic inches and shall be of the following dimensions by inside measurements: twelve and three eighths inches in length by twelve and three eighths inches in width and seven and one sixteenth inches in depth. When the above specified boxes are made of wood the ends shall be not less than five eighths inches in thickness and the sides and bottom not less than three eighths inches in thickness. All such boxes and half boxes of the dimensions specified herein shall be marked on at least one outer side in bold, uncondensed capital letters, not less than one inch in height:—Standard Box Farm Produce,—and,—Standard Half Box Farm Produce,—respectively. Whoever marks or otherwise represents any box or half box to be a standard box or half box for the sale of farm produce at wholesale shall, unless such box

or half box complies with every specification and requirement of this section, be punished by a fine of not more than fifty dollars. The director of standards in the department of labor and industries, his inspectors and the sealers and deputy sealers of weights and measures in cities and towns shall enforce the provisions of this section."

G. L., c. 94, § 104, provides as follows:—

"Each closed package of apples packed or repacked within the commonwealth and intended for sale within or without the commonwealth, shall have marked in a conspicuous place on the outside of the package in plain letters a statement of the quantity of the contents, the name and address of the person by whose authority the apples were packed, the true name of the variety, and the grade and minimum size of the apples contained therein, in accordance with sections one hundred and one and one hundred and three, and the name of the state where they were grown. If the true name of the variety is not known to the packer or other person by whose authority the apples are packed, the statement shall include the words 'variety unknown,' and if the name of the state where the apples were grown is not known, this fact shall also be set forth in the statement. If apples are repacked, the package shall be marked 'repacked,' and shall bear the name and address of the person by whose authority it is repacked, in place of that of the person by whose authority they were originally packed."

This section pertains to packages containing apples, while St. 1921, c. 248, pertains to "standard for boxes and half boxes for farm produce sold at wholesale." Each statute contains a mandatory requirement as to marking on the outside of the package or box. I am accordingly of the opinion that an apple grower who uses boxes which are standard according to St. 1921, c. 248, must mark said boxes, if they contain apples, in accordance with the requirements of both said chapter 248 and G. L., c. 94, § 104.

The dimensions of the standard box for farm produce sold at wholesale, as defined in St. 1921, c. 248, are not, in my opinion, affected by the fact that in certain instances, where said box is used for the packing of apples, risers, so called, about five-eighths of an inch thick, are placed on the ends of the box, inasmuch as it appears that most varieties of apples will not pack in such a way as to fill the standard box even full but will over-run somewhat so that they cannot be covered unless the sides or ends of the box are increased in height. The purpose of the risers is obviously merely to permit the box to be suitably covered, and if the box contains the dimensions provided for in said act I am of the opinion that it constitutes a standard box, as therein defined, although in the cases referred to it is necessary to attach such risers.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Insurance — Policies to Tobacco Growers for Damage by Hail — Difference in Cost of Policies to Different Persons, based on Membership or Non-membership in an Association of Tobacco Growers — Rebates.

G. L., c. 175, § 182, prohibits the giving by an insurance company of a lower rate to certain insureds merely because the favored insureds are members of a particular association.

There may be an allowable difference in rates for policies to tobacco growers, if it is based upon a reasonable mode of classifying the insureds.

JUNE 30, 1923.

HON. CLARENCE W. HOBBS, *Commissioner of Insurance.*

DEAR SIR:—You ask me for an opinion as to whether or not the course followed by an insurance company in issuing policies to tobacco growers generally, for damage by hail, at a regular rate of \$50 an acre, while at the same time it sells policies of a similar character to members of an association of tobacco growers, and to them only, at a rate of \$24, is, under all the circum-

stances, a violation of G. L., c. 175, § 182, which forbids the giving of rebates and other advantages to certain customers.

As I understand the letter given to you by the vice president of the insurance company in answer to a letter written by a tobacco grower (hereinafter called the "complainant"), the insurance company does give, if desired, to some 2,000 members of the tobacco association insurance against loss by hail, at the rate of \$24 an acre, but will not sell at this price to non-members, of whom the complainant is one. The insurance company contends that this lower rate given to these particular persons, is not in the nature of a rebate or other advantage forbidden by the statute, because the members of this association agree to write eighty per cent of their insurance with this particular insurance company; that much of this tobacco so offered for insurance is in other and more desirable localities than that of the complainant, and so more desirable as a risk to the company; and that also the members of the association agree to write their fire insurance on their tobacco, as well as their hail insurance, with this insurance company, which the complainant does not do.

The statute under consideration is as follows (G. L., c. 175, § 182): —

"No company, no officer or agent thereof and no insurance broker shall pay or allow, or offer to pay or allow, in connection with placing or negotiating any policy of insurance or any annuity or pure endowment contract or the continuance or renewal thereof, any valuable consideration or inducement not specified in the policy or contract, or any special favor or advantage in the dividends or other benefits to accrue thereon; or shall give, sell, or purchase, or offer to give, sell or purchase, anything of value whatsoever not specified in the policy; or shall give, sell, negotiate, deliver, issue, or authorize to issue or offer to give, sell, negotiate, deliver, issue, or authorize to issue any policy of workmen's compensation insurance at a rate less than that approved by the commissioner. No such company, officer, agent or broker shall at any time pay or allow, or offer to pay or allow, any rebate of any premium paid or payable on any policy of insurance or any annuity or pure endowment contract."

The statute is aimed to prevent discrimination between individuals of the same class. To favor one particular member of a class merely because he buys more insurance or more kinds of insurance than another is prohibited by the statute. Attorney General's Report, 1921, p. 133.

Nevertheless, there is no doubt but that there may be made a reasonable classification among insurers of the same kind of property, based not upon volume of business but upon quality; that is, upon a less hazardous undertaking. It may be that, under the arrangement made between the company and the association referred to, a class of insureds different from the one to which the complainant belongs may reasonably be said to exist. The fact that the properties of this latter class are in widely scattered localities, and in widely separated areas, where the average hazard will not be as great as in the district in which alone the assured desires property insured, may be, if the facts justify it, a reasonable mode of classification which would give no undue advantage to one assured over another, within the meaning of the statutes. Whether all the facts necessary to be ascertained relative to the business of tobacco growing make such a form of classification reasonable, is itself a question of fact, upon which it is not my province to pass. The mere fact that the members of the association of growers offered a larger volume of business than that offered by the complainant, would not, in itself, furnish a reasonable ground for placing them in a different classification as to rates. The mere fact that they were members of an association, as such, would not make their classification reasonable. The mere fact that they offered to place fire insurance as well as hail insurance, would not make the classification reasonable. But if the facts in this particular trade, relative to variation in the grade of tobacco grown in various localities, show that the tobacco offered by members of this association, by reason of the variety of the places of growth, tends to make

the offerings, on the whole, much less hazardous risks, than the risk offered by the complainant's tobacco from a single and possibly unfavorable locality, then it is possible that, as I have said, as a matter of fact a classification of insureds, such as was practised by this insurance company, might not be unreasonable.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Taxation — Foreign Corporations — Allocation of Income.

Under Gen. St. 1919, c. 355, §§ 19 and 20 (G. L., c. 63, §§ 41 and 42), a foreign corporation must give notice in each year of its refusal to accept determination of income allocable to the Commonwealth by the statutory method provided by section 19, as a basis of its right to have its net income derived from business carried on within the Commonwealth determined by the alternative method provided by section 20.

JULY 3, 1923.

Board of Appeal.

GENTLEMEN:— You have requested my opinion in the matter of an excise tax assessed upon the Childs Dining Hall Company for the year 1921. The following facts appear from the statement contained in your request.

The Childs Dining Hall Company is a foreign corporation doing business in this Commonwealth and in other States. Under date of April 8, 1920, in accordance with the statutory provisions contained in Gen. St. 1919, c. 355, §§ 19 and 20 (G. L., c. 63, §§ 41 and 42), the company notified the Commissioner of its refusal to accept the determination of its net income derived from business carried on within the Commonwealth in the manner provided by section 19, and thereafter filed its return for the year 1920 with its own allocating method attached thereto. The Commissioner assessed a tax for the year 1920 on the basis of the allocating method set out in the statute, and the company appealed to the Board of Appeal, which subsequently revised the determination of the Commissioner.

While the application for a hearing by the Board of Appeal was pending and before the hearing, the time arrived for the filing of the 1921 return. The corporation filed its return for that year on or about May 11, 1921, with a statement of reasons for late filing and with the same allocating method as in 1920. No refusal to accept the statutory method was filed with respect to the return for 1921, unless the notification of April 8, 1920, constituted such notification or unless such notification may be inferred from the pending proceedings relative to the 1920 tax.

The Commissioner determined the 1921 tax by the method provided by G. L., c. 63, § 41. The company paid the tax under protest, and after numerous hearings the Commissioner refused to abate the tax and the company appealed again to the Board of Appeal. You ask whether the Board of Appeal can act favorably upon the appeal.

G. L., c. 63, §§ 41 and 42, are as follows:—

"SECTION 41. The Commissioner shall determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

The following classes of income shall be allocated as follows:

(a) Gains realized from the sale of capital assets, if such assets consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(b) Interest received from any corporation organized under the laws of the commonwealth or from any association, partnership or trust having transferable shares and having its principal place of business in the commonwealth, or from any inhabitant of the commonwealth, except interest received on deposits in trust companies or in national banks doing business in the commonwealth, shall be allocated to this commonwealth.

(c) Gains realized from the sale of capital assets other than those named in paragraph (a) above shall not be allocated in any part to this commonwealth.

Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight.

SECTION 42. A foreign corporation carrying on part of its business outside the commonwealth may, in lieu of the allocating method required by the preceding section for determining the amount of business assignable to this commonwealth, refuse to accept such determination by notification thereof to the commissioner on or before the time when its income tax return under this chapter is due to be filed. Such a foreign corporation shall, within thirty days thereafter, file with the commissioner, under oath of its treasurer, a statement in such detail as the commissioner shall require, showing the amount of its annual net income derived from business carried on within the commonwealth. The commissioner may require such further information with reference thereto as he may deem necessary for the assessment of the tax, and shall determine the proportion of the net income received from business carried on within the commonwealth."

It is my opinion that G. L., c. 63, § 42, and the corresponding provision of the statute of 1919 require definite action each year by a foreign corporation which desires to refuse to accept a determination of net income derived from business carried on within the Commonwealth according to the statutory method provided by the preceding section, by a notification each year to the Commissioner of the refusal of the corporation to accept such determination; and that such notification is not to be inferred from the giving of a similar notice for a preceding year or from proceedings had in consequence of such prior notice. The reference in section 42 to "the time when its income tax return under this chapter is due to be filed" and the requirement that the corporation "shall, within thirty days thereafter, file with the commissioner" the required statement, seem to me to preclude any other construction. I must advise you, therefore, that under the circumstances the determination made by the Commissioner seems to have been the only one legally permissible, and that the amount of the tax resulting therefrom seems to be fixed as a matter of law.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Teachers' Retirement Association — Withdrawal of Membership — Refund — Retiring Allowance.

A teacher who has not attained the age of sixty may withdraw from the public school service under the provisions of G. L., c. 32, § 11, and is entitled to receive from the annuity fund all amounts contributed as assessments, together with regular interest thereon; and having so withdrawn and received said refund, such teacher has thereby withdrawn entirely from the public school service.

G. L., c. 32, § 10, par. (2), provides for a mandatory retirement from service in the public schools by any member of the association on attaining the age of seventy years, and § 10, par. (1), permits a teacher between the ages of sixty and seventy to apply for retirement; and on retirement such a teacher has withdrawn from the public school service.

A voluntary member of the Teachers' Retirement Association sixty years of age or over, who has terminated his service as a teacher in the public schools, is not entitled to receive a refund of his contributions, but must accept the retiring allowance provided by the statute.

The phrase "any member," as used in G. L., c. 32, § 10, applies to voluntary members, i.e., teachers who entered the service of the public schools before July 1, 1914, and who have elected to become members of the association, as well as to teachers who entered the service of the public schools for the first time after July 1, 1914, and thereby *ipso facto* became members of the association by virtue of the provisions of section 7.

JULY 16, 1923.

DR. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR:—You request my opinion on the following questions:—

"1. Can a teacher who voluntarily joined the Massachusetts Teachers' Retirement Association withdraw from membership in the Association, receiving a refund of his contributions with interest, without withdrawing from the public school service — (a) If he has not attained the age of sixty? (b) If he is sixty years of age or over?

2. Can a voluntary member sixty years of age or over who has terminated his service as a teacher in the public schools withdraw from membership in the Retirement Association, receiving a refund of his contributions with interest, or must he, either at the time he terminates his service or at some time thereafter, accept a retiring allowance?

3. Can a teacher who entered the service of the public schools of Massachusetts for the first time after July 1, 1914, thereby being required to join the Retirement Association, receive a refund of his contributions with interest upon terminating his service in the public schools after he has attained the age of sixty, or must he, either at the time he terminates his service or at some time thereafter, accept a retiring allowance."

1. G. L., c. 32, §§ 6-19, inclusive, pertain to retirement systems for teachers. Section 7 thereof provides as follows:—

"There shall be a teachers' retirement association organized as follows:

(1) All persons now members of the teachers' retirement association established on July first, nineteen hundred and fourteen, shall be members thereof.

(2) All teachers hereafter entering the service of the public schools for the first time shall thereby become members of the association.

(3) Any teacher who entered the service of the public schools before July first, nineteen hundred and fourteen, who has not become a member of the association, may hereafter, before attaining the age of seventy, upon written application to the board, become a member of the association by paying an amount equal to the total assessments, together with regular interest thereon, which he would have paid if he had joined the association on September thirtieth, nineteen hundred and fourteen.

(4) Teachers in training schools maintained and controlled by the department of education shall be considered as public school teachers under sections seven to nineteen, inclusive, and such a teacher upon becoming a member of the association shall thereafter pay assessments based upon his total salary including the part paid by the commonwealth; provided, that the total assessments shall not exceed one hundred dollars in any year. Such assessments shall be deducted in accordance with the rules prescribed by the board. This paragraph shall not apply to teachers regularly employed in the normal schools and therefore subject to sections one to five, inclusive, although they devote a part of their time to training school work."

Section 10 provides, in part:—

"(1) Any member of the association shall, on written application to the board, be retired from service in the public schools on attaining the age of sixty, or at any time thereafter. . . .

(2) Any member, on attaining the age of seventy, shall be retired from service in the public schools at the end of the school year in which said age

is attained, but any member attaining that age in July, August or September shall then be retired."

The provision authorizing withdrawal and reinstatement of members of the public school service is contained in section 11 as follows:

"(1) Any member withdrawing from the public school service before becoming eligible to retirement, except for the purpose of entering the service of the commonwealth, and any member who becomes subject to chapter two hundred and thirty-seven of the acts of nineteen hundred and chapter five hundred and eighty-nine of the acts of nineteen hundred and eight as amended shall be entitled to receive from the annuity fund all amounts contributed as assessments, together with regular interest thereon, either in one sum or, at the election of the board, in four quarterly payments. If a member dies before receiving all his quarterly payments the balance thereof shall be paid to his estate.

(2) Any member thus withdrawing, after having paid ten annual assessments, may receive, at his election and in lieu of payments under paragraph (1) of this section, an annuity for life, as determined by the board, of such amount as the sum of his assessments under section nine, paragraph (2), with regular interest thereon, shall entitle him to receive, with the provision that if he dies before receiving payments equal to the amount used to purchase the annuity the difference shall be paid to his estate.

(3) Any member after having withdrawn from the public school service shall, on being re-employed in such service, be reinstated as a member in accordance with such rules for reinstatement as the board shall adopt.

(4) If a member who is not receiving payments under paragraph (1) or (2) of this section dies before retirement, the full amount of his assessments, with regular interest thereon, shall be paid to his estate."

Under the statute a teacher who entered the service of the public schools before July 1, 1914, has an option whether to become a member of the Teachers' Retirement Association or not, whereas all teachers entering the service of the public schools for the first time after July 1, 1914, "shall thereby become members of the association." Inasmuch as your first question relates to a teacher who "voluntarily" joined the Massachusetts Teachers' Retirement Association, it is clear that such a teacher must have entered the service of the public schools before July 1, 1914.

Leaving out of present consideration the case of a teacher who has become permanently incapable of rendering satisfactory service by reason of physical or mental disability and is accordingly retired, as provided in section 10, paragraph (8), it is clear that a teacher who has not attained the age of sixty, and consequently has not become eligible to retirement, may withdraw from the public school service under the provisions of section 11, and if he does so he is entitled to receive from the annuity fund all amounts contributed as assessments, together with regular interest thereon, either in one sum or, at the election of the board, in four quarterly payments. Having so withdrawn and received his proper refund, I am of the opinion that such teacher has thereby *ipso facto* withdrawn entirely from the public school service. Any other conclusion would be inconsistent with the purpose and effect of the statute.

G. L., c. 32, § 10, par. (2), provides for a mandatory retirement from service in the public schools by any member of the association on attaining the age of seventy. Said section also provides, in paragraph (1), that any member of the association on attaining the age of sixty "shall, on written application to the board, be retired . . ." The context discloses that between the ages of sixty and seventy a teacher may apply for retirement. If a teacher, on attaining the age of sixty, does not file a written application for retirement to the Teachers' Retirement Board, he is apparently entitled to continue in service, unless in the opinion of the employing school committee he is incapable of rendering satisfactory service as a teacher, in which event he may, with the approval of said board, be retired by such committee or employer. The same reasons

appear to follow in the case of such a teacher who has attained the age of sixty years as in the case of one who has not attained said age, and I am accordingly of the opinion that such a teacher on retirement has withdrawn from the public school service.

2. G. L., c. 32, § 10, par. (5), provides as follows:—

“Any member who served as a regular teacher in the public schools prior to July first, nineteen hundred and fourteen, and who has served fifteen years or more in the public schools, not less than five of which shall immediately precede retirement, on retiring as provided in paragraph (1) or (2) of this section, shall be entitled to receive a retirement allowance as follows: (a) such annuity and pension as may be due under paragraphs (3) and (4) of this section; (b) an additional pension to such an amount that the sum of this additional pension and the pension provided in paragraph (4) of this section shall equal the pension to which he would have been entitled under sections seven to nineteen, inclusive, if he had paid thirty assessments based on his average yearly rate of salary for the five years immediately preceding his retirement, at the rate of assessment in effect at that time, and his account had been annually credited with interest at the rate of four per cent per annum; provided, that if his term of service in the commonwealth shall have been over thirty years, the thirty assessments, with interest as provided above, shall be credited with interest at the rate of four per cent, compounded annually for each year of service in excess of thirty; but the assumed accumulation of assessments with interest under this paragraph shall not exceed the amount which at the age of sixty and in accordance with clause (a) of paragraph (3) of this section will purchase an annuity of five hundred dollars, and the minimum pension shall be of such an amount that the annual pension, plus the annual amount which would have been paid from the annuity fund if the member had chosen an annuity computed under clause (3) (a) of this section, shall be four hundred dollars. If a member is at any time eligible to retire and receive a pension computed under this paragraph, he shall receive upon retirement a pension computed hereunder without the necessity of five years of continuous service preceding retirement.”

In an opinion rendered by a former Attorney General to the Board of Retirement, dated April 18, 1918 (V Op. Atty. Gen. 192), it was decided that under the statutes governing the retirement system for employees of the Commonwealth any member of the Retirement Association who ceases to be an employee after he has acquired voluntary retirement rights is not entitled to a refund of his payments, the only course open to him upon leaving the service being to exercise his retirement rights and to accept a pension.

The statute under consideration contains no provision authorizing a refund of contributions with interest under the facts stated in your second question, and I am accordingly of the opinion that such a voluntary member, sixty years of age or over, who has terminated his service as a teacher in the public schools is not entitled to receive a refund of his contributions but must accept the retiring allowance provided by the statute.

3. G. L., c. 32, § 10, provides that “any member” of the association may, on written application to the Teachers’ Retirement Board, be retired on attaining the age of sixty. This accordingly applies to voluntary members, that is, teachers who entered the service of the public schools before July 1, 1914, and who have elected to become members of the association, as well as to teachers who entered the service of the public schools for the first time after July 1, 1914, and thereby *ipso facto* became members of the association by virtue of section 7. Therefore, the same conclusion reached in my answer to your second question applies to your third question, and I am accordingly of the opinion that such a teacher is not entitled to receive a refund of his contributions with interest, but must accept the retiring allowance provided by said section 10.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Soldiers' Relief — Dependents — Re-enlistment in Time of Peace — Veteran — Honorable Discharge — Effect of Dishonorable Discharge.

The dependents of a person who served honorably in the war with Spain or in the World War, if otherwise eligible to receive soldiers' relief under G. L., c. 115, § 17, are not deprived of the benefits conferred thereby merely because the soldier later enlisted when the country was not at war and is serving in a peace-time enlistment.

A veteran, otherwise eligible, is entitled to receive the benefits of State and military aid and soldiers' relief under the provisions of G. L., c. 115, where such veteran had an honorable discharge from his war service, although in an enlistment prior or subsequent to such war service he received a dishonorable discharge from the service, unless the dishonorable discharge be in itself the direct and proximate cause of the inability of the veteran wholly or partly to provide maintenance for himself and his dependents.

JULY 16, 1923.

MR. RICHARD R. FLYNN, *Commissioner of State Aid and Pensions.*

DEAR SIR:— You request my opinion on the following questions:—

"1. Are the dependents of a person who served honorably in the war with Spain or in the World War, and later re-enlisted when the country was not at war, eligible to receive soldiers' relief when the soldier, sailor or marine is serving in a peace-time enlistment?"

2. Is a veteran eligible to receive the benefits of State and military aid and soldiers' relief under the provisions of G. L., c. 115, where such veteran had an honorable discharge from his war service, but in an enlistment prior or subsequent to war service received a dishonorable discharge from the service?"

1. G. L., c. 115, § 17, provides, in part, as follows:—

"If a person who served in the army or navy of the United States in the war of the rebellion, in the army, navy or marine corps in the war with Spain or the Philippine insurrection between April twenty-first, eighteen hundred and ninety-eight, and July fourth, nineteen hundred and two, or in the army, navy or marine corps in the world war and received an honorable discharge from all enlistments therein, and who has a legal settlement in a town in the commonwealth, becomes from any cause, except his own criminal or wilful misconduct, poor and wholly or partly unable to provide maintenance for himself, his wife or minor children under sixteen years, or for a dependent father or mother, or if such person dies leaving a widow or such minor children or a dependent father or mother without proper means of support, such support as may be necessary shall be accorded to him or his said dependents by the town where they or any of them have a legal settlement; but should such person have all the said qualifications except settlement, his widow, who has acquired a legal settlement in her own right before August twelfth, nineteen hundred and sixteen, which settlement has not been defeated or lost, shall also be eligible to receive relief under this section. Such relief shall be furnished by the aldermen or selectmen, or, in Boston, by the soldiers' relief commissioner, subject, however, to the direction of the city council of said city as to the amount to be paid. The beneficiary shall receive said relief at home, or at such other place as the aldermen, selectmen or soldiers' relief commissioner deem proper, but he shall not be compelled to receive the same at an almshouse or public institution unless his physical or mental condition requires, or, if a minor, unless his parents or guardian so elect."

The answer to this question depends upon what is meant by the phrase "and received an honorable discharge from all enlistments therein" as used in the statute. If the Legislature intended this expression to refer to any and all enlistments in the Army and Navy, whether in time of war or in time of peace, it would follow that both of your questions must be answered in the

negative. But, in my opinion, the context does not so indicate. The phraseology used seems to disclose the legislative intent that the only enlistments here referred to are enlistments in the Army or Navy of the United States "in the war of the rebellion, . . . in the war with Spain or the Philippine insurrection . . . or in the army, navy or marine corps in the world war."

The soldiers' relief provided for by G. L., c. 115, § 17, seems to be distinct from that provided for by G. L., c. 115, §§ 6 and 10. In the latter statute the context clearly demonstrates that any and all enlistments are meant, while section 17 seems to be confined to war time enlistments and service.

G. L., c. 115, § 6, provides that the recipient of State aid shall comply with certain conditions precedent, among which are the following: that he "shall have been honorably discharged from all appointments and enlistments in the army or navy, shall be so far disabled, as the result of his service in the army or navy, as to prevent him from following his usual occupation." This pertains to veterans disabled as the result of service in the Army or Navy. G. L., c. 115, § 10, refers to military aid, and provides that the recipient shall belong to and have the qualifications of the four classes therein enumerated. This section likewise provides that the recipient "shall have been honorably discharged or released from active duty in such United States service and from all appointments and enlistments therein." Section 10 clearly pertains to veterans whose disability arose from causes independent of military or naval service, and who would otherwise be obliged to receive relief under the pauper laws. There is likewise a requirement as to settlement or residence in the towns aiding.

While the question is not free from difficulty, owing to the various classes of State aid, military aid and soldiers' relief, and the conditions precedent pertaining thereto, outlined in the statute, I am of the opinion that the dependents of a person who served honorably in the war with Spain or in the World War, if otherwise eligible to receive soldiers' relief under section 17, *supra*, are not deprived of the benefits conferred thereby merely because the soldier later enlisted when the country was not at war and is serving in a peace-time enlistment.

In an opinion rendered the Superintendent of State Adult Poor, dated January 13, 1903 (II Op. Atty. Gen. 408), construing the above section (then R. L., c. 79, § 18), a former Attorney General said:—

"The purpose of the act was undoubtedly to insure the proper maintenance of worthy veterans and their families, and the aid to be furnished to the widow or other relatives of the soldier himself was in the nature of a reward to him, and an assurance that those dependent upon him should be provided for."

2. The conclusions reached in the answer to your first question likewise control the answer to your second question. It accordingly follows that such a soldier or his dependents are entitled to soldiers' relief if he becomes from any cause, "except his own criminal or wilful misconduct, poor and wholly or partly unable to provide maintenance for himself" or his dependents therein specified, unless the dishonorable discharge referred to in your question be in itself the direct and proximate cause of the inability of the veteran wholly or partly to provide maintenance for himself and his dependents, in which event it would seem that such veteran would not be entitled to the relief afforded by section 17 aforesaid.

I may also direct your attention to an opinion rendered by a former Attorney General, dated August 18, 1891 (I Op. Atty. Gen. 27), in which it was decided that a man who enlisted in Massachusetts during the war of the rebellion and was honorably discharged is entitled to military aid under St. 1889, c. 279, § 2, par. 3 (G. L., c. 115, § 10), notwithstanding that previous to his enlistment in Massachusetts he had been dishonorably discharged from a Rhode Island regiment.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Police Commissioner of Boston—Civil Service—Non-competitive Examinations.

The Commissioner of Civil Service alone has the power to determine whether examinations for promotion in the police force of Boston are to be by competitive or non-competitive examinations.

JULY 20, 1923.

HON. HERBERT A. WILSON, *Police Commissioner for the City of Boston.*

DEAR SIR:—You request my opinion as to whether you are compelled to consider for promotion only those members of your department whose names are certified to you from the various lists by the Commissioner of Civil Service, or whether you can, under G. L., c. 31, § 20, send to the Civil Service Commissioner, for non-competitive examination, the names of those members of your department, with special qualifications, whom you deem worthy of promotion.

The police department of the city of Boston was subject to the statutes relative to civil service, under R. L., c. 19. Under this statute the Civil Service Commissioners were authorized to make rules regulating the selection of persons to fill appointive positions in the several cities, not inconsistent with law, and of general or limited application, among other things, to open competitive and other examinations, and to promotions, the latter, if practicable, on the basis of ascertained merit in the examination and seniority of service (R. L., c. 19, § 7), and this same power the Commission had had since the institution of the system by St. 1884, c. 320.

In the rules made by the Civil Service Commission after the passage of the Revised Laws, and continued in effect and now printed with Civil Service Law and Rules, 1922, as "Rule 28. *Promotion*," it was and is provided:—

"1. In the Official Service, a promotion from one grade, as fixed by the rules or determined by the Commissioner, to another grade in the same class, shall not be valid until the candidate or candidates for promotion shall have been subjected to a competitive or non-competitive examination, as the Commissioner may decide, except as otherwise required by statute."

In other words, the Commissioner had the discretion to decide whether a promotion should be determined by competitive or non-competitive examination.

St. 1920, c. 368, § 3, provided that appointments and promotions in the police forces of cities "shall hereafter be made *only* by competitive" examination. This act applied to all cities alike, and swept away the effect of Civil Service Rule 47, by which the Commissioner had discretionary power to say whether the examination for promotion should be competitive or non-competitive. The examination was required to be competitive in every instance, and applied equally to Boston as to other cities.

The language of St. 1920, c. 368, § 3, was, however, modified by the passage of G. L., c. 31, § 20, so that the law requiring competitive examinations for promotions and appointments in the police forces did not apply to the city of Boston.

This chapter removed the prohibition imposed on the Commissioner by St. 1920, c. 368, § 3, to permit non-competitive examinations to be held, as far as the city of Boston was concerned.

The matter of appointments and promotions in the police department of the city of Boston, then, is left just where it was prior to the act of 1920, and, under the general provisions of the civil service law, R. L., c. 19, which had not been modified by any further intervening legislation, the examinations for appointment and promotion in the Boston police force were again subject to the rules and regulations of the Civil Service Commission. Rule 28 is still in force, and under it the Commissioner has the power to determine whether examinations for promotion in the police force of Boston are to be by competitive or non-competitive examination.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Jurisdiction of the Commonwealth and of the United States — Application of State Penal Statutes.

When the United States acquires lands within the limits of Massachusetts, with the consent of the Legislature of this Commonwealth, for the erection of a hospital, the Federal Constitution confers upon the United States the exclusive jurisdiction of the tract so acquired, and therefore penal statutes of this Commonwealth concerning the installation and use of compressed air tanks cannot constitutionally apply to contractors while engaged in work within the limits of a place under the exclusive jurisdiction of the Federal government.

AUG. 13, 1923.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You ask my opinion “as to the jurisdiction of the Commonwealth in requiring a contractor or sub-contractor operating as such under a Federal government contract, upon land owned by the Federal government and under Federal supervision, to meet requirements of the laws of this Commonwealth as to inspection and approval, or otherwise, of apparatus used by said contractors or sub-contractors.”

It appears from the report submitted by an inspector in the Department of Public Safety, annexed to your letter, that a compressed air tank, or tank for the storage of compressed air, on the new stand-pipe installation at the Federal hospital, Leeds, Massachusetts, has been installed by certain contractors employed by the Federal government, under the general charge or direction of an officer of the United States Army, which has not been inspected, and which, in the opinion of the inspector, does not correspond with the standard for such tanks prescribed by the Department of Public Safety, under the provisions of G. L., c. 146, §§ 34 to 41, inclusive. It is stated in said report that such tank is now upon the ground acquired by the United States, and the tank in question is being there used by the contractors in connection with the work of building a stand-pipe to be used in connection with the hospital, when the latter is completed. In connection with this tank construction is an air tank and compressor, the compressed air being used for operating pneumatic hammers.

The tank in question is actually upon the ground acquired by the United States, and is being used by the contractors employed by or for the United States in the erection of a hospital on such land, which was the particular purpose for which such land was so acquired.

The statute in question is a penal statute, there being a provision in section 41 for fine and imprisonment, or both, for any person installing, using or causing to be installed or used tanks for the storage of compressed air which have not been inspected and certified as to their safety by State inspectors, and which do not conform to certain requirements named in the statute. The statute also calls for the payment of a fee for such inspection by the owner, agent or user of such tank.

Where land has been acquired by the United States within the jurisdiction of a State, it makes no difference whether it be for a military or civil purpose; and unless the acquisition be by the State's own act, with certain restrictions agreed to by the Federal government at the time of such cession by the State, the authority of the Federal government over such land is paramount in all acts connected with the purpose for which the land was taken. Even if the State attached concessions to the ceding of the land, they will be valid only if they do not interfere with the purpose for which the jurisdiction is ceded. Congress has exclusive jurisdiction over the lands, including “needful buildings.” *Newcomb v. Rockport*, 183 Mass. 76. And the United States has the power to carry on the work for which the land was acquired in whatever way it sees fit, and the pursuance of such work in whatever way Congress, acting through duly appointed officers and agents, sees fit cannot be impeded by the ordinances of the State wherein the land lies, even if such ordinances

be enacted to promote health and safety. The Federal government, through its agents, is the arbiter as to what means promote health and safety upon the particular work in hand. So it has been held in a leading case that the superintendent of a soldiers' home on land acquired by the Federal government is solely under the jurisdiction of Congress and is not amenable to State laws relative to the serving and use of oleomargarine. *Ohio v. Thomas*, 173 U. S. 276.

It is immaterial whether the act done on the Federal government's land be done directly by employees of the government or through contractors who, for the purpose of carrying on the work, act to some extent as the agents of the Federal government, and the contractors' employees in like manner. These all, while carrying out the work undertaken by the Federal government, are equally protected from the provisions of a penal State statute such as the one under discussion.

In *Tennessee v. Davis*, 100 U. S. 257, the court said that the government can act only through its agents and servants. If, when thus acting, within the scope of their authority, they can be arrested and brought to trial in a State court for an alleged offence against the State authority, yet warranted by the Federal authority, and if the Federal government is powerless to help them,—the operations of the Federal government may at any time be arrested at the will of one of its members.

And to the same effect see *Ex parte Siebold*, 100 U. S. 371.

So it has been held that a Federal and not a State statute as to hours of work for contractors' laborers applies on Federal public works. *United States v. San Francisco Bridge Co.*, 88 Fed. Rep. 891. See also, *In re Turner*, 119 Fed. Rep. 231; and *In re Neagle*, 135 U. S. 1.

In *Johnson v. Maryland*, 254 U. S. 51, it was held that State laws penalizing those who operate motor trucks without having obtained licenses based on examinations and payment of a fee cannot constitutionally apply to an employee of the post office while engaged in driving a government truck over a post road, in the performance of his official duty.

Again, it has been held that State regulations relative to penalties for non-delivery of telegrams cannot apply upon land acquired by the Federal government. *Western Union Tel. Co. v. Chiles*, 214 U. S. 274.

The exclusive character of the Federal government over land acquired, to the exclusion of the police regulations of the State, has been stated with great strength in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U. S. 525.

This view of the law was taken from a very early date by the courts of Massachusetts. The Supreme Court decided that the State statute regulating the amount of stone which could be carried in a sailing vessel did not apply to a vessel at the Charlestown Navy Yard, even if used only on waters within the ordinary jurisdiction of the State. *Mitchell v. Tibbetts*, 17 Pick. 298.

The general rule is, that, under the provision in the Federal Constitution that Congress shall have power to exercise exclusive legislation in all cases whatsoever, over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of specified structures, when property is so purchased by the United States with the consent of the Legislature of the State, the Federal jurisdiction is exclusive of all State authority, and land so purchased *ipso facto* falls within the exclusive jurisdiction of the United States; and the reservation by the State accompanying its consent that civil and criminal process of the State may be served in the place purchased is not considered as interfering in any respect with the supremacy of the United States over it, but is admitted to prevent such place from becoming an asylum for fugitives from justice. *Commonwealth v. Clary*, 8 Mass. 72.

The statutory provision as to the Commonwealth's retaining concurrent jurisdiction for the execution of all civil and criminal process is found in G. L., c. 1, § 7, but, in order that the United States may possess exclusive legislative power over the tract, it must have acquired the tract with the consent of the State. By G. L., c. 1, § 7, general consent was given in the matter of marine

hospitals, custom offices, post offices, lighthouses, etc. There are many instances where the Commonwealth, by legislation, has consented to the acquisition of land of this Commonwealth. Recent examples are: property in the town of Rutland, St. 1922, c. 409; Camp Devens, St. 1921, c. 456; land in South Boston, Gen. St. 1919, c. 270.

As to the land in question, located at Leeds, in the city of Northampton, the facts furnished me through your department are simply to the effect that the ownership of the land passed to the United States government as a gift from the citizens of Northampton. It does not appear that the land has been acquired with the consent of the Legislature of this Commonwealth.

Accordingly, for a decisive opinion on the questions raised by you, as to whether or not the statutory provisions relative to the use of the air tank are effective, it would be necessary to have full information as to the acquisition of the tract by the Federal government.

Yours very truly,

JAY R. BENTON, *Attorney General*.

City Ordinances — Approval of the Attorney General.

An ordinance of a city which has adopted Plan B as a plan of government, under Gen. St. 1915, c. 267, is not subject to the requirements of G. L., c. 40, § 32, and takes effect without the approval of the Attorney General.

AUG. 16, 1923.

PETER J. NELLIGAN, Esq., *City Solicitor of Cambridge*.

DEAR SIR:— You ask my opinion whether it is necessary to submit to me, for my approval, ordinances of the city of Cambridge. You state that the question has been raised in connection with a complaint under an ordinance of the city of Cambridge relating to traffic regulations passed and approved by the mayor in 1917.

I have some doubt whether it is within my province to give the opinion which you request, but I have concluded that under the circumstances it is proper to do so.

G. L., c. 40, § 22, authorizes a city or town to make ordinances or by-laws for the regulation of carriages and vehicles used therein, except as otherwise provided in G. L., c. 90, § 18 (authorizing special regulations as to the speed and use of motor vehicles). In view of this statute no question can be made that the ordinance in question is outside the scope of proper municipal legislation. The sole question is whether or not it was invalid because the provisions of G. L., c. 40, § 32, were not complied with. Said section is as follows:—

“Before a by-law takes effect it shall be approved by the attorney general, and shall be published at least three times in one or more newspapers, if any, published in the town, otherwise in one or more newspapers published in the county; or instead of such publication, notice of the by-laws shall be given by delivering a copy thereof at every occupied dwelling or apartment in the town, and affidavits of the persons delivering the said copies, filed with the town clerk, shall be conclusive evidence of proper notice hereunder; provided, that any by-law in force upon May sixteenth, nineteen hundred and four, shall not be subject to this section.”

The requirement that a by-law, before taking effect, should be approved by the Attorney General was made by an amendment passed in 1904 (St. 1904, c. 344, § 1). Prior to that time the statutes required that by-laws should receive the approval of the Superior Court. (See R. L., c. 25, § 26.)

There are certain statutory provisions under which the contention may be made that statutes relating to town by-laws should be construed to include city ordinances.

G. L., c. 4, § 7, cl. 22, provides:—

“‘Ordinance,’ as applied to cities, shall be synonymous with by-law.”

G. L., c. 40, § 1, is as follows: —

“Cities and towns shall be bodies corporate, and, except as otherwise expressly provided, shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in the acts relating thereto. Except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities.”

You state that, prior to 1915, the city of Cambridge was governed under the old Cambridge charter, granted by St. 1891, c. 364, section 15 of which is, in part, as follows: —

“The city council shall have power to make ordinances and to fix penalties therein, as provided herein and by general law, which shall take effect from the time therein limited, without the sanction or confirmation of any court or justice thereof. All city ordinances shall be duly published, and in such newspaper or newspapers in said city as the city council shall direct.”

You state further that Cambridge, in 1915, adopted as a new charter Plan B of Gen. St. 1915, c. 267. This chapter contains general provisions and special provisions under Plan B for the passage of ordinances by a city council, and the approval of them by the mayor. (See pt. I, §§ 1-4, 8, and 20-23; pt. III, §§ 4 and 8.) Pt. I, § 23, requires proposed ordinances, except emergency measures, to be published once before passage and once afterwards. Pt. III, § 8, provides, in part, as follows: —

“Every order, ordinance, resolution and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it he shall sign it; if he disapproves it he shall return it, with his objections in writing, to the city council, which shall enter his objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution or vote by a two thirds vote of all the members of the city council, it shall then be in force, but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution and vote shall be in force if it is not returned by the mayor within ten days after it has been presented to him.”

Pt. I, § 11, provides that, upon the adoption of one of the plans of government provided for in the act, “the provisions of this act, so far as applicable to the form of government under the plan adopted by the city, shall supersede the provisions of its charter and of the general and special laws relating thereto and inconsistent herewith.”

G. L., c. 40, § 32, is a law relative to towns. By G. L., c. 40, § 1, it is made applicable to cities, except as otherwise expressly provided. In my opinion, the charter under which the city of Cambridge is governed does otherwise provide, and therefore section 32 is not applicable.

I am confirmed in this opinion by the case of *Commonwealth v. Davis*, 140 Mass. 485. That was a complaint for violation of an ordinance of the city of Boston. The defendant contended that the ordinance was invalid because it had not been recorded in the clerk's office, as required by Pub. St. c. 27, § 21, providing that “before any by-law takes effect it shall be approved by the Superior Court, or in vacation by a justice thereof, and shall with such approval be entered and recorded in the office of the clerk of the courts in the county where the town is situated, or in the county of Suffolk in the office of the clerk of the Superior Court for civil business.” The court held that this provision applied only to the by-laws of towns, and by statutory enactment to cities only so far as not inconsistent with general or special provisions relating thereto, that the provisions were inconsistent with the special provisions of the charter of Boston, and therefore were not applicable. It is true that in that case the charter expressly provided that the city ordinances should take effect without the sanction or confirmation of any court or other authority

whatsoever. The sections which I have referred to in the statute constituting the charter of the city of Cambridge seem to me also to make city ordinances effective when passed and approved as therein provided.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Master Plumbers — Registration — Non-resident — Building Department of the City of Boston.

A master plumber who has a regular place of business and performs plumbing work by himself or by his journeymen may lawfully be registered under the provisions of existing statutes, even if he is not a resident of the state.

AUG. 20, 1923.

EUGENE R. KELLEY, M.D., *Commissioner of Public Health*.

DEAR SIR:— You ask my opinion regarding a question of mixed law and fact contained in a letter written by the building commissioner of Boston, to the secretary to the State Examiners of Plumbers. The question is phrased in the letter as follows:—

“Three brothers, one of whom is a licensed master plumber, entered into a partnership to perform plumbing. They registered in the office of the building department, the registration being signed by the brother who is licensed as a master plumber but is not a resident of Boston, being a resident of Chicago. The question is: In your opinion, can the building department of the city of Boston recognize this registration as being in accordance with the requirements of G. L., c. 142, § 3, and St. 1907, c. 550, § 113?”

St. 1907, c. 550, above referred to, has been in large part amended by St. 1909, c. 536, and by later statutes. The provisions regarding master plumbers, contained in these earlier acts, are embodied in G. L., c. 142, § 3. In this chapter a master plumber is defined as “a plumber having a regular place of business and who, by himself or journeymen plumbers in his employ, performs plumbing work.” In section 3 it is provided that no person shall engage in the business of a master plumber unless he is lawfully registered or has been licensed.

It is not the province of the Attorney General to pass upon questions of fact, but from the statement of facts contained in the letter which embodies the question you desire answered, it does not appear but that the registration of the master plumber in question was properly made, without fraud, and in accordance with the usual mode of registration; and the matter which gives rise to the question of a possible illegality relative to this registration appears to be due only to the fact that at the time of such registration the master plumber was not a resident of Boston but a resident of Chicago, and is still a resident of Chicago, although doing business in the city of Boston.

There is nothing in the provisions of the General Laws, nor in any of the numerous acts dealing with master plumbers previously enacted, which requires that a master plumber shall be a resident of the city of Boston, or even of the Commonwealth of Massachusetts, for the purpose of being registered under the provisions of this and similar statutes. It is required as a prerequisite of such registration that such master plumber shall have a regular place of business and perform plumbing work by himself or by his journeymen. There is nothing in the statutes which tends to indicate that a master plumber cannot carry on business in this Commonwealth and still be a resident of a city outside the Commonwealth. There would seem, therefore, no reason why the building department of the city of Boston should not recognize the registration of such a master plumber as is described in your letter. The further fact, that the partners of the master plumber are not themselves licensed master plumbers, is of no special importance upon this aspect of the matter, provided that the firm has one properly licensed master plumber. See *Burke v. Board of Health*, 219 Mass. 219.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Insurance — Fraternal Benefit Society — Mortuary Funds — Interest on Certain Loans.

A fraternal benefit society may not, under G. L., c. 176, place a portion of its mortuary fund in a separate fund and then disburse it for expenses incidental to the growth or strengthening of the society.

Interest due upon money borrowed by a fraternal benefit society for its death fund is an item of expense which, under G. L., c. 176, should be repaid from the expense account of such society.

SEPT. 6, 1923.

HON. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR:— You have asked my opinion upon two questions relative to the mortuary funds of fraternal benefit societies.

The first question is: "Whether or not the use of money for expense purposes under such circumstances (i.e., those set forth in the first and second paragraphs of your letter) is authorized by the provisions of G. L., c. 176."

The circumstances referred to are stated in your letter to be as follows:—

"The Catholic Order of Foresters of Chicago, Illinois, is a foreign fraternal benefit society which is subject to the provisions of the G. L., c. 176.

During the year 1922, the society readjusted its mortuary assessment rates, and, as a result of making this readjustment, transferred from its mortuary fund to the surplus revenue fund \$8,693,421.25. The money transferred was money received apparently from assessments levied upon the members for death purposes and the accretions of said fund. \$160,000 of this money was transferred from the surplus revenue fund to a fund called the readjustment fund, and said readjustment fund, to the amount of \$120,567.70, was used for paying the expenses of the readjustment."

G. L., c. 176, §§ 13 and 14, provide:—

"SECTION 13. Any society may create, maintain, invest, disburse and apply a death fund, any part of which may in accordance with the by-laws of the society be designated and set apart as an emergency, a surplus or other similar fund, and a disability fund. Such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein, or become entitled to any part thereof, except as provided in section sixteen, seventeen or nineteen. The funds from which benefits shall be paid shall be derived and the fund from which the expenses of the society shall be defrayed may be derived from periodical or other payments by the members of the society and accretions of said funds; provided, that no society shall be incorporated, and no society not authorized on January first, nineteen hundred and twelve, to do business in the commonwealth shall be admitted to transact business therein, which does not provide for stated periodical contributions sufficient to meet the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress August twenty-third, eighteen hundred and ninety-nine, or any higher standard, with interest assumption not more than four per cent per annum, except societies providing benefits for disability or death from accident only.

SECTION 14. Every provision of the by-laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purposes of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses."

The Attorney General, of course, does not undertake to pass upon questions of fact, as such. The circumstances, as you set them forth, indicate that the benefit society had created a death fund, and by appropriate by-laws had designated and set apart a portion of such death fund in a surplus revenue fund, so called, and later created a readjustment fund, so called, to which \$120,567.70 of the money previously placed in the surplus fund was removed

and paid out to defray the expenses incidental to a readjustment of the assessment rates of the society, which was then made.

Section 14, above quoted, states specifically that "no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses." This rule seems plain and absolute. No difference is made by its terms between ordinary expenses of management and extraordinary expenses. The designation of part of the death fund as separate funds, under the provisions of section 13, does not disabuse the parts of the death fund so designated of their inherent character as moneys collected for mortuary purposes, and no such designation can free them from the limitations imposed by section 14. The provisions of section 13, while authorizing the division of the death fund into emergency and other funds, keep alive and recapitulate the existence of the mortuary fund from which benefits are to be paid as a unit, and designate the fund from which expenses are to be paid as a separate entity. The phrase in section 13 concerning the different funds into which the mortuary fund may be divided—"such funds shall be held, invested and disbursed for the use and benefit of the society"—does not divest the funds of their character as funds applicable to the payment of benefits eventually, and permit their being used to defray expenses. Moreover, all the funds made out of the mortuary fund under section 13 are charged with the special interest therein which may accrue to members under the provisions of sections 16, 17 and 19.

It is apparent from reading together all the sections of this chapter that the funds derived from a division of the mortuary fund are all charged with the same limitations as the original fund, and are intended by the statute to constitute only reserve sections, as it were, of the original fund. They all exist primarily to make sure the payment of the death benefits and the prerogatives of the members to which they later may become entitled under sections 16, 17 and 19, and they cannot be diverted from their primary purpose to pay expenses of the society, either usual or unusual. The words "disbursed for the use and benefit of the society" (§ 13, line 5) do not signify a disbursement for a purpose foreign to the one for which, as part of the death fund, they were created. The payment of the expenses of the society is not the purpose for which they were created. A totally different mode of paying the expenses of the society is indicated by the statute.

It has been specifically held that where the statutory rule forbids the payment of expenses from funds collected for or charged with the payment of death benefits, it is not lawful to use such funds for expenses. *Chicago Mutual Life Ind. Assn. v. Hunt*, 127 Ill. 257. Nor for the expense involved in a campaign to strengthen the society by obtaining new members. *Wolf v. Germania Ins. Co.*, 149 Wis. 576.

To permit a benefit society to place part of its mortuary fund in a separate fund under another name, and to disburse this portion of the mortuary fund, so set aside, for expenses incidental to the growth or the strengthening of the society, would be to open the road for the withdrawal of all the funds primarily intended to secure the payment of claims, and to permit their disbursement in an entirely different manner, which might be highly prejudicial to the rights of members and defeat the entire purpose of the statute in this respect. The statute makes no distinction between usual expenses and unusual expenses such as those incurred in arranging for an adjustment of rates.

There is nothing in the recent case of *Delaney v. Grand Lodge A. O. U. W.*, 244 Mass. 556, which modifies or affects the principle here involved.

I must therefore answer your first question to the effect that the use of money for expense purposes, under the circumstances which you describe, is not authorized by G. L., c. 176.

Your second question is: "Whether a fraternal benefit society which borrows money for its death fund has the right, under the statute, to pay from its death fund interest for the use of said money, or is said interest an expense which should be disbursed from the expense account."

It is not contemplated, under the provisions of G. L., c. 176, that the death fund shall be depleted except by payments to beneficiaries, for whose benefit it was established. Although the borrowing of money to prevent the depletion of the death fund in some emergency indirectly enures to the benefit of the immediate recipients of payments from the fund, the principal of the fund will suffer by paying for the temporary help, to the detriment of future claim holders. The cost of borrowing money is an expense. The statute is aimed to prevent the depletion of the death fund by expenses incurred by the society, for whatever purposes and with whatever good intentions. It contemplates the discharge of such indebtedness by an entirely separate and independent fund. Under such circumstances as your question discloses, payment of interest is an expense, and it should not be paid out of the death fund.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Gasoline — Necessaries of Life — Construction of Statute — Special Commission on the Necessaries of Life.

The words "necessaries of life" mean literally things necessary to sustain life, and naturally connote commodities of prime importance, such as food, fuel, clothing and housing.

The words "necessaries of life," as used in Mass. Const. Amend. XLVII, have a broad and elastic meaning, the intention being that the powers thereby given to the Legislature should extend to such things as may be fairly termed "necessaries," from time to time, with the changing needs of the community.

The question whether gasoline was intended by the Legislature to be included in the class of "commodities which are necessaries of life," as to which the special Commission on the Necessaries of Life was given certain powers and duties by St. 1921, c. 325, is a question of interpretation, involving a consideration of the language used and of the objects sought to be accomplished in that and other statutes where the same words have been used.

Gasoline, while it is an important factor in the transportation of necessaries of life, is not itself a "necessary of life," within the meaning of St. 1921, c. 325.

Whether the sale of gasoline is a "business which relates to or affects" necessaries of life, under St. 1921, c. 325, is a question of fact for the Commission to determine.

SEPT. 7, 1923.

MR. EUGENE C. HULTMAN, *Chairman, Commission on the Necessaries of Life.*

DEAR SIR:— You request my opinion as to whether or not gasoline is a necessary of life, under the provisions of St. 1921, c. 325, as extended by St. 1922, c. 343, and St. 1923, c. 320, which creates and defines the powers and duties of your commission.

In answering your question it is necessary to study the history of the passage of the present and preceding acts.

A special Commission on the Necessaries of Life was established by Gen. St. 1919, c. 341. This enactment was preceded by Gen. St. 1917, c. 342, known as the "Commonwealth Defence Act of 1917," and by an amendment to the Constitution, in both of which provision was made for the exercise of control over the supply of necessaries of life. Accordingly, reference should first be made to these earlier provisions and acts done thereunder.

Gen. St. 1917, c. 342, approved May 26, 1917, contained the following provision:—

"SECTION 23. Whenever the governor, with the advice and consent of the council, shall determine that an emergency has arisen in regard to the cost, supply, production, or distribution of food or other *necessaries of life* in this

commonwealth, he may ascertain the amount of food, or other *necessaries of life* within the commonwealth; the amount of land and labor available for the production of food; the means of producing within or of obtaining without the commonwealth food or other *necessaries of life* as the situation demands; and the facilities for the distribution of the same, and may publish any data obtained relating to the cost or supply of such food or other necessities, and the means of producing or of obtaining or distributing the same. In making the said investigation he may compel the attendance of witnesses and the production of documents, and may examine the books and papers of individuals, firms, associations and corporations producing or dealing in food or other *necessaries of life*, and he may compel the co-operation of all officers, boards, commissions and departments of the commonwealth having information that may assist him in making the said investigation."

The purpose of the statute was declared by section 1 to be "to provide for the safety, defence and welfare of the commonwealth and for the discharge of its duties toward the national defence as one of the United States." By section 6 the Governor was authorized, whenever he believed it necessary or expedient, to take possession of and to fix minimum and maximum prices for certain kinds of property therein enumerated, including land, machinery, means of conveyance, provisions, fuel and other means of propulsion. These were not described as necessities of life. By section 12 the Governor was authorized, with the approval of the Council, to confer on other persons the powers to do in his name whatever might be necessary to carry into effect the powers which the act conferred upon him.

After the passage of this statute a "Fuel Director" was appointed, to have supervision over the cost, supply and distribution of coal within the Commonwealth. (See Attorney General's Report, 1921, p. 60.) There was also appointed a "Committee of Public Safety," which may have exercised some of the powers conferred by section 23. So far as I am advised, however, no executive action was ever taken under this statute to investigate or to regulate the cost, supply or distribution of gasoline.

Mass. Const. Amend. XLVII was submitted to the people October 11, 1917, and was adopted November 6, 1917. This amendment is as follows:—

"The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common *necessaries of life* and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine."

By Gen. St. 1919, c. 341, there was established for one year from August 1, 1919, a special commission to be known as the Commission on the Necessaries of Life. By section 1 of said statute it was provided that:—

"It shall be the duty of said commission to study and investigate the circumstances affecting the prices of the commodities which are *necessaries of life*. The commission may inquire into all matters relating to the production, transportation, distribution and sale of the said commodities, and into all facts and circumstances relating to the cost of production, wholesale and retail prices and the methods pursued in the conduct of the business of any persons, firms or corporations engaged in the production, transportation, or sale of the said commodities, or of any business which relates to or affects the same."

This statute was amended by Gen. St. 1919, c. 365, by adding, after the provision quoted above, the following:—

"It shall also be the duty of said commission to study and investigate the circumstances affecting the charges for rent of property used for living quarters or for the production of *necessaries of life*, and in such investigation the commission may inquire into all matters relating to charges for rent."

St. 1920, c. 610, purports to continue to January 1, 1922, those provisions of the Commonwealth Defence Act of 1917 "relating to the appointment, duties, authority and powers of a fuel administrator." (See Attorney General's Report, 1921, p. 60.)

St. 1920, c. 628, extended the term of service of the special Commission on the Necessaries of Life to March 1, 1921. It contains, also, a further provision as follows:—

"SECTION 5. In the public emergency which exists, and which may exist for an indefinite period, and in order to insure an adequate supply of the *necessaries of life* for the people of the commonwealth, including housing facilities, the provisions of the Commonwealth Defence Act of nineteen hundred and seventeen, being chapter three hundred and forty-two of the General Acts of nineteen hundred and seventeen, relating to the appointment, duties, authority and powers of a food administrator, are hereby made operative until March first, nineteen hundred and twenty-one. If the said emergency continues, the governor is hereby authorized to appoint, under the provisions of said chapter, one or more administrators as he may deem the emergency requires, or to designate the commission on the necessaries of life to act in that capacity."

St. 1921, c. 325, established for the term of one year from May 1, 1921, a special commission to be known as the Commission on the Necessaries of Life, of which one member is to act as chairman and fuel administrator. Section 2 provides as follows:—

"It shall be the duty of the commission to study and investigate the circumstances affecting the prices of fuel and other commodities which are necessities of life. The commission may inquire into all matters relating to the production, transportation, distribution and sale of the said commodities, and into all facts and circumstances relating to the cost of production, wholesale and retail prices and the method pursued in the conduct of the business of any persons, firms or corporations engaged in the production, transportation, or sale of the said commodities, or of any business which relates to or affects the same. It shall also be the duty of the said commission to study and investigate the circumstances affecting the charges for rent of property used for living quarters, and in such investigation the commission may inquire into all matters relating to charges for rent."

The term of service of this commission was extended for one year by St. 1922, c. 343, and was again extended to May 1, 1924, by St. 1923, c. 320.

Reference should also be made to Res. 1922, c. 50, providing, in part, as follows:—

"*Resolved*, That the special commission on the necessities of life be authorized and directed to inquire into the subject of the retail distribution and sale of gasoline and refined petroleum products, with special reference to the means and methods whereby competition in such sale and distribution has been substantially eliminated and conditions of monopoly established. . . .

The attorney general is hereby directed to place at the disposal of the commission the services of an assistant attorney general for the purposes of the investigation herein provided for. For said purposes, the commission may exercise all the powers conferred upon it by chapter three hundred and twenty-five of the acts of nineteen hundred and twenty-one and chapter three hundred and forty-three of the acts of the current year, and the said products shall, for the purposes of this investigation be deemed 'necessaries of life' within the meaning of said chapters three hundred and twenty-five and three hundred and forty-three. The commission shall report the results of its investigation to the general court not later than the second Wednesday in January, nineteen hundred and twenty-three, with drafts of such proposed legislation as may be necessary to carry its recommendations into effect."

Acting under this provision, the Commission did make an investigation into the distribution and sale of gasoline as directed in the resolve, but it has never

made any other investigation of that subject. The fact that the Legislature here expressly provided that gasoline, "for the purposes of this investigation," should be deemed a necessary of life furnishes some argument that in the 1921 statute they did not intend that gasoline should be included as a necessary of life.

Prior to the Commonwealth Defence Act of 1917, the words "necessaries of life" were used in the so-called "Dubuque Law," St. 1898, c. 549, § 1 (G. L., c. 225, § 1), providing for equitable process after judgment in cases where the judgment is founded on a claim for necessaries of life. There is no decision of the court construing the words "necessaries of life" in a case arising under this statute which throws light upon the present question.

The words "necessaries of life," taken literally, must mean things necessary to sustain life. They naturally connote commodities of prime importance, such as food, fuel, clothing and housing. (See Attorney General's Report, 1921, pp. 243, 245.) The word "necessaries," alone, may have that restricted meaning. *International Textbook Co. v. Connolly*, 206 N. Y. 188.

As applied to an infant, the term "necessaries" has been given a broader meaning, so that it includes articles of utility suitable to the station in life which the person occupies. *Davis v. Caldwell*, 12 Cush. 512; *Raynes v. Bennett*, 114 Mass. 424; *Conant v. Burnham*, 133 Mass. 503; *Hamilton v. Lane*, 138 Mass. 358; *Jordan Marsh Co. v. Cohen*, 242 Mass. 245, 249. But, under the insolvency statute, it was held by Chief Justice Shaw that the word was to be construed strictly and in reference to the purpose for which it was introduced. *Prentice v. Richards*, 8 Gray, 226. In admiralty law, necessaries are held to be articles needed to enable a ship to prosecute the particular business in which she is engaged. *The Penn*, 273 Fed. 990, 991.

Under the Lever Act (Act of August 10, 1917, c. 53, as amended by Act of October 22, 1919, c. 80) Congress provided for the exercise of control over foods, feeds, wearing apparel, fertilizer and certain implements, which in the act were called necessaries. It was held that under this act "necessaries" included only the articles specified in the act. *United States v. American Woolen Co.*, 265 Fed. 404; *cf. C. A. Wood & Co. v. Lockwood*, 264 Fed. 453; *Merritt v. United States*, 264 Fed. 870. I believe that under this act no attempt was made to exercise control of the production, distribution or sale of gasoline.

In dealing with the question of the meaning of "necessaries of life," as used in the instant act, it is apparent that little help can be derived from precedents established by judicial decisions, because the words must be defined in the light of the purpose for which the legislation was enacted, and, as so used, they have a different connotation from that which has been given to them in cases which have heretofore come before the courts.

The question whether a given article is a necessary is said to be largely a question of fact; but the tribunal determining that question is entitled to instruction to aid it in such determination, and also to a ruling when, as a matter of law, articles of a certain kind do not come within the class of necessaries. *Davis v. Caldwell*, 12 Cush. 513; *Raynes v. Bennett*, 114 Mass. 424; *Hamilton v. Lane*, 138 Mass. 358; *Jordan Marsh Co. v. Cohen*, 242 Mass. 245, 249.

Mass. Const. Amend. XLVII has already been referred to and quoted in full. An examination of the records of the debates of the Constitutional Convention, which presented this amendment to the people, is not particularly illuminating in regard to gasoline. The amendment, as it was originally introduced in the Convention in 1917, when the general thoughts of the Convention were directed primarily to the necessities of war, was referred to as a public trading amendment, and was as follows:—

"The General Court may authorize the Commonwealth to take by purchase or otherwise foodstuffs, fuel, ice and other necessities of life, and to sell the same to the inhabitants thereof or to any county, city, town or other municipal corporation therein; and may authorize municipalities to buy and to sell

to their inhabitants such *necessaries of life*, and to harvest and manufacture ice. The General Court may authorize the establishment, maintenance and operation by the Commonwealth, cities and towns, of markets, docks, fuel and coal yards, elevators, warehouses, canneries, slaughter-houses and other like means for producing, selling and distributing the necessities of life."

The long and strenuous debate which ensued, and which was carried on chiefly by Mr. Clapp, of Lexington, Mr. Anderson, of Brookline, Mr. Washburn, of Worcester, Mr. Pillsbury, of Wellesley, and Mr. Lomasney, of Boston, was devoted primarily to a discussion of the general propriety of the Commonwealth's engaging in various kinds of business enterprises and as to what should constitute a public emergency. Very little attention, if any, was paid specifically to the discussion of what were necessities of life. Originally, it was attempted to enumerate and define necessities by the use of such words as foodstuffs, fuel, ice, housing, feed, etc., the intention of some members being, apparently, from their remarks, to confine the authority given by the amendment to the exact articles enumerated. If this had been finally done the situation would have been as it was under the Federal act, where Congress had defined "necessaries" by enumerating certain commodities, and the Federal courts held that those commodities, and those only, could be regarded as necessities of life under the Federal act. There was, however, opposition to this limitation from the outset, and from the debates it appears to have been the consensus of opinion that the power of the Legislature should not be so curtailed, but that scope should be left for it to deal with all things which might be fairly termed "necessaries," from time to time, with the changing needs of the community, and which could not then be in the mind of the Convention. In the debates it was admitted by every one that the term "necessaries of life" was an undefined term, open to debate and decision at any period in the life of the State. In the early stages of the discussion Hon. George W. Anderson, now a judge of the United States Circuit Court of Appeals, suggested in one of his speeches to the Convention (Debates, C. C. vol. I, 642) —

"We have limited the first provision to foodstuffs, fuel, ice and other necessities. What may be a necessary I agree is a matter sometimes open to debate. I know of no method by which you can avoid that possible difficulty in the constitutional grant of power. I think it should be left for the Legislature to determine what is necessary, naming it in the legislation enacted."

After a very considerable amount of debate, however, which was mostly directed toward the proposed trading activities of the Commonwealth, the trading feature was gradually dropped out of sight, more or less by common consent. At length the amendment in its present form was adopted.

In the whole course of the debate I cannot find anything which throws any light upon the intention of the Convention as to what should or should not be considered necessities, other than the common agreement that food, fuel, clothing, ice and housing were undoubtedly necessities, the admission that there were other probable necessities of life, and the apparent intention of the Convention to leave the amendment so elastic as not to bind the judgment of the Legislature in future times with new economic developments before it.

But the question on which my opinion is asked is not whether gasoline is a necessary of life within the broad and elastic meaning of those words as used in the amendment, but whether it was intended by the Legislature to be included in the class of "commodities which are necessities of life," as to which your commission was given certain powers and duties by St. 1921, c. 325. This question of interpretation of the legislative will involves a consideration of the language used and of the objects sought to be accomplished in that and other statutes where the same words have been used. *Moore v. Stoddard*, 206 Mass. 395, 399; *Commonwealth v. Dee*, 222 Mass. 184; *Duggan v. Bay State St. Ry. Co.*, 230 Mass. 370, 374. The meaning of the words used in a statute is a question of law. *Boston v. Boston Elevated Ry. Co.*, 213 Mass. 407, 411; *Selectmen of Natick v. Boston & Albany R.R. Co.*, 210 Mass. 229, 232.

The ordinary necessities of life undoubtedly are food, fuel, clothing and housing facilities. Food, fuel and housing facilities are expressly mentioned by the Legislature.

In determining whether a commodity is a necessary of life careful distinction must be made between necessities of life and the *means* of producing, transporting and distributing such necessities. Such means, though vital factors in sustaining life, cannot be regarded as necessities of life within the purview of the statute. Were this not so, there would be, in our present condition of social life, very few commodities which could not be classed as necessities of life. Such result was not intended by the act. It is a known fact, of which perhaps judicial notice may be taken, that transportation of food by motor trucks is a vital factor in keeping the markets of cities properly supplied. Gasoline is a necessary element in such transportation but is no more necessary than the motor truck. Plainly, motor trucks are not necessities of life within the purview of the statute, nor are farming implements, though the soil cannot be tilled and farm produce raised without them. I am therefore of the opinion that gasoline, while it is an important factor in the transportation of necessities of life, is not itself a "necessary of life" within the meaning of the statute.

Your powers are not, however, limited to investigating the prices of necessities of life. Under the statute it is your duty to inquire "into all matters relating to the production, *transportation*, distribution and sale of the said commodities, and into all facts and circumstances relating to the cost of production, wholesale and retail prices, and the method pursued in the conduct of the business of any persons, firms or corporations engaged in the production, *transportation*, or sale of the said commodities, or of any business which relates to or affects the same."

Under certain circumstances the sale of gasoline may be a "business which relates to or affects" necessities of life or may be a factor in affecting the prices of such commodities. Whether or not that condition exists is a question of fact for you to determine. If it does, I am of the opinion that you may investigate the price of gasoline in so far as it affects necessities of life.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Insurance — Broker's License — Fee — War Service — Induction from a Draft Board — Discharge.

An applicant for an insurance broker's license under G. L., c. 175, § 166, is not exempt from paying the fee prescribed by said section, on the ground that he has "served" in the Army of the United States, if he was inducted from a draft board, but was discharged before being mustered into the Federal service.

An "induction" from the draft is not the equivalent of "service" in the Army. To have "served" in the Army a person must not only have been inducted from the jurisdiction of a draft board, but must also have been through the further process of being "mustered into" or enrolled in the service.

A "discharge from the draft" is not intended to be the equivalent of an honorable discharge for those who have actually been mustered into the service of the United States.

SEPT. 13, 1923.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR: — You request my opinion as to whether a certain applicant for an insurance broker's license under G. L., c. 175, § 166, is exempt from paying the fee prescribed by said section, on the ground that the applicant in question comes within that clause of section 166 which provides that —

"No fee for a license issued hereunder shall be required of any soldier, sailor or marine resident in this commonwealth who has served in the army or navy of the United States in time of war or insurrection and received

an honorable discharge therefrom or release from active duty therein, if he presents to the commissioner satisfactory evidence of his identity."

It appears from your letter and from the copy of a document annexed thereto, which has been presented to you by said applicant as evidence of his right to exemption from the payment of the said fee, that the applicant was inducted into the military service of the United States from the jurisdiction of the Local Board for Division 9, Philadelphia, on Nov. 11, 1918, and was discharged from the military service of the United States "by reason of cancellation of induction call" on the same day.

The document presented by the applicant is entitled "Discharge from Draft." It bears on its face these words:—

"NOTE. — This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, . . ."

The answer to your question turns upon what is meant by "served" in the army of the United States, as used in G. L., c. 175, § 166. I am of the opinion that the words used in the document entitled "Discharge from Draft," presented by the applicant, which state that he "was inducted into the service from the jurisdiction of the Local Board for Division 9—Philadelphia," are not of themselves sufficient to establish the fact that the applicant "served in the army of the United States," within the meaning of the statute under consideration.

An "induction" from the draft is not the equivalent of "service" in the Army. To have "served" in the Army a person must not only have been inducted from the jurisdiction of a draft board, but must also have been through the further process of being "mustered into" or enrolled in the service. After induction from the draft board the person so inducted is to a certain extent under martial law, so far that he may be treated as a deserter if he does not properly report thereafter, but he has yet to undergo a physical examination, and is subject to discharge without actual enrollment, for physical disability or a number of other causes which may be found to exist. *French v. Sangerville*, 55 Me. 69; *Mahoney v. Lincolnville*, 56 Me. 450; *Reed v. Sharon*, 35 Conn. 191; *Bickford v. Brooksville*, 55 Me. 89.

In construing the soldiers' bonus law the Attorney General has ruled that the provisions of Gen. St. 1919, c. 283, granting a war bonus to men honorably discharged from the service of the United States in the World War, do not apply to drafted men who were passed by the draft board, sent to army camps and there discharged because physically disqualified or for misconduct or on similar grounds. See V Op. Atty. Gen. 405. In that opinion a former Attorney General used the following language:—

"In my judgment, . . . it cannot be said that the class of men to which you refer was enlisted in or had been enrolled in or had been mustered into the Federal service, within the meaning of this statute. These men were never in the army of the United States to a sufficient extent to be discharged from it. In my opinion, it cannot be said that they performed 'services . . . in the army . . . of the United States' of the character intended by this statute to be recognized. Accordingly, I must advise you that men of the class to which you refer are not entitled to the benefits of the statute."

This department has also ruled that the exemption from all poll taxes granted by Gen. St. 1919, c. 9, does not include persons summoned in the draft, who reported for duty, but were discharged before they were mustered into the Federal service. V Op. Atty. Gen. 601.

A similar conclusion was reached by the Supreme Court of Rhode Island in *Bannister v. Soldiers' Bonus Board*, 43 R. I. 346.

In the "Discharge from Draft" which the present applicant presents to you it is evident, from the "note" which is made a part of the form, that it is not intended to be the equivalent of an honorable discharge for those who have actually been mustered into the service of the United States, but

is a form used for those who have presented themselves as drafted men but have not actually been enrolled because of some disqualification. It is apparent, also, from the wording of the body of the document, that the applicant was discharged upon the very day of his induction, and that the reason for his discharge was the "cancellation of induction call." There is nothing in the document entitled "Discharge from Draft" which indicates that the applicant was mustered into or enrolled or served in the Army of the United States so as to bring him within the provisions of G. L., c. 175, § 166, which exempts those who have served as soldiers in the Army of the United States, and have been honorably discharged therefrom or released from active duty therein, from paying a fee for a license to engage in the insurance business.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Teachers' Retirement Board—Membership—Payment of Back Assessments in Instalments—Payments in Anticipation of Membership.

A rule of the Teachers' Retirement Board permitting a teacher who served prior to July 1, 1914, to join the association, paying his back assessments in instalments, is not consistent with law, and therefore is invalid.

G. L., c. 32, § 7, par. (3), defines the only terms upon which teachers who served in the public schools of Massachusetts prior to July 1, 1914, are permitted to become members of the State Teachers' Retirement Association at any time before attaining the age of seventy; and said statute contains no provision whereby an applicant for membership may make payments of back assessments in instalments.

No authority is granted by the statute creating the Retirement Board which permits the board to receive deposits from applicants in anticipation of membership.

SEPT. 18, 1923.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:—You desire my opinion upon the following questions:—

"1. Did the Teachers' Retirement Board have the right to adopt a rule allowing a teacher who served prior to July 1, 1914, to join the association, paying his back assessments in instalments?"

2. If the Retirement Board has not the right to permit teachers to join the Retirement Association under the provisions of the aforesaid rule, may the board allow teachers to make deposits in anticipation of membership, enrolling these teachers as members when they have accumulated in the retirement fund an amount equal to their back assessments with interest?"

1. G. L., c. 32, § 7, par. (3), provides as follows:—

"Any teacher who entered the service of the public schools before July first, nineteen hundred and fourteen, who has not become a member of the association, may hereafter, before attaining the age of seventy, upon written application to the board, become a member of the association by paying an amount equal to the total assessments, together with regular interest thereon, which he would have paid if he had joined the association on September thirtieth, nineteen hundred and fourteen."

G. L., c. 32, § 8, par. (2), provides:

"The board may make by-laws and regulations consistent with law."

At a meeting of the Retirement Board held on October 8, 1919, the board adopted the following rule:—

"Any teacher joining the Retirement Association under the provisions of paragraph (3) of section 7 of the retirement law, may pay his back assessments with interest in equal monthly instalments for a period of not exceeding five years. The monthly instalments shall not be less than the regular monthly

assessment, and they shall be deducted from the salary of the member by the employing school committee as directed by the Retirement Board. The teacher may at any time make additional payments reducing the balance due the annuity fund. Interest on the balance due after each payment is made shall be figured at the rate of 4% per annum and shall be paid within three months from the date of payment of the last instalment."

To be valid and effective this rule must, in the language of the statute, be "consistent with law." The statute [G. L., c. 32, § 7, par. (3)] defines the only terms upon which teachers who served in the public schools of Massachusetts prior to July 1, 1914, are permitted to become members of the State Teachers' Retirement Association at any time before attaining the age of seventy. Under this statute such membership can only be acquired by making written application to the board and "by paying an amount equal to the total assessments, together with regular interest thereon," which the applicant would have paid if he had joined the association on September 30, 1914. These requirements are conditions precedent to membership, and there is nothing in the statute which permits an applicant to make such payments in instalments, nor does the statute confer authority upon the Retirement Board to receive such payments from an applicant in instalments. Membership can only be acquired by paying the entire amount called for. Since the statute does not expressly confer the right to make and receive such assessments by instalments, it is to be presumed that no such right exists, and that it was the legislative intention to exclude such method of acquiring membership. It accordingly follows that the rule of the Retirement Board is not "consistent with law," and therefore is invalid.

2. The same reasons given in my answer to your first question govern in answering your second question. No authority is granted by the statute creating the Retirement Board which permits it to receive deposits from applicants in anticipation of membership. It is obvious that many complicated situations would arise if the board should act as a depository for such instalments. In the absence, therefore, of express authority conferring upon the Retirement Association this right, I am of the opinion that your second question must likewise be answered in the negative.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Metropolitan District Commission—Jurisdiction—Private Ways adjoining Roads constructed by the Commission—Rights of Owners of Abutting Land to Egress and Ingress—Regulation.

The Metropolitan District Commission has the power, as to roads laid out under G. L., c. 92, § 33, to prohibit the construction of private ways connecting with such roads by abutting owners.

The Commission has not the right to prohibit the construction of a private way reasonably necessary for access to the land of an abutting owner connecting with a boulevard or roadway laid out under the provisions of G. L., c. 92, § 35.

If the owner of an abutting piece of land has been given by the Commonwealth, by deed, the right of free access to a "reservation" roadway or to a "boulevard," this right of free access cannot be limited by the Commission.

The Commission may make reasonable rules and regulations regulating the location of a private way which is to connect abutting land with a "reservation" roadway or "boulevard."

An abutting owner having a right of free access to a public way, not limited by the terms of a deed, is entitled to a connecting way for all purposes for which he may lawfully use his land.

A regulation restricting the use of such a private way, so as to interfere with any purpose for which the land of the abutting owner might lawfully be used, is not a reasonable regulation.

Metropolitan District Commission.

GENTLEMEN:— You have requested my opinion relative to the jurisdiction of your Commission over the construction of private ways for the egress and ingress of owners of land adjoining roads constructed by your Commission.

There are two classes of roads which may be constructed under the terms of our statutes by your Commission. The first of these consists of roads constructed under the provisions of G. L., c. 92, § 33, formerly St. 1893, c. 407, and consists, in general, of roads laid out upon or bordering upon spaces taken by the Commission for exercise and recreation. In the absence of particular facts relative to any one of such roads, these roads may fairly be said not to be public ways (*Gero v. Metropolitan Park Commission*, 232 Mass. 389); and in the absence of an easement given by the Commonwealth to some adjoining landowner, the adjoining landowner will not have any right of way from his land to such road.

The second class of roads over which this Commission has jurisdiction are those constructed under G. L., c. 92, § 35, formerly St. 1894, c. 288, commonly called "boulevards," which are constructed for the particular purpose of connecting various parts of the park system with towns in which any of the parks are situated. As to these boulevards the Commission is given the same powers which it has in regard to reservations, and additional powers such as those exercised by other public bodies over public ways. These boulevards constructed under section 35 are public ways. *Whitney v. Commonwealth*, 190 Mass. 531.

It is a settled principle of our law that abutting owners have a right of way for reasonable needs from their lands to the public way adjoining. The abutting owner's right of access to and from the public way is as much his property as his right to the soil within his boundary lines. With regard, therefore, to owners of land abutting on the roads called "boulevards," made under section 35, your Commission has not the power to prevent the construction by the abutting landowners of ways leading from their land to such boulevards. If at any time easements granting such right of connection with the highway to the owners of abutting lands have been given by easements in deeds from the Commonwealth, the rights of the abutting owners are additionally confirmed thereby.

Although the Commission has not the power to prohibit the exercise by the abutting owner of his right of access to and from a public way constructed under section 35, yet it has the power to regulate the manner in which he shall use his right of access.

By G. L., c. 92, § 37, the Commission has authority to "make rules and regulations for the government and use of reservations or boulevards under its care." The right of the abutting owner is subject to this general provision for the regulation of the roads under the control of your Commission. Your Commission may make *reasonable* regulations concerning the location, construction and maintenance of such private ways as may be built by the abutting owners, as far as relates to their connection with the public ways. Conditions change from time to time, and what may be a *reasonable* regulation at one period may not be considered reasonable at another. There is wide latitude for the discretion of the Commission in this respect, but there is, in general, a right to make reasonable regulations as to the location of the private way with a view to the safety of the public traveling on the public way.

To summarize: Your Commission has the power, as to roads laid out under G. L., c. 92, § 33, to prohibit the construction of private ways connecting with such roads by abutting owners. Your Commission has not the right to prohibit the construction of a private way reasonably necessary for access to the land of an abutting owner connecting with a boulevard or roadway laid out under the provisions of G. L., c. 92, § 35. If by deed the owner of an abutting piece of land has been given by the Commonwealth the right of free access to a "reservation" roadway or to a "boulevard," this right of free

access cannot be limited by the Commission; but if the terms of the Commonwealth's deed do not give the right to construct more than one connecting way, the Commission, by its reasonable rules and regulations, may regulate the location of the private way which is to connect the abutting land. The abutting owner on a "boulevard" or the owner having a right of free access to such public way, unlimited by the terms of a deed, is entitled to a connecting way for all purposes for which he may lawfully use his land in the situation in which it is, and a regulation restricting the use of such private way, so as to interfere with any purpose for which the land of the abutting owner might lawfully be used, would not be a reasonable regulation.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Great Ponds — Title — Control — Public Rights — Access — Fishing — Prescriptive Rights — Colonial Ordinance of 1641-1647.

Great ponds are ponds containing in their natural state more than ten acres. Title to great ponds, not granted to towns or appropriated to private persons prior to 1647, is in the Commonwealth for the benefit of the public.

Public rights in great ponds are not limited to those mentioned in the Colonial Ordinance: such ponds are devoted to such public uses as the progress of civilization and the increasing wants of the community properly demand. Except during the period from 1835 to 1867, prescriptive rights in great ponds could not be acquired against the Commonwealth.

The Commonwealth and the public may acquire prescriptive rights in ponds privately owned.

Control of great ponds is in the Legislature.

There is now no public right to fish in certain great ponds containing twenty acres or less.

Other public rights are not affected by the statute relative to fishing.

The public has a right to reasonable means of access to ponds containing more than twenty acres, for the purpose of fishing.

The public, to gain access to great ponds for the purpose of fowling, and possibly for some other rights, where there are no public lands, roads or rights of way, may pass and repass on foot over unimproved and unenclosed lands.

OCT. 1, 1923.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR: — You have requested my opinion relative to certain public rights in great ponds.

The foundation of public rights in great ponds lies in the Colonial Ordinance of 1641-1647 (see Ancient Charters, 148; Body of Liberties, sec. 16; edition of the colony laws of 1660), which provides:—

"SECT. 2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the free-men of the same town, or the general court, have otherwise appropriated them: provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

The which clearly to determine; SECT. 3. It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands.

SECT. 4. And for great ponds lying in common, though within the bounds

of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow."

By this ordinance great ponds were defined as ponds containing more than ten acres, created by the natural formation of the land at a particular place, and were set apart and devoted to the public use. *West Roxbury v. Stoddard*, 7 Allen, 158; *Commonwealth v. Tiffany*, 119 Mass. 300; *Attorney General v. Herrick*, 190 Mass. 307; *Sprague v. Minon*, 202 Mass. 467, 468. The fact that the area of a great pond has been increased by a dam or by other artificial means does not change its character as a great pond. The test is the area covered by the pond in its earlier, natural condition. *Commonwealth v. Tiffany*, 119 Mass. 300.

Title to great ponds, both to the waters and to the soil underneath, which had not before the year 1647 been granted to a town or been appropriated to private persons, is in the Commonwealth for the benefit of the public, and if a pond had before that date been granted to a town and had not passed to a private person, the legal title remains in the town but the beneficial right is in the public. *Commonwealth v. Roxbury*, 9 Gray, 451; *West Roxbury v. Stoddard*, 7 Allen, 158; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548; *Attorney General v. Revere Copper Co.*, 152 Mass. 444.

Though fishing and fowling are the only public rights enumerated in the Colonial Ordinance, the mention of them did not exclude other rights, and the uses which the public might make of great ponds not appropriated to private persons prior to 1647 were not limited to those named in the ordinance or in the Body of Liberties, or to such as could be made of them at the time. The great ponds, like any other property, can be applied to such uses as from time to time they become capable of. They are appropriated to such public uses as the progress of civilization and the increasing wants of the community properly demand. Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are public rights which are free to all persons so far as they do not interfere with the reasonable use of the ponds by others or with the public right, except in cases where the Legislature has otherwise directed. *West Roxbury v. Stoddard*, 7 Allen, 158, 171; *Hittinger v. Eames*, 121 Mass. 539; *Slater v. Gunn*, 170 Mass. 509, 514; *Attorney General v. Herrick*, 190 Mass. 307; *Butler v. Attorney General*, 195 Mass. 79, 83.

The public rights are common to all, and the permission to "householders," in the Colonial Ordinance, never has been construed as a prohibition to those who were not householders. *Slater v. Gunn*, 170 Mass. 509, 514. An unreasonable use of great ponds, not authorized by the Legislature, which is an interference with their reasonable use by the public, is a public wrong for which an indictment or information would lie. *Potter v. Howe*, 141 Mass. 357, 360. The littoral proprietors of land upon great ponds which had not been appropriated to private use have no peculiar rights in the waters or in the land under them, except by grant of the Legislature or by prescription from which a grant is to be implied. Subject to those exceptions, there are no private rights of property in great ponds. *Hittinger v. Eames*, 121 Mass. 539, 546; *Gage v. Steinkrauss*, 131 Mass. 222; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 557.

Prescription did not run against the king except by statute, and this rule of common law prevailed in Massachusetts until the enactment of the Revised Statutes in 1835, chapter 119, section 12. Under that statute a title by disseizin could be acquired against the Commonwealth as readily as against a private person, and prescriptive rights in the real estate of the Commonwealth, including great ponds, could be acquired. But by St. 1867, c. 275, now G. L., c. 260, § 31, it was provided that the statute of limitations on real actions brought by the Commonwealth should not apply to "any property, right, title or interest of the commonwealth below high water mark or in the great ponds." Since the statute of 1867 the statute of limitations cannot be set up in bar

of a real action brought by the Commonwealth to recover a great pond, unless the defendant had acquired a title by disseizin after the passage of the Revised Statutes in 1835, chapter 119, section 12, and prior to the enactment of St. 1867, c. 275. *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 452; *Sklaroff v. Commonwealth*, 236 Mass. 87, 88.

Both the Commonwealth and the public may, however, by prescription acquire rights in ponds which are privately owned, and rights of way to ponds, but the possession which operates such a result must be not only actual but open, adverse, exclusive and uninterrupted. *Coolidge v. Learned*, 8 Pick. 504; *Deerfield v. Connecticut River R.R.*, 144 Mass. 325; *Attorney General v. Abbott*, 154 Mass. 323, 328; *Attorney General v. Vineyard Grove Co.*, 181 Mass. 507; *Attorney General v. Ellis*, 198 Mass. 91, 98. If the use upon which the claim to a prescriptive right is based was with the permission, express or implied, of the successive owners of the land or pond, and was not adverse and under a claim of right, no rights by prescription are acquired. *Slater v. Gunn*, 170 Mass. 509, 511. If a right of way is claimed by dedication, it must be shown that there was an intention on the part of the owner to dedicate the roadway to the public, and an acceptance on the part of the public authorities. *Hayden v. Stone*, 112 Mass. 346, 350; *Commonwealth v. Coupe*, 128 Mass. 63; *Slater v. Gunn*, *supra*, p. 511.

The control of great ponds, in the public interest, is in the Legislature, which represents the public. It may regulate and change these public rights, or take them away altogether, to serve some paramount public interest. It may by a proper grant make them the subject of private property. *Commonwealth v. Alger*, 7 Cush. 53; *Hittinger v. Eames*, 121 Mass. 539; *Gage v. Steinkrauss*, 131 Mass. 222; *Sprague v. Minon*, 195 Mass. 581, 583; *Lynnfield v. Peabody*, 219 Mass. 322, 329.

In *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 555, the court said:—

“These rights and powers, both the *jus privatum* and the *jus publicum*, to the extent to which they existed either in the king or Parliament, vested in the Colonial and Provincial government, and after the Revolution vested in the Commonwealth, including all the prerogatives and rights of the crown, and powers of regulation which had at any time previously been held and exercised by the government of England.”

And at page 557 of that case the court said:—

“The power of the Legislature to regulate the rights of fishing, and other public rights, is very broad. Thus it may regulate the time and manner of fishing in the sea within its limits, and may grant exclusive rights of fishing. Instances of the exercise of this power in regard to the great ponds are found in the various statutes leasing such ponds to individuals, which have been held to be valid, although they grant exclusive rights to individuals and exclude others from the exercise of rights to the use of the ponds to which they were before entitled. *Commonwealth v. Vincent*, 108 Mass. 441. *Commonwealth v. Tiffany*, 119 Mass. 300. *Cole v. Eastham*, 133 Mass. 65.”

When the Legislature grants certain rights it makes subordinate all other public rights which are inconsistent with the exercise of the rights granted. *Fay v. Salem & Danvers Aqueduct Co.*, 111 Mass. 27; *Attorney General v. Revere Copper Co.*, 152 Mass. 444; *Rockport v. Webster*, 174 Mass. 385; *Gardner Water Co. v. Gardner*, 185 Mass. 190, 194.

It is a well established rule that, in determining the scope and effect of such grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee and in favor of the grantor, reversing the common rule as between individuals. *Cleaveland v. Norton*, 6 Cush. 380, 383; *Commonwealth v. Roxbury*, 9 Gray, 451, 492; *Martin v. Waddell*, 16 Pet. 367, 411.

Acting under this power, the Legislature restricted the public right of fishing in great ponds. G. L., c. 130, § 24 (formerly St. 1869, c. 384, § 8), provides:—

"The fishery of a pond, the area of which is more than twenty acres, shall be public, except as hereinafter provided; and all persons shall, for the purpose of fishing, be allowed reasonable means of access thereto."

G. L., c. 130, § 32 (formerly St. 1869, c. 384, § 7, and R. L., c. 91, § 23), provides:—

"The riparian proprietors of any pond, other than a great pond, and the proprietors of any pond or parts of a pond created by artificial flowing shall have exclusive control of the fisheries therein."

G. L., c. 130, § 33 (formerly St. 1869, c. 384, § 13, and R. L., c. 91, § 24), provides:—

"A pond other than a great pond, bounded in part by land belonging to the commonwealth or to a county, city or town shall become the exclusive property of the other proprietors as to the fisheries therein only upon payment to the state treasurer, or county, city or town treasurer of a just compensation for their respective rights therein, to be determined . . ." (in a prescribed manner).

St. 1869, c. 384, §§ 7 and 13, and R. L., c. 91, §§ 23 and 24, apply to "any pond the area of which is not more than twenty acres." Though G. L., c. 130, §§ 32 and 33, seem to apply to any pond other than a great pond, they must be construed in the light of section 24 of that act and in the light of the previous enactments. So construed, these two sections apply to ponds which are not more than twenty acres in area. Were this not so and were it held that these provisions apply only to ponds which are not great ponds, thereby meaning ponds ten acres or less in area, the provisions of these two sections would be of no effect, because the public, even in the absence of statutes, has no rights in ponds which are not great ponds. The effect of G. L., c. 130, §§ 24, 32 and 33, is to cut off the right of the public to fish in great ponds which are twenty acres or less in area where the pond is entirely surrounded by land of private riparian proprietors, and also in ponds twenty acres or less in area where the surrounding land is owned by individuals and the Commonwealth or a county, city or town, and compensation has been paid in accordance with the provisions of G. L., c. 130, § 33. See also IV Op. Atty. Gen. 639, 641. These sections do not diminish the fishing rights of the public in great ponds of more than twenty acres in area. Neither do they curtail other public rights in great ponds of less than twenty acres in area, nor in any way affect the conception of a great pond as one containing in its natural state more than ten acres. See G. L., c. 91, § 35.

G. L., c. 130, § 24, provides that, *for the purpose of fishing*, all persons shall be allowed "reasonable means of access to ponds more than twenty acres in area." What constitutes "reasonable means of access" is a question of fact. The right to "reasonable means" was first granted by St. 1869, c. 384. Prior to that act the means of access to great ponds for the purpose of fishing was, and the right of access at the present time for the purpose of exercising other public rights is, such as were granted by the Colonial Ordinance, which provided that the public "may pass and repass on foot through any man's propriety . . . so they trespass not upon any man's corn or meadow."

In *Commonwealth v. Alger*, 7 Cush. 53, 70, the court said:—

"The word 'propriety' is nearly, if not precisely, equivalent to 'property'. It imports not an easement, an incorporeal right, license, or privilege, but a *jus in re*, a real or proprietary title to, and interest in, the soil itself, in contradistinction to a usufruct, or an uncertain and precarious interest."

In *Slater v. Gunn*, 170 Mass. 509, 512, the court said:—

"The question whether the public may cross private lands and if so to what extent, for the purpose of gaining access to them, does not seem to have been passed upon, though there are various dicta in our decisions in regard to it which tend to show that the right of access is limited to cases

where it can be exercised without trespassing on the lands of others. *Coolidge v. Williams*, 4 Mass. 140, 144. *West Roxbury v. Stoddard*, 7 Allen, 158, 171. *Paine v. Woods*, 108 Mass. 160, 173. *Rowell v. Doyle*, 131 Mass. 474."

At pages 514-516 the court said:—

"At the time when the ordinances were adopted the territory to which they applied was almost wholly a wilderness. There naturally would be few public ways leading to great ponds. If there was any common land upon them it might be remote and inconvenient. The population was small and scattered. Many, if not most, of the ponds would be surrounded with wild lands. No harm would be done by permitting persons to cross these lands for the purpose of gaining access to the ponds for fishing and fowling, which were the uses for which they were principally resorted to. In view of all these circumstances, it was provided by the ordinance of 1649 that any man who desired to gain access to the ponds for these purposes should be free to 'pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow.' This, we think, was intended to limit the passing and repassing to unimproved and unenclosed lands lying on the ponds, and is to be construed with reference to the condition of things existing when the ordinance was adopted. It did not create a right of way over such lands on the part of the public, but relieved persons crossing them in the manner and for the purposes named from liability as trespassers, to the end that the public reservation should in no case altogether fail. If it is regarded as establishing a rule of property, the rule is not an inflexible and unvarying one, but it is to be applied with a due regard to existing conditions. As public means of access to the ponds multiply, and the land about the ponds becomes more valuable, it may well be held that a rule which was adapted to earlier and different conditions should suffer a corresponding modification in its application. In cases where there are no convenient means of access, fishermen and hunters, and possibly others, may still pass and repass on foot through wild lands lying upon them for the purpose of gaining access to great ponds. But it hardly could have been intended, we think, that as the uses of the ponds increased the right to cross and recross the unimproved and unenclosed lands lying upon them should increase also, and that such land should be liable to be subjected to a constantly increasing burden. As the ponds became more valuable for the public use, and were resorted to more by the public, means of access naturally would be provided by the public authorities, and there would be less instead of more necessity for crossing private lands. . . . the Legislature has provided . . . that all persons shall be allowed reasonable means of access to great ponds of more than twenty acres for the purpose of fishing without rendering themselves liable as trespassers. . . . If it had been understood that under the ordinance the public had a right of access to great ponds over private lands, this legislation would have been unnecessary, except so far as it related to the size of the ponds."

The case of *Slater v. Gunn*, *supra*, appears to be the only case decided in Massachusetts which deals directly with the question of the means of access to great ponds. That case holds that "in cases where there are no convenient means of access, fishermen and hunters, and possibly others, may still pass and repass on foot through wild lands lying upon them, for the purpose of gaining access to great ponds."

I am accordingly of the opinion that the public, in order to gain access to great ponds for the purpose of exercising the right of fowling, and possibly some other rights which reasonably may be supposed to have been contemplated at the time of the adoption of the Colonial Ordinance, may, where there are no public lands or public roads or rights of way acquired by eminent domain, purchase, dedication or prescription, pass and repass on foot over unimproved and unenclosed lands without rendering themselves liable as trespassers. With respect to fishing in ponds of more than twenty acres, the public is by statute afforded a reasonable means of access. Where there are no means of access over unimproved and unenclosed lands and no public lands, public ways or ac-

quired rights of way, persons may in a reasonable manner pass over other lands of proprietors bordering on such ponds, for the purpose of gaining access thereto for fishing, without rendering themselves liable as trespassers. The Commonwealth or any municipality may, of course, by eminent domain take sufficient land to lay out a public way to any great pond. Except for the foregoing, the public has no right of access across private lands for the purpose of exercising public rights in great ponds.

To summarize:

(1) Great ponds are ponds created by the natural formation of the land at a particular place, containing, in their natural condition, more than ten acres.

(2) Title to great ponds which had not before the year 1647 been granted to a town or been appropriated to private persons is in the Commonwealth for the benefit of the public.

(3) Public rights in great ponds which are not appropriated to private persons are not limited to those mentioned in the Colonial Ordinance. Such ponds are devoted to such public uses as the progress of civilization and the increasing wants of the community properly demand.

(4) The public rights are common to all persons.

(5) Except during the period from 1835 to 1867, prescriptive rights in great ponds could not be acquired against the Commonwealth.

(6) The Commonwealth and the public may acquire prescriptive rights in ponds which are privately owned.

(7) The control of great ponds is in the Legislature, which may regulate and change the public rights or take them away altogether.

(8) There is now no public right to fish in ponds containing twenty acres or less, where such ponds are entirely surrounded by land of private riparian owners, or where the surrounding land is owned by private persons and the Commonwealth or a county, city or town, and compensation has been paid by the private owners in accordance with the statutory provisions.

(9) The other public rights in great ponds, whether more or less than twenty acres in area, are not affected by the statute relative to fishing and exist in full force, except as they have otherwise been restricted by the Legislature.

(10) In ponds containing more than twenty acres in area, the public, in addition to such rights as it has in the pond itself, has a right to reasonable means of access to such ponds for the purpose of fishing.

(11) In exercising the foregoing right the public may, where there are no means of access over unimproved and unenclosed land and no public lands or public roads or rights of way, pass in a reasonable manner over other lands of proprietors bordering on such ponds.

(12) The public, in order to gain access to great ponds for the purpose of exercising the right of fowling, and possibly some other rights which reasonably may be supposed to have been contemplated at the time of the adoption of the Colonial Ordinance, may, where there are no public lands, public roads or rights of way, pass and repass on foot over unimproved and unenclosed lands without rendering themselves liable as trespassers.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Commissioner of Public Works — Registrar of Motor Vehicles — Approval of Increases in Salaries of Motor Vehicle Investigators.

The approval of the Commissioner of Public Works should follow the determination of increases in salaries of investigators and examiners appointed by the Registrar of Motor Vehicles before such increases are finally determined.

OCT. 25, 1923.

MR. THOMAS W. WHITE, *Commissioner (Personnel and Standardization), Commission on Administration and Finance.*

DEAR SIR:— You have requested my opinion as to whether or not the approval of the Commissioner of Public Works is necessary in the matter of cer-

tain proposed increases in the salaries of motor vehicle investigators, which have been submitted to you by the Registrar of Motor Vehicles.

G. L., c. 16, § 4, provides as follows:—

“The commissioner shall be the executive and administrative head of the department. He shall approve all contracts made by either division, and may require any of the expenditures of either division to be submitted to him for approval. He may appoint, assign to divisions, transfer and remove such officials and employees as the work of the department may require, and fix their compensation.”

G. L., c. 90, § 29, reads as follows:—

“The registrar shall appoint competent persons to act as investigators and examiners, may remove them for cause, and may determine their compensation and terms of service and define their duties. . . .”

In order to arrive at a determination of your question, which is raised because of the apparent conflict between the two statutory provisions quoted above, it is necessary to examine the history and language of the statutes which created the Department of Public Works in its present form, and which passed on to the Registrar of Motor Vehicles the powers and duties of the former Massachusetts Highway Commission.

By adopting Mass. Const. Amend. LXVI the people of the State provided that—

“On or before January first, nineteen hundred twenty-one, the executive and administrative work of the commonwealth shall be organized in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the governor or the council, shall be placed. Such departments shall be under such supervision and regulation as the general court may from time to time prescribe by law.”

Pursuant to this mandate, the General Court passed an act in 1919 to organize in departments the executive and administrative functions of the Commonwealth, and this act, sometimes referred to as the “consolidation act,” was Gen. St. 1919, c. 350.

By section 111 the Massachusetts Highway Commission and the Commission on Waterways and Public Lands were abolished and were succeeded by the Department of Public Works. G. L., c. 16, § 1, the instant statute, provides:—

“There shall be a department of public works, consisting of a division of highways and a division of waterways and public lands.”

Section 2 provides for the appointment of a commissioner and four associates to supervise and control the department. Section 3 provides that the Governor shall appoint two of the associate commissioners to have charge of the Division of Highways, and the other two to have charge of the Division of Waterways and Public Lands.

By virtue of this statute, which was originally enacted as Gen. St. 1919, c. 350, pt. III, the commission formerly known as the Massachusetts Highway Commission was merged in the new department, and, as the act of 1919 specifically stated, all its rights, duties, powers and obligations were transferred to and are to be exercised by the Department of Public Works. The provisions of G. L., c. 16, are merely a codification of the original act of 1919 creating such Department of Public Works. In like manner the provisions for the creation and appointment of a Registrar of Motor Vehicles, to be appointed by the Commissioner of Public Works, were first enacted in the same chapter, Gen. St. 1919, c. 350, and are there in the identical words of G. L., c. 16, § 4, except that the powers and duties of the Registrar are described and fixed in these words in section 115 of Gen. St. 1919, c. 350:—

“The registrar of motor vehicles shall have, exercise and perform all the rights, powers, duties and obligations of the Massachusetts highway commis-

sion relative to motor vehicles and to the operation thereof, as defined by chapter five hundred and thirty-four of the acts of nineteen hundred and nine, and acts in amendment thereof and addition thereto. Any person aggrieved by a regulation, ruling or decision of said registrar may, within ten days thereafter, appeal . . . to the commissioners of the division of highways . . .”

Provisions similar to those in the earlier act, for appeal from rulings and regulations made by the Registrar to the commissioners of the Division of Highways, appear in various sections of G. L., c. 90.

This same act which abolished the former jurisdiction of the Massachusetts Highway Commission over motor vehicles created the office of Registrar, created the Department of Public Works, gave the Commissioner of Public Works the power to fix the compensation of officials and employees of the division, as well as to remove and to transfer from one division to another any of such employees (Gen. St. 1919, c. 350, § 114), and this in addition to the power given him to appoint and remove the Registrar. The Registrar, though given broad powers under the act of 1919, was subject to a review of his decisions by the new Division of Highways, as he still is under G. L., c. 90. His powers and duties are defined to be those of the former Massachusetts Highway Commission. Since the enactment of the statute of 1919 creating the Department of Public Works, the Registrar has been in practice treated as a subdivision of the Division of Highways.

If we seek to construe the law concerning the jurisdiction of the Commissioner of Public Works over the salaries of the employees of the Registrar, in view of the fact that the provisions relating thereto were originally all part of the same act, and not, as now, codified into separate chapters, we may more easily arrive at a determination of the legislative intention in framing the clauses under discussion.

The original act of 1919, which created both the Commissioner of Public Works and the Registrar, gave to the Registrar the powers of the former Highway Commission under St. 1909, c. 534, as amended by subsequent legislation. It is true that St. 1909, c. 534, gave to the Highway Commissioners the power to appoint and remove investigators and examiners and to fix their compensation in essentially the same language as is used in G. L., c. 90, § 29, and their fixation of compensation was not then reviewable by any other official, nor had it become so by later enactments. However, the very act which transferred their powers to the Registrar embodied within itself the creation of the new Department of Public Works, two new divisions and the new office of Registrar, all manifestly intended to be under the Commissioner's supervision as regards the expenditures of their offices and the compensation of their employees. It is obvious from an inspection of Gen. St. 1919, c. 350, pt. III, division 18, that the power to supervise salaries was given to the Commissioner as to both the divisions of his department, and that the office of Registrar, also created by division 18, was not intended by the Legislature to be an office wholly separate and distinct from the newly created Department of Public Works, but was intended to be limited by the other provisions of division 18, and to be subject, in the exercise of powers relative to employees' salaries, to the general provision of the division of the statute, in section 115, giving to the Commissioner the general oversight of and right to approve all matters pertaining to the compensation of the employees of the various officials mentioned in division 18 of the statute.

While it is true that the former Massachusetts Highway Commission had the power to fix the compensation of their employees, nevertheless, in view of the fact that the act of 1919, which conferred their power upon the Registrar, created a supervisory official who had authority to oversee matters of compensation relative to employees, it seems that it is necessary to construe the act of 1919 as by its very terms withholding from the Registrar this particular power which the Highway Commission previously had, but which, under the intention of the new act, neither their successor, the Highway Division, nor the Waterways Division was to possess any longer. The fact that in process

of codifying the laws the subject-matter of the act of 1919 was separated into two distinct chapters is responsible for the apparent conflict; but when read together, as they were originally written, the meaning and intent of the Legislature are plain.

To construe the statute as establishing one office, among all those created by the statute, which alone should be above the authority of the executive head with respect to salaries, would seem to subvert the manifest intention of the Legislature in passing this act, which was to centralize in the hands of one responsible official, the Commissioner, the ultimate authority over all the other officials and employees mentioned in this division of the statute, for the purpose of bringing the whole group into harmony as respects salaries and duties, correlative to each other. The power of the Commissioner indicated in the act of 1919 in this respect is generally to be exercised by a power of change or veto over the acts of the subordinate executives, leaving them, as in the case of the Registrar, power of initial movement in the matter.

A study of the history of the enactment of the so-called "consolidation act" and its codification in the General Laws clearly indicates that it was the conception of both the joint committee on administration and commissions, which prepared the reorganization act, and the General Court, which enacted it, to secure centralization of responsibility. "What was required was a scheme for the establishment of better order in the administration of the affairs of the executive branch of the State government, leaving the correction of mistaken details to the future. Upon the Governor rests the duty to select the proper personnel, and upon the officials *he* appoints the duty to see that the machinery which the Legislature has provided is intelligently operated." A very thorough statement of the history of the consolidation act is to be found in the August, 1919, number of the Massachusetts Law Quarterly, at page 366, prepared by Fitz-Henry Smith, Jr., Esq., House chairman of the joint committee on administration and commissions, which prepared the reorganization bill.

In view of the foregoing, in my judgment, the approval of the Commissioner of Public Works should follow the determination of compensation of investigators and examiners appointed by the Registrar of Motor Vehicles.

In connection with this opinion I might add that it was clear to the Legislature that matters might arise, after the statute was placed upon the books, where certain provisions were in apparent conflict, and therefore it was provided by Gen. St. 1919, c. 350, § 10, that —

"In all cases where a question arises between departments or officers or boards thereof as to their respective jurisdiction or powers, or where departments, or officers or boards thereof, issue conflicting orders or make conflicting rules and regulations, the governor and council shall, on appeal of any such department or any person affected thereby, have jurisdiction to determine the question, and to order any such order, rule or regulation amended or annulled; *provided*, that nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy. The time within which such appeal may be taken shall be fixed by the governor and council."

In the codification this provision was changed to read as follows (G. L., c. 30, § 5): —

"In all cases where a question arises between executive or administrative departments, or officers or boards thereof, as to their respective jurisdictions or powers, or where such departments, or officers or boards thereof, issue conflicting orders or make conflicting rules and regulations, the governor and council may, on appeal by any such department or by any person affected thereby, determine the question, and order any such order, rule or regulation amended or annulled; *provided*, that this section shall not deprive any person of the right to pursue any other lawful remedy. The time within which such appeal may be taken shall be fixed by the governor and council."

Yours very truly,

JAY R. BENTON, *Attorney General*.

Metropolitan District Commission—Land bordering on Mystic Lakes—Easement.

By a continuous uninterrupted user an easement by prescription has been acquired in land bordering on the Mystic Lakes for the maintenance of a structure used as a boat club, and a right of way thereto.

OCT. 27, 1923.

Hon. JAMES A. BAILEY, *Commissioner, Metropolitan District Commission.*

DEAR SIR:—You have requested my opinion upon certain matters relative to land under the control of the Metropolitan District Commission bordering on the Mystic Lakes in Medford.

It appears from your letter that the city of Charlestown, by virtue of St. 1860, c. 217, entitled "An Act for supplying the city of Charlestown with pure water," in consideration of the payment of a certain sum of money, acquired from the owners of land bordering the upper Mystic Lake, and lying between the two lakes, an easement of flowing the land of the owners by a certain dam, and an easement providing for a right of way over the land and the occupancy of the land, limited to a right of way and occupancy for the specific purposes of the said act, and a further right of way over another strip of the owner's land near by, limited so as to be "only for the purpose of enabling said city to make necessary repairs upon the said conduit (then upon said land or to be placed there), and to such acts as may be necessary for the preservation, examination and use and reconstruction thereof (that is, of the conduit), and for no other purposes whatever,"—the words in parentheses not being in the indenture. The owners expressly retain in the indenture their own rights in the land and the lake for all purposes not in conflict with the Commonwealth's use, and their rights to use the pond for boating and other purposes. It was also provided in the indenture that if the grantee did not maintain the aqueduct for the purposes of the act, or if the aqueduct and the water works were discontinued or not maintained, then, that easement should cease and determine. The rights acquired under this indenture have vested in the Metropolitan District Commission by the operation of various subsequent statutes, and takings of these easements thereunder, and have been so vested since 1895. The mere fact that water from the lakes has not actually been used for some years for water supply purposes, and is not at the present time in a condition to be used, is not of itself such a discontinuance of the maintenance of the aqueduct and water works as would work an abandonment thereof so as to determine the easements.

The actual easements which vested in the Commission in 1895 were limited in their scope to the purposes of the act of 1860, and the repair and general maintenance of the conduit referred to in the indenture. The purposes for which land might be taken and held were described by the act. The city of Boston was authorized to "take and hold by purchase, or otherwise, lands and real estate necessary for the erecting, laying and maintaining, and may erect, lay and maintain, such aqueducts, pipes, reservoirs, embankments, water-ways, drains or other structures as may be necessary or convenient to convey said water into, and for the use of, the said city of Charlestown." And the general purpose of the act was described as being "the supplying of the city of Charlestown with pure water." In other words, the easements acquired under the indenture could be used only for purposes connected with supplying water for Charlestown.

The grantee of the easements, and its successors, did not acquire any right, as against the owner of the fee, to erect or maintain structures for purposes unconnected with supplying water to Charlestown. It did not acquire by the indenture the right to maintain or to permit others to maintain a structure for use as a boat club on the land or in the lake, or to occupy the land or lake for boating, nor did it acquire by the indenture any right of way over the lands for itself or for others, to pass and repass to a structure maintained as a boat club, or for any other purpose unconnected with the use of the lake

as a source of water supply. It did not acquire under the indenture any right to park automobiles, or to permit others so to do, on the lands, except in necessary connection with the maintenance of the water supply.

It follows, then, that in 1900 the Commission did not have such an easement under the indenture that they could use any building on the land for boating or permit others to use such a building for such a purpose. I assume, from the facts stated in your letter, that the use made of the structure, of the land and of the pond and of the right of way, for the purposes of the boat club, was without the permission of the owner of the fee at all times subsequent to 1900. If the fact be otherwise, and these uses were permissive, and not, as your letter indicates, adverse to the owner of the servient tenement, the Commission and the Commonwealth are in no better position than they were in 1900. Assuming the uses to have been adverse, then the owners of the fee could have prevented, by a resort to equity, the exercise by the licensees of the permission given to them by the Commission in its letter of 1900, and could have prevented the remodeling and use of the building by the Commission's licensees under the permission given in the letters of the Commission of May 18, 1900, May 4, 1904, and March 7, 1907, and might have prohibited the passage of automobiles and their parking upon the lands, as was subsequently the usage after the letters of the Commission of May 4, 1904, and March 7, 1907, and the vote of the Commission of September 29, 1920. All the acts which were then done relative to the boat club, and the use of the land by automobiles going to and from the boat club, were plainly in excess of any easement which had been acquired over the servient tenement, were adverse to the owner of the fee, and were not within the rights vested in the Commission by the indenture or the subsequent taking. The Commission could not itself so use the land, nor could it give or transfer to any licensee any right so to use the land.

The use made of the land for the purpose of maintaining a boat club, beginning with the year 1900, was open and continuous. Such use as was made at that time by the permission of the Commission of a right of way over the land for the purposes of the boat club was also open, and has been continuous and, in the same manner, adverse to the owner of the fee. I am of the opinion that, since these uses have continued uninterrupted by the owner of the fee during the period since 1900, the Commonwealth or the boat club, or both, have acquired an easement by prescription, as against the owner of the fee, to use the land and the pond and to maintain a structure for the purposes of a boating club, and to pass and repass over the land for purposes of access to the boat club, to the general extent which such passing was practised in 1900. *Attorney General v. Ellis*, 198 Mass. 91. If any use of the land or passage over the land has been made within the past twenty years which has imposed a materially different or heavier burden upon the servient tenement than did the usages in practice twenty years ago, such materially different or heavier usage has not yet given rise to any prescriptive right, and the Commonwealth and its licensees are continuing such usage adversely to the owner of the fee, and, under the terms of the indenture, the owner of the fee may prohibit them.

Whether or not the Commonwealth has, as against the owners of the fee, acquired easements in the land, the Commission has authority, as a Commission, to permit the use of the lands for any lawful purpose not necessarily inconsistent with the maintenance of the aqueduct, the water works and the existence of the lakes as a possible water supply, subject to its determination by the owner of the fee if such use exceed any easement in such lands which the Commonwealth has acquired by actual grant or by prescription.

The fact that a greater use of the servient tenement is made than is authorized by the easement, unless necessarily destructive of the character of the easement itself, does not determine or lessen the easement which was originally actually granted. The excessive use may be prohibited by injunction by the owner of the fee, but the excessive use will not destroy the easement as origi-

nally granted. *Mendell v. Delano*, 7 Met. 176; *Cowell v. Thayer*, 5 Met. 253; *Roby v. New York Central R.R.*, 142 N. Y. 176. The adverse user described in your letter does not appear to have been of a character which would affect the existence of the easement which was originally granted by the indenture.

The propositions above set forth answer the first two questions in your letter to this department.

Your third question is: "If the Commission has authority to continue the present use by the boat club, can it accept such a bond as is suggested?" (That is, a bond from the boat club, which occupies a portion of the land under a license so to occupy from the Commission, to indemnify the Commission or the Commonwealth for any liability on the part of the Commission or the Commonwealth to persons passing or repassing over the lands in question for the purpose of using the boat club.)

You do not state in your letter whether any road has been laid out on the existing embankment or elsewhere by the Commission, giving access to the boat club or to the land. It is impossible for this department, therefore, to determine what, if any, liability would rest upon the Commission or the Commonwealth relative to persons driving along the embankment to which you refer in your letter. If no way has been laid out by the Commission, it is highly improbable that there would be any liability to persons entering upon the land to go to the boat club. If the Commission has laid out a highway, liability would be governed by the provisions of G. L., c. 81, § 18, and there would be no liability on the part of the Commission or the Commonwealth for injury due to the absence of a railing. The taking of a bond of indemnity from the Commission's licensee could not, in any event, be an admission of any duty or liability upon the part of the Commonwealth; and, as a protection from expense of litigation, as well as more serious obligations, if any there be, the acceptance of an indemnity bond from the boat club would seem to be within the authority of the Commission.

If, however, in the opinion of the Commission the way in question, whatever its character may be, is not safe for the use of automobiles without a railing, the acceptance of a bond, without insistence upon the erection of such a railing by the Commission's licensee, although relieving against possible liability on the part of the Commission or the Commonwealth, does not tend to ensure the safety of the public traveling over such way.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Certified Milk — Foreign Supervision — Medical Milk Commissions.

Certification of milk by a foreign corporation or board is not a sufficient compliance with the requirements of G. L., c. 180, §§ 20-25, as amended.

Nov. 1, 1923.

EUGENE R. KELLEY, M.D., *Commissioner of Public Health*.

DEAR SIR: — You request my opinion as to whether or not a certain proposed plan for the certification of milk complies with the provisions of G. L., c. 180, §§ 20-25, as amended.

You state that it has been suggested to you that a certain citizen of New Hampshire be permitted to sell "certified milk" in Boston. It is said that "the milk is supervised by the Cheshire County Medical Commission" (not a Massachusetts corporation), and it is apparently proposed that this milk should be sold in Boston under a certification made by this foreign commission and "approved by the Boston Medical Milk Commission." Whether it is intended that the Boston Medical Milk Commission shall also certify the milk is not plain from your communication, but unless they did so certify it themselves its sale as "certified milk" would be unlawful in any event.

G. L., c. 180, §§ 20 and 21, provide for the creation of corporations composed of physicians and members of boards of health, to be known as medical milk commissions, and the purpose of such bodies is said by the statute to be:

"for the purpose of supervising the production of milk." By section 23, as amended by St. 1923, c. 252, such corporations may enter into written agreements with dairymen for the production of milk under their supervision, of at least a minimum prescribed standard, under conditions prescribed by the corporations. The conditions prescribed are to be approved by the Department of Public Health. By section 24 the working methods of the corporations and the dairies with which they make contracts are to be subject to investigation by the department. The corporations may certify milk produced under their supervision, which may be sold as "certified milk," so called.

It is not the intent of the statute that milk certified by a foreign corporation, not subject to the provisions of chapter 180, should be sold in this State as "certified milk," nor is it the intent of the statute that the corporations formed under its provisions should act merely as registrants of the acts of a foreign commission. The intent of the statute is that milk of the quality known as "certified" should be produced under the supervision of these Massachusetts corporations, called medical milk commissions, through contracts made by them with dairymen, which prescribe the particular conditions under which the milk should be produced, these conditions to have the approval of the Department of Public Health of this State.

To permit these medical milk commissions to forego the making of contracts with dairymen for the production of milk under conditions approved by the State Department of Health, and in lieu thereof to accept a certificate of the quality of the milk made by officials of another State, would be entirely contrary to the purpose and intent of the statute. The commissions cannot substitute for their own supervision and regulation of the dairies which are the source of their milk supply the supervision of a commission of another State.

I am of the opinion that the proposed plan for certification of milk does not conform to the statutory requirements.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Prisoners — State Prison — Successive Sentences.

A second sentence of a person serving a sentence at the State prison begins to run upon the expiration of the minimum term of the first sentence.

The first sentence of such prisoner is not terminated by the taking effect of the second sentence.

After the second sentence of such prisoner takes effect, both sentences run concurrently.

Nov. 10, 1923.

Hon. SANFORD BATES, *Commissioner of Correction.*

DEAR SIR:—You state that a man was sentenced to the State prison on December 16, 1920, to serve not more than five and not less than three years; that he escaped from the prison on May 11, 1921, and was returned thereto on September 11, 1921; that for the crime of escape he was sentenced to the State prison for not more than one and one-half years and not less than one year, said sentence to take effect from and after the expiration of his first sentence. You request my opinion upon the following questions:—

"1. Assuming that no parole is granted to the prisoner, and assuming that he has not been punished or broken the rules of the prison, upon what day would he be entitled to release upon these two sentences?"

2. Assuming no parole is granted him on the first sentence, upon what day will the second sentence begin to run? In other words, is the 4-months' period which he spent outside the prison automatically deducted from his term?"

G. L., c. 279, § 24, provides, in part:—

"If a convict sentenced to the state prison receives an additional sentence thereto, it shall take effect upon the expiration of the minimum term of the preceding sentence."

This second sentence, accordingly, will begin to run upon the expiration of the minimum term of the first sentence.

The convict was at large for four months, and this period should manifestly not be considered as time served under his sentence. The minimum term of his first sentence will therefore expire three years and four months after December 16, 1920, and his second term will then begin to run.

The first sentence is not, however, in my opinion, terminated by the taking effect of the second. The convict is under sentence during the whole of the maximum term of the first sentence. A sentence for a minimum and maximum term is, in effect, a sentence for the maximum fixed by the court. *Commonwealth v. Brown*, 167 Mass. 144, 146; *Oliver v. Oliver*, 169 Mass. 592, 594; *Ex parte Spencer*, 228 U. S. 652, 661; *Adams v. Russell*, 229 U. S. 353, 368. It necessarily follows that after the second sentence takes effect both sentences run concurrently.

The maximum period of time during which the prisoner may be confined under both sentences is five years, since his second sentence will have completely expired before the maximum of his first sentence expires. Assuming that no parole is granted to him, and assuming that he has not been punished or broken the rules of the prison, he is entitled, under the provisions of G. L., c. 127, § 133, to a permit to be at liberty upon such terms and conditions as the Board of Parole may prescribe when he has served four years. If the record shows that he has violated the rules of the prison, he is not entitled to be released until he has served five years.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Construction of St. 1922, c. 462 — Directory or Mandatory.

A statute directing a public official to do a certain act within a certain time is generally construed as being directory rather than mandatory, and not as limiting his authority to do the act after the expiration of the time.

St. 1922, c. 462, directing the Division of Waterways and Public Lands to determine the location where it is advisable to build a public terminal for the Cape Cod Canal, and authorizing the Division thereafter to build such terminal, does not require the Division to determine the location within definite limits of time.

Nov. 20, 1923.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR: — You ask me to advise you with reference to St. 1922, c. 462, if, in my opinion, the Division of Waterways and Public Lands is required, within definite limits of time, to determine the location along the line of the Cape Cod Canal or elsewhere in the town of Bourne or Sandwich, where, in its opinion, it is advisable to build a public terminal.

St. 1922, c. 462, is, in part, as follows: —

“SECTION 1. The division of waterways and public lands of the department of public works, hereinafter called the division, is hereby authorized and directed to determine, after public hearings to be held in one or more places in each of the counties of Barnstable and Plymouth, and after such examination as it may deem necessary, the location along the line of the Cape Cod canal or elsewhere in the town of Bourne or Sandwich, where, in its opinion, it is advisable to build a public terminal which shall include a pier and approaches, and such equipment, appliances and rail connections as it deems necessary, and to do such other work as may be necessary and advisable to carry out the purposes of this act.

SECTION 2. When the location of the proposed terminal has been so determined, the division may purchase, or take by eminent domain under chapter seventy-nine of the General Laws, such lands and flats and rights and interests therein as may be necessary, and may build such terminal; provided, however, that no expense shall be incurred until contributions towards the cost of said

terminal amounting to seventy-five thousand dollars have been made by the counties of Barnstable and Plymouth and paid into the state treasury. . . . The division may expend the total sum so contributed, together with a further sum, not exceeding seventy-five thousand dollars, out of the annual appropriation or appropriations for the improvement of rivers and harbors, when such sum and the total sum contributed as aforesaid are made available for the purposes of this act.

In effect the statute authorizes and directs the Division to determine, after public hearings and examination, the location along the line of the Cape Cod Canal or elsewhere in the town of Bourne or Sandwich, where, in its opinion, it is advisable to build a public terminal; and further provides that when the location of the proposed terminal has been so determined the Division *may* purchase or take by eminent domain such lands and interests therein as may be necessary, and *may* build such terminal; but shall incur no expense until contributions towards its cost have been made by the counties of Barnstable and Plymouth. No definite time is stated in the act when the determination shall be made.

A statute authorizing and directing a public official to do a certain act within a certain time is generally construed as being directory rather than mandatory, and not as limiting his authority to do the act after the expiration of the time. *Pond v. Negus*, 3 Mass. 230, 232; *Clemens Electrical Mfg. Co. v. Walton*, 168 Mass. 304, 307, 308; *Rutter v. White*, 204 Mass. 59, 61, 62. The cases also sometimes go further in interpreting a positive direction, in the light of the statute as a whole, as importing only power or authority. The word "shall," used in that connection, has been construed to mean "may." *Suburban Light & Power Co. v. Boston*, 153 Mass. 200, 202; *Rea v. Aldermen of Everett*, 217 Mass. 427; *Ashley v. Three Justices of Superior Court*, 228 Mass. 63, 69, 70.

The act does not direct the Division to proceed with the construction of the terminal at any time. You will note that section 1 provides that the Division is to determine the location, after public hearings, and "after such examination as it may deem necessary." This language clearly indicates that it is within the Division's discretion as to how extensive an examination shall be made. You are not limited as to time. Further, if your Division should determine that for a proper examination certain expenses should be incurred, you are precluded from proceeding until contributions have been made by the counties of Barnstable and Plymouth and paid into the State treasury. This is a condition precedent to your incurring expense. This is, of course, collateral to your main question, which has been answered above to the effect that your Division is not required to determine the location within definite limits of time.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Department of Public Health — Aberjona River — Regulations — Sewage.

The word "sewage" as used in St. 1911, c. 291, includes filth from manufactories as well as from dwellings.

The Department of Public Health may prevent the discharge of sewage into the Aberjona River and its tributaries as well as the creation of a nuisance therein.

Nov. 27, 1923.

Dr. EUGENE R. KELLEY, *Commissioner of Public Health*.

DEAR SIR:— You have asked my opinion relative to several matters connected with drainage into the Aberjona River and its tributaries.

Your first question is as follows:—"Is the word *sewage* in chapter 291, Acts of 1911, to be interpreted to include all manufacturing filth or refuse, even if free from human excreta or household wastes?"

I am of the opinion that the word "sewage" in the statute under consideration is not limited to household wastes and human excreta, but includes filth and refuse from manufactories as well as from dwellings.

No precise definition of the word "sewage," applicable to all conditions, is given in the decisions of our Supreme Court or in the statutes. The connotation of the word varies with regard to the context of the particular act under consideration, but it is not in any event limited so as to apply only to what is sometimes called "house slops." As used in the present statute the essential character of the thing designated as sewage is that it is something carried into the river through a sewer. The entrance into the river of other noxious substances which might be carried by flow, percolation or surface drainage into the stream is taken care of by the last clause of the section. The word "sewage" has been defined in various decisions along these general lines:—

"The refuse and foul matter, solid or liquid, carried through a sewer by the water flowing therein." (*Wendell v. Waukesa*, 110 Wis. 101.)

"The refuse and foul matter, solid or liquid, which a sewer carries off." (*Morgan v. Danbury*, 67 Conn. 484.)

"The matter which passes through sewers; excreted and waste matter, solid and liquid, carried off in sewers." (*Century Dictionary*.)

"Sewerage is a system of drainage by means of sewers, and sewage is sometimes used to denote the water flowing in or carried off by sewers and sometimes the system of sewers for carrying off filth or superfluous water." (*Wilson v. Chicago Sanitary Dist.*, 133 Ill. 443.)

"Excrement, waste stuff or dye material washed into a river by the surface drainage and not conducted there by a system of pipes is not sewage." (*Durham v. Eno Mills*, 144 N. C. 705.)

Your second question is as follows:—"In the opinion of the Attorney General is St. 1911, c. 291, to be interpreted to mean that the department is to prohibit the discharge of sewage into the Aberjona River or its tributaries, even though the quantity of sewage now being discharged into said river or tributaries is insufficient to create a nuisance or cause injury to the public health?"

Under the act in question your department has the power to prevent the discharge of any sewage into the Aberjona River.

Your third question is as follows:—"Is it the duty of the department to prohibit the discharge of both sewage and manufacturing wastes into the Aberjona River or its tributaries, even though neither sewage nor such waste is now being discharged there in such quantities as to cause the condition of the river to be injurious to public health or to create a public nuisance?"

As I have said in my answer to your second inquiry, your department has the power to prohibit the discharge of any sewage into the river. It also has the power to prohibit the discharge into the river of any substance which cannot be said to be included in the term "sewage" and which is or may be injurious to public health or creates or has a tendency to create a public nuisance. In regard to these substances other than sewage, the department's power to prohibit their entrance into the river exists only if they may reasonably be said to create or to be likely to create the conditions mentioned, that is, injury to public health or formation of a public nuisance.

As regards sewage, no previous determination of the department as to the conditions which may be created by the sewage is necessary. I am of the opinion, however, that it is left to the discretion of the department to exercise its power of prohibition, both as to sewage and as to other substances, in a reasonable manner, with due regard to the public welfare. The department is not required by the terms of the act to prohibit the entrance of all sewage. It is its duty, however, to prohibit the entrance of any sewage which it finds injurious or likely to be injurious to the public. It is its duty to deal with "other substances" in like manner, and it may prohibit the entrance of sewage altogether.

That the words "authorized and directed," as used by the Legislature in this statute, are not, strictly speaking, mandatory, but do so far compel the department to action that it cannot arbitrarily or capriciously refuse to act, but is permitted to use a wise discretion as to when it shall proceed to prohibit, seems

to be indicated by the provisions of section 2, which directs the department to use persuasion and advice as a means of remedying pollution which may be occurring or likely to occur. Whether the department should or should not exercise its authority to prohibit discharges into the river in any particular instance depends upon a determination of the facts relative thereto and an application of the principles of law suggested.

Upon the questions of fact involved this office cannot pass. It is for the department to say whether the public interest requires it to act to prohibit the discharge of sewage or other substances into the river. In the absence of any injury to the public or individuals, or the likelihood of any such injury arising from a given set of conditions, it would not appear to be obligatory on the department to take any steps under the provisions of the act.

Your fourth question is as follows:—"Can the department, in case it should find that a nuisance exists in a tributary stream which disappears before reaching the main stream, prohibit the entrance or discharge of sewage, etc., into the tributary only, or must any order under this act cover the entire stream and its tributaries?"

In my opinion, the provisions of the act under consideration permit the department, in the reasonable exercise of its discretion, to prohibit the discharge of sewage into the river or into any of its tributaries, as such, and the prohibition may be enforced as to the whole river system or as to any of its parts.

Yours very truly,

JAY R. BENTON, *Attorney General.*

License to maintain Garage and keep Gasoline—License Commissioners of Cambridge—State Fire Marshal—Commissioner of Public Safety—Right of Appeal—Matters for Consideration.

Under G. L., c. 148, § 45, an appeal lies to the State Fire Marshal from a decision of the board of license commissioners of Cambridge in granting a license to conduct or maintain a garage of the first class and to keep inflammable liquid in connection therewith, and, under G. L., c. 147, § 5, to the Commissioner of Public Safety from a decision of the State Fire Marshal confirming such grant.

The State Fire Marshal and the Commissioner of Public Safety, in making decisions on such appeals, have the right to consider not only fire hazard but the inconvenience and annoyance of persons affected and the general good order and welfare of the community.

Nov. 28, 1923.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR:—You have requested my opinion on three questions of law arising out of the following situation:—

"On May 23, 1923, _____, _____ Street, Cambridge, petitioned the board of license commissioners of Cambridge for a license to conduct or maintain a garage of the first class for eight cars additional, and keeping or storing volatile inflammable liquid in connection therewith in tanks of cars only.

After due notice and hearing held on June 19, 1923, said license was granted.

On August 9, 1923, appeal was made to the State Fire Marshal, requesting that the State Fire Marshal give a hearing in the case. On August 20, 1923, the State Fire Marshal granted a hearing and made the following decision:

'The decision of the Board of License Commissioners granting a license to conduct or maintain a garage of the first class for eight cars and to keep volatile inflammable liquid in connection therewith, in tanks of cars only, at No. _____

_____ Street, in the city of Cambridge, is hereby confirmed.'

An appeal from the decision of the State Fire Marshal to the Commissioner of Public Safety was taken, and on October 29, 1923, the Commissioner of Public Safety granted a hearing on this appeal."

Your first question is: Does a right of appeal lie from the board of license commissioners of Cambridge to the State Fire Marshal?

The answer is "Yes." G. L., c. 148, § 45, specifically provides for such an appeal.

Your second question is: Does an appeal lie from the State Fire Marshal's decision to the Commissioner of Public Safety?

The answer to this question is also in the affirmative. See G. L., c. 147, § 5; also, V Op. Atty. Gen. 718.

Your third question is as follows: What facts can legally be considered by the State Fire Marshal and the Commissioner of Public Safety in arriving at a decision on this case? Should this opinion be based entirely on the fire hazard or may any and all facts relative to such matter, and which might rightfully be considered by the board of license commissioners of Cambridge, be considered by the Fire Marshal and the Commissioner of Public Safety in arriving at a decision?

First, it is to be pointed out that the powers of the State Fire Marshal and, in turn, the Commissioner are not affected by Spec. St. 1919, c. 83, or St. 1922, c. 95, as both acts specifically provided that "nothing herein contained shall affect the authority of the state fire marshal." For the purposes of this decision, St. 1894, c. 399, contained practically the same provisions as are now found in G. L., c. 148, § 14, which section provides, in brief, that no building shall be used for the keeping, storage, etc., of inflammable articles unless licensed. In construing this act the Supreme Judicial Court, in the case of *Commonwealth v. Packard*, 185 Mass. 64, 67, held that the tribunal designated to pass upon and determine whether a license should be issued might give due consideration to those who might be inconvenienced and annoyed, and also have a proper regard for the general good order and welfare of the community. While G. L., c. 148, § 14, applies outside of the metropolitan fire prevention district, yet by section 30 the Marshal is given, within the metropolitan district, the powers given by said section 14; so that the decision of the court applies here: with the result, that the State Fire Marshal had, and the Commissioner of Public Safety has, on the appeal now before him, the right not only to consider the fire hazard but, as the court pointed out, the right to give consideration to those who may be inconvenienced and annoyed, and to have a proper regard for the general good order and welfare of the community.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Registrar of Motor Vehicles — Records in Certain Criminal Cases.

It is the duty of courts and trial justices to send to the Registrar of Motor Vehicles abstracts of records of cases in which persons are charged with violations of the automobile laws, when such cases have been disposed of. Courts and trial justices are not bound to send to the Registrar of Motor Vehicles abstracts of cases which have been continued but not disposed of.

Nov. 30, 1923.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You request my opinion as to whether the courts are required to send to the Registrar of Motor Vehicles abstracts of certain records of cases in which persons are charged with violation of any of the provisions of G. L., c. 90.

G. L., c. 90, § 27, provides, in part:—

"A full record shall be kept by every court and trial justice of every case in which a person is charged with a violation of any provision of this chapter, and an abstract of such record shall be sent forthwith by the court or trial justice to the registrar. Said abstracts shall be made upon forms prepared by the registrar, and shall include all necessary information as to the parties to the case, the nature of the offence, the date of the hearing, the plea, the judgment and the result; and every such abstract shall be certified by the

clerk of the court or by the trial justice as a true abstract of the record of the court."

It is the clear intent of the statute that abstracts of records of cases that are disposed of, regardless of the manner of disposition, shall be sent forthwith to the Registrar of Motor Vehicles. I am therefore of the opinion that it is the duty of courts and trial justices in all cases in which persons are charged with a violation of any provision of G. L., c. 90, to send forthwith to the Registrar abstracts of records of such cases as have been disposed of. This includes cases where there has been an acquittal, a conviction and fine, or the defendant placed on probation, or where a plea of nolo has been accepted and the case placed on file. Courts and trial justices are not bound to send to the Registrar abstracts of cases which have been continued from time to time but have not been disposed of.

Yours very truly,

JAY R. BENTON, *Attorney General*.

State House Grounds — Traffic and Parking Regulations — Authority of Superintendent of Buildings.

Pursuant to statutory authority, the title to the ways within the State House grounds has been acquired by the Commonwealth, and the streets formerly located therein have been discontinued.

Under G. L., c. 8, §§ 4, 9 and 12, and c. 85, § 23, the Superintendent of Buildings, with the approval of the Governor and Council, may make traffic and parking regulations applicable to ways within the State House grounds, and may enforce such regulations through watchmen appointed by him.

DEC. 5, 1923.

Mr. F. H. KIMBALL, *Superintendent of Buildings*.

DEAR SIR: — You ask me to give you my opinion as to the following points:

"1. As to the authority of the Superintendent of Buildings to make traffic regulations and enforce the same.

2. As to the authority of the Superintendent of Buildings to make parking regulations and enforce the same.

3. As to the jurisdiction of the Superintendent of Buildings over Mt. Vernon Street between Bowdoin and Hancock Streets with reference to parking and traffic.

4. As to the jurisdiction of the Superintendent of Buildings over the driveway within the State House yard, from a point opposite the end of Ashburton Place to the junction of the driveway with Mt. Vernon Street, as to parking and traffic.

5. If you find that the Superintendent of Buildings has authority and jurisdiction in the above matters, can he vest that authority in the watchmen in his department who act as traffic officers?"

By St. 1888, c. 349, and several succeeding statutes, a taking was authorized by purchase or otherwise, in the name and behalf of the Commonwealth, of land adjacent to or near the State House, including that portion of Mt. Vernon Street as now extended from Hancock Street to Bowdoin Street and the driveway from a point opposite the end of Ashburton Place to its junction with Mt. Vernon Street. Said succeeding statutes are St. 1892, c. 404; St. 1893, c. 450; St. 1894, c. 532; and St. 1901, c. 525. St. 1888, c. 349, § 6, also authorized the discontinuance of Temple Street, between Mt. Vernon Street and Derne Street, and any other avenue or way on the land acquired or taken under that act; and St. 1901, c. 525, authorized the closing of Mt. Vernon Street from Beacon Street to the State House Arch.

Pursuant to the authority so granted, the land described in these statutes has been acquired by the Commonwealth and title is vested in the Commonwealth, in fee, and Temple Street, from Derne Street to Mt. Vernon Street, and Mt. Vernon Street, from Hancock Street to Beacon Street, have been discontinued, by takings duly recorded with Suffolk Deeds (Lib. 1849, fol. 225; Lib. 2076, fol.

245; Lib. 2124, fol. 507), and by order of the Governor and Council, July 24, 1901. The order of the Governor and Council is as follows:—

“*Ordered*: That the Governor and Council acting under chapter 525 of the acts of the current year and under every other power and authority hereto enabling, hereby close Mt. Vernon street from Beacon street to the State House Arch, and lay out for use as a park, with driveways, walks, grass-plots, curbing and railing, with new approaches to the State House from Bowdoin street and from Beacon street, that tract of land lying easterly of the State House and westerly of Bowdoin street as widened and established by an order of the Governor and Council of even date herewith, in accordance with Plan No. 1717-15, made by Ernest W. Bowditch, Landscape Engineer, Boston, Mass., July 2, 1901, and on file with the records of the council.”

Plan No. 1717-15, referred to in said order, shows the driveway from a point opposite the end of Ashburton Place to its junction with Mt. Vernon Street substantially as it now is.

The powers and duties of the Superintendent of Buildings are defined in G. L., c. 8. Sections 4, 9 and 12 of that chapter contain the following provisions:—

“SECTION 4. He may appoint such clerks, engineers, electricians, firemen, oilers, mechanics, watchmen, elevator operators, porters, cleaners and other persons as may be necessary to enable him to perform his duties. . . .

SECTION 9. The superintendent shall, under the supervision of the governor and council, have charge of the care and operation of the state house and its appurtenances . . .

SECTION 12. The superintendent shall take proper care to prevent any trespass on, or injury to, the state house or its appurtenances, or any other building or part thereof in Boston owned by or leased to the commonwealth for public offices; and if any such trespass or injury is committed, he shall cause the offender to be prosecuted therefor. For any criminal offence committed in any part of the state house or the grounds appurtenant thereto, or in any other building in Boston owned by or leased to the commonwealth, the superintendent and his watchmen shall have the same power to make arrests as the police officers of Boston.”

G. L., c. 85, § 23, is as follows:—

“The governor, with the advice and consent of the council, may make by-laws for the regulation of travel on ways belonging to the commonwealth. Whoever violates any such by-law shall be punished by a fine of not more than fifty dollars.”

In my opinion, these provisions contain a sufficient grant of authority to the Superintendent of Buildings to make traffic and parking regulations applicable to the ways referred to in your inquiry, which should be approved by the Governor and Council, and to enforce such regulations through the watchmen appointed by him. See *Commonwealth v. Brooks*, 109 Mass. 355; *Commonwealth v. Mulhall*, 162 Mass. 496; *Commonwealth v. Newhall*, 205 Mass. 344.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Taxation—Domestic Business Corporation—Deduction on Account of Leasehold Interest.

The purpose of the deductions in the corporation tax law is to avoid double taxation.

Leaseholds are not real estate subject to local taxation, and therefore are not deductible, under G. L., c. 63, § 30, par. 3, (a) and (c), whether the property is within or outside the Commonwealth.

Since buildings on land are taxable with the land as real estate, although by agreement, as against the owner, they may be considered as personal property, a lessee corporation is not entitled to a deduction on account of a building erected by it on the land of another.

DEC. 10, 1923.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:—You ask my opinion upon various questions concerning the right of a domestic business corporation owning a leasehold interest in real estate to a deduction under G. L., c. 63, § 30, par. 3, (a) and (c), on account of such leasehold interest. Said provisions are as follows:—

“3. ‘Corporate excess,’ in the case of a domestic business corporation, the fair cash value of all the shares constituting the capital stock of a corporation on the first day of April when the return called for by section thirty-five is due, less the value of the following:

(a) The works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee.

(c) Its real estate, machinery, merchandise and other tangible property situated in another state or country, except such part thereof as represents the interest of a mortgagee.”

Apart from statute a lease of land is, in a general sense, personal estate. It is, however, an interest in land, and is called a chattel real. *Moulton v. Commissioner of Corporations and Taxation*, 243 Mass. 129. In Massachusetts it is provided by statute (G. L., c. 4, § 7) that “in construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears: . . . Seventeenth, ‘Land,’ ‘lands’ and ‘real estate’ shall include lands, tenements and hereditaments, and all rights thereto and interests therein”; and our court has said that “these words are broad enough to comprehend leases.” *Moulton v. Commissioner of Corporations and Taxation*, *supra*, 132. If, therefore, the question were simply whether the words “real estate,” occurring in G. L., c. 63, § 30, par. 3, (a) and (c), should be construed to include leaseholds, without taking into account their context and the history of their use in that connection, the answer would not be free from doubt. Consequently, your inquiry requires some examination of the history and purpose of the corporation tax laws of Massachusetts.

The first statute providing for a franchise tax on corporations was St. 1864, c. 208. Under that act an excise was levied upon the franchise of domestic corporations, based upon the total value of their capital stock after deducting the value of their real estate and machinery for which they were actually locally taxed. *Commonwealth v. Hamilton Mfg. Co.*, 12 Allen, 298; *New England, etc., S. S. Co. v. Commonwealth*, 195 Mass. 385; *Simplex Elec. Heating Co. v. Commonwealth*, 227 Mass. 225. Sections 1 and 5 of the act were as follows:—

“SECTION 1. The assessors of the several cities and towns shall annually, on or before the first Monday of August, return to the treasurer of the Commonwealth the names of all corporations having a capital stock divided into shares, chartered by this Commonwealth or organized under the general laws, and established in their respective cities and towns, or owning real estate therein, and the value of the real estate and machinery for which each was taxed in such cities and towns on the first day of May preceding.

SECTION 5. The treasurer and the auditor of the Commonwealth shall be a board of commissioners who shall, excepting in the cases of telegraph, coal and mining companies, and such railroad companies as own lines of railroad extending beyond the limits of the state, ascertain from the returns or other-

wise, the excess of the market value of all the capital stock of each corporation or banking association not exempted from taxation, state and municipal, by the laws of the United States, over the value of its real estate and machinery, if any, as returned under the first section of this act, and shall annually, on or before the first Monday of October, notify its cashier or treasurer respectively, of the excess thus ascertained; and every such corporation or banking association shall annually, on or before the first Monday of November, pay to the treasurer of the Commonwealth a tax of one and one-sixth per cent. upon such excess. Nothing in this section shall affect the liability of any bank, insurance company, or any other corporation for any other tax imposed upon it, and payable to the treasurer of the Commonwealth under other existing laws."

By St. 1865, c. 283, it was provided that the Tax Commissioner should determine the value and amount of all real estate and machinery owned by each corporation and subject to local taxation, instead of merely taking the local assessors' figures, the rate was changed from one and one-sixth per cent to the average tax rate of all the cities and towns, and the deduction was extended to include the value of real estate and machinery wherever situated. Sections 1, 4 and 5 of that act were, in part, as follows:—

"SECTION 1. The assessors of the several cities and towns shall annually, on or before the first Monday of August, return to the tax commissioner hereinafter named, the names of all corporations, except banks of issue and deposit, having a capital stock divided into shares, chartered by this Commonwealth or organized under the general laws, for purposes of business or profit, and established in their respective cities and towns, or owning real estate therein, and a statement in detail of the works, structures, real estate and machinery owned by each of said corporations, and situated in such city or town, with the value thereof, on the first day of May preceding, and the amount at which the same is assessed in said city or town for the then current year. They shall also, at the same time, return to said tax commissioner the amount of taxes laid, or voted to be laid, within said city or town, for the then current year, for state, county and town purposes, including highway taxes.

SECTION 4. The tax commissioner shall ascertain, from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of section three, and shall estimate therefrom the fair cash valuation of all of said shares constituting the capital stock of such corporation on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this act.

He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and to the deductions hereinafter provided; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

SECTION 5. Every corporation embraced in section three shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the Commonwealth during the same current year, as returned by the assessors of the several cities and towns under section one, upon the aggregate valuation of all the cities and towns in the Commonwealth for the preceding year, as returned under chapter one hundred and sixty-seven of the acts of the year eighteen hundred and sixty-one, and acts in addition thereto: . . . From the valuation, ascertained and determined as aforesaid, there shall be deducted, — . . . *Second*, in case of other corporations, included in section three, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated."

The system thus established was substantially continued down to the enactment of St. 1903, c. 437. *New England, etc., S. S. Co. v. Commonwealth*, 195 Mass. 385, 387. In that statute additional deductions were allowed of the value of securities which, if owned by a natural person resident in the Commonwealth, would not be liable to taxation, and of property generally (instead of real estate and machinery only) situated in another state or country and subject to taxation therein. It was held that the word "property," there used, meant tangible property, such as real estate, merchandise, machinery and animals. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51; *Simplex Elec. Heating Co. v. Commonwealth*, 227 Mass. 225. See Nichols, *Taxation in Massachusetts*, 2nd ed., p. 542. In 1902 underground conduits, wires and pipes were made locally taxable, and their value was deducted from the corporate franchise tax. St. 1902, c. 342. Poles were treated in the same way in 1909. St. 1909, c. 439. See St. 1909, c. 490, pt. III, § 41; Nichols, *Taxation in Massachusetts*, 2nd ed., p. 539. As thus modified, the franchise tax law was continued without modification important to this discussion until 1919. In that year the structure of the corporation tax law was materially changed and a tax on income was added as an additional factor of the tax. Gen. St. 1919, c. 355; codified in G. L., c. 63, §§ 30-52. The provisions of the old law for determining the value of the corporate franchise were then carried over and applied to the determination of the "corporate excess" which forms the basis of one factor of the present excise tax.

The reason for the deduction allowed for real estate and machinery in the acts of 1864 and 1865 was to avoid double taxation, the real estate and machinery of corporations being subject to local taxation in the towns where they were situated. *Commonwealth v. Hamilton Mfg. Co.*, 12 Allen, 298, 305, 306; *Firemens Ins. Co. v. Commonwealth*, 137 Mass. 80, 83. The deductions were extended when it was found that in some other respects the system resulted in double taxation of corporations. *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156, 159, 160. But a corporation was entitled to deductions only so far as deductions were allowed by the statute. *Commonwealth v. New England Slate & Tile Co.*, 13 Allen, 391; *Simplex Elec. Heating Co. v. Commonwealth*, 227 Mass. 225, 229.

By St. 1881, c. 304, §§ 1-3, the local tax law was amended by making provision for taxing separately as real estate the interest of a mortgagee (see G. L., c. 59, §§ 12-14). In *Firemens Ins. Co. v. Commonwealth*, 137 Mass. 80, 83, it was held that this statute made the interest of a mortgagee, for all purposes of taxation, real estate subject to local taxation, and thus brought such interest within the words of the corporation franchise tax law, requiring the Tax Commissioner to deduct an amount equal to the value "of their real estate and machinery, subject to local taxation, wherever situated." The rule thus declared prevailed until Gen. St. 1919, c. 332, which amended the previous law by excepting from the deductions allowed "that part of the said value which, as matter of law, may be deemed to be real estate and is represented by a mortgage debt." This was to prevent the amount of a mortgage from being deducted twice. Nichols, *Taxation in Massachusetts*, 2nd ed., pp. 539, 540. This exception is carried over into G. L., c. 63, § 30, par. 3, (a) and (c).

Leaseholds are not, for purposes of taxation, real estate subject to local taxation. "Taxes on real estate shall be assessed, in the town where it lies, to the person who is either the owner or in possession thereof on April first." G. L., c. 59, § 11. Except for the separate tax on the interest of a mortgagee, a real estate tax is a tax on the land as a whole and not merely on the interest of the person taxed, although the tax may be assessed either to the owner or to the person in possession of the land. *Parker v. Baxter*, 2 Gray, 185, 189; *Worcester v. Boston*, 179 Mass. 41, 48; *Donovan v. Haverhill*, 247 Mass. 69.

It is obvious, therefore, that a domestic corporation owning a leasehold interest in Massachusetts real estate is not entitled, under G. L., c. 63, § 30, par. 3 (a), to a deduction of the value of that interest. It is only the value

of "real estate . . . subject to local taxation" which may be deducted. "Real estate," for the purpose of the deduction provided by G. L., c. 63, § 30, par. 3 (a), as well as for the purpose of assessment under G. L., c. 59, § 11, is the entire estate, and not some lesser interest therein. This deduction, by the terms of the statute, is allowed to a corporation only when it owns real estate in the sense described. It is not allowed to a corporation which owns a lease merely, or even a mortgage interest. It is not allowed to a lessee corporation even if the land is assessed to the lessee as occupant, but the lessee may recover the tax of his landlord unless there is a different agreement between them. G. L., c. 59, § 15. See Nichols, *Taxation in Massachusetts*, 2nd ed., p. 540.

Prior to Gen. St. 1919, c. 332, the provision for a deduction of the value of real estate and certain other kinds of property *outside the jurisdiction*, first authorized by St. 1865, c. 283, and extended by St. 1903, c. 437, § 72, was limited by the phrase "subject to local taxation," or, in the language of the act of 1903, "subject to taxation therein." That phrase was omitted in Gen. St. 1919, c. 332, and in the corresponding provision of Gen. St. 1919, c. 355, pt. I, § 1, because it was found that corporations were being taxed in many states by excise or income taxes on their local business rather than by taxes directly on their property in the jurisdiction, and that they were consequently suffering from the effects of a considerable amount of double taxation. See report of joint special committee on taxation, Senate Document No. 313 of 1919. Thereafter a corporation was entitled to a deduction on account of the value of real estate and other tangible property outside the Commonwealth, whether or not the property was directly subject to taxation where it was situated. The purpose of the change was to exempt from an indirect tax by the Commonwealth property, situated elsewhere, which was indirectly, but not directly, taxed where it was situated. This was in accordance with the "progressive tendency" of our statutes, referred to in *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156, 159, 160, "to prevent the technical distinction between excises and property taxes from resulting in double taxation." The words "real estate," as used in clause (c), were not intended, in my judgment, to have a different and broader meaning from that which they have in clause (a), i.e., the land itself, although in clause (c) they are not qualified by the words "subject to local taxation." This view is to some extent supported by the correlation of the words "other tangible property." Cf. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51; *Simplex Elec. Heating Co. v. Commonwealth*, 227 Mass. 225. It is my opinion, therefore, that a domestic corporation is not entitled to a deduction for a leasehold interest in real estate outside the Commonwealth.

You also ask to what deduction, if any, a lessee corporation is entitled on account of a building erected by it on the land of another.

A building may be considered as personal property belonging to a person other than the owner of the land to which it is affixed, as against the owner of the land and others having notice, if at the time it was annexed there was an agreement, express or implied, that it should be so held. *First Parish in Sudbury v. Jones*, 8 Cush. 184, 189, 190; *Gibbs v. Estey*, 15 Gray, 587; *Howard v. Fessenden*, 14 Allen, 124, 128; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Madigan v. McCarthy*, 108 Mass. 376; *Trask v. Little*, 182 Mass. 8.

But "buildings affixed to land are in their nature real property, and they are only considered as personal property between the parties to an agreement making them such and those who purchase the land with knowledge of the agreement; they pass as a part of the land to a purchaser for value without notice." *McGee v. Salem*, 149 Mass. 238, 240. The tax law makes no provision for taxing buildings separately from the land. On the contrary, G. L., c. 59, § 3, provides:—

"Real estate for the purpose of taxation shall include all land within the commonwealth and all buildings and other things erected thereon or affixed thereto. . . ."

Accordingly, it has been held that all buildings on land are taxable with the land as real estate. *Phinney v. Foster*, 189 Mass. 182, 187. See also *Milligan v. Drury*, 130 Mass. 428; *McGee v. Salem*, 149 Mass. 238.

By St. 1909, c. 490, pt. III, § 41, cl. 3rd, the provision giving to domestic business corporations a deduction of the value of certain property within the Commonwealth subject to local taxation was changed by inserting the words "works" and "structures." These words would seem to be superfluous. The reason for their inclusion is stated in the report of the commission on taxation for the year 1908, in the following note, at page 205:—

"By the provisions of section 40 (Revised Laws, chapter 14, section 37; Acts of the year 1906, chapter 463, part II, section 211, part III, section 125; chapter 516, section 14), corporations are required, among other things, to make return of their works, structures, real estate and machinery. This requirement is clearly for the purpose of giving to the Tax Commissioner such information as will aid him in making the deductions provided for in this section. While it may be doubtful that anything can be included in the words 'works, structures' that could not fairly be embraced within the meaning of real estate and machinery, the commission has thought it proper to employ the same phraseology in the deduction as in the return section; and therefore has added the words 'works, structures,' omitted in Revised Laws, chapter 14, section 38, in this and other sections where a corresponding omission occurs."

Clearly, in my opinion, they do not serve to extend to a lessee corporation a right to deduct the value of a building which, as between itself and its lessor, is personal property belonging to the lessee, since such a structure is taxable to the lessor as real estate.

Very truly yours,

JAY R. BENTON, *Attorney General*.

State Retirement Association — Workmen's Compensation — Injured Employee — Retirement.

Payments made in accordance with the requirements of the Workmen's Compensation Act are not to be construed by the Board of Retirement as salary or wages.

If a member of the Retirement Association above the age of seventy years applies for retirement because of age and service and not because of any disability, his retirement allowance should be figured from the date on which he should have automatically been removed from the service at the age of seventy years, in accordance with the statute [G. L., c. 32, § 2, par. (4)].

DEC. 13, 1923.

Hon. JAMES JACKSON, *Chairman, Board of Retirement*.

DEAR SIR:—I acknowledge the receipt of your communication wherein you state as follows: Because of an injury received on July 20, 1918, a member of the Retirement Association was awarded, by agreement between the Industrial Accident Board and the Metropolitan Water and Sewerage Board, now the Metropolitan District Commission, weekly payments of workmen's compensation. These weekly payments to him continued until September 27, 1923, when the Industrial Accident Board approved an agreement to redeem liability by the payment of \$1,100 in a lump sum.

During the time the workmen's compensation payments were being made to this beneficiary he retained his membership in the Retirement Association, because at the time of his injury he had reached sixty years of age and had completed at least fifteen years of service. This member has now applied for retirement under the provisions of the general contributory law, because of his age and service and not because of any disability for which the workmen's compensation payments were paid to him. He has submitted proof that he is older than he has always claimed to be, so that if he had not been

injured and had remained in the service, this proof of age would have required his retirement four years ago, at age seventy, the compulsory retirement age.

You request my opinion upon the following questions based on the above facts:

"1. Has the Board of Retirement the right now to retire the aforesaid member?"

2. If the answer to question 1 is in the affirmative, from what date shall the payment of the retirement allowance be figured— (a) the date the application for retirement was made, or (b) the date the aforesaid member would have been automatically removed from the service at the age of seventy years?"

G. L., c. 32, § 2 (4), provides as follows:—

"Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board upon recommendation of the head of the department in which he is employed, or, in case of members appointed by the governor, upon recommendation of the governor and council, and any member who reaches the age of seventy must so retire."

G. L., c. 32, § 5 (2) A (a), provides as follows:—

"Should a member of the association enter a position in the service of the commonwealth not covered by sections one to five, inclusive, or cease to be an employee of the commonwealth for any cause other than death, or for the purpose of entering the service of the public schools as defined in section six, before becoming entitled to a pension, there shall be refunded to him all the money paid in by him under section four (2) A, with such interest as shall have been earned thereon."

In an opinion of a former Attorney General (V Op. Atty. Gen. 192) it was held that,—

"The phrase 'before becoming entitled to a pension' must be interpreted as meaning before having become entitled to retire as a matter of right. It thus restricts refunds to persons who have not yet acquired voluntary retirement rights."

The member in question, having retained his membership in the Retirement Association, is now entitled to retirement, and your board has the right to retire him under the provisions of G. L., c. 32, § 2 (4), and I so answer your first question.

In an opinion of a former Attorney General to the Treasurer and Receiver General, dated December 21, 1914, it was decided that payments made in accordance with the requirements of the Workmen's Compensation Act are not to be construed by the Board of Retirement as salary or wages. This is in conformity with the decision of the Supreme Court in *King v. Viscoloid Co.*, 219 Mass. 420, wherein the court says (p. 425):—

"It has been suggested that the statutory compensation given to an . . . employee is really a payment of wages . . . But this is not so. The *quantum* of the compensation is measured by the amount of the wages; but the payment is in place of all the rights of action that belong to the injured employee, and covers suffering and temporary or permanent disability as well as loss of wages."

G. L., c. 152, § 69, provides as follows:—

"The commonwealth and any county, city, town or district having the power of taxation which has accepted chapter eight hundred and seven of the acts of nineteen hundred and thirteen shall pay to laborers, workmen and mechanics employed by it who receive injuries arising out of and in the course of their employment, or, in case of death resulting from such injury, to the persons entitled thereto, the compensation required by this chapter. Sections

sixty-nine to seventy-five, inclusive, shall apply to the commonwealth and to any county, city, town or district having the power of taxation which has accepted said chapter eight hundred and seven of the acts of nineteen hundred and thirteen."

G. L., c. 152, § 73, provides as follows:—

"Any person entitled to receive compensation as provided by section sixty-nine from the commonwealth or from such county, city, town or district, who is also entitled to a pension by reason of the same injury, shall elect whether he will receive such compensation or such pension, and shall not receive both. If a person entitled to such compensation from the commonwealth or from such county, city, town or district receives by special act a pension for the same injury, he shall forfeit all claim for compensation; and any compensation received by him or paid by the commonwealth or by such county, city, town or district which employs him for medical or hospital services rendered to him may be recovered back in an action at law. No further payment shall be awarded by vote or otherwise to any person who has claimed and received compensation under sections sixty-nine to seventy-five, inclusive."

G. L., c. 32, § 2 (4), provides, in part, as follows:—

"... and any member who reaches the age of seventy must so retire."

This provision is explicit. I am accordingly of the opinion that inasmuch as the member in question applied for retirement because of age and service and not because of any disability, his retirement allowance should be figured from the date on which he should have automatically been removed from the service at the age of seventy years, in accordance with the statute [G. L., c. 32, § 2 (4)].

Very truly yours,

JAY R. BENTON, *Attorney General*.

Hawkers and Pedlers — Agents — License.

Under the provisions of G. L., c. 101, §§ 13, 14 and 18, no one may peddle under a license except the person named therein. Accordingly, if a sale is made by an agent or representative, he and not his principal must be licensed to make such sale.

DEC. 20, 1923.

E. LEROY SWEETSER, Esq., *Commissioner of Labor and Industries*.

DEAR SIR:—You request my opinion on the following question:—

"Is there any statutory provision which would permit any person to peddle under a hawker's and pedler's license other than the one to whom such license has been issued or transferred?"

G. L., c. 101, § 13, defines hawkers and pedlers as follows:—

"Except as hereinafter expressly provided, the terms 'hawker' and 'pedler' as used in this chapter shall mean and include any person, either principal or agent, who goes from town to town or from place to place in the same town selling or bartering, or carrying for sale or barter or exposing therefor, any goods, wares or merchandise, either on foot, on or from any animal or vehicle."

G. L., c. 101, § 14, provides:—

"A hawker or pedler who sells or barter or carries for sale or barter or exposes therefor any goods, wares or merchandise, except as permitted by this chapter, shall forfeit not more than two hundred dollars, to be equally divided between the commonwealth and the town in which the offence was committed."

G. L., c. 101, § 18, provides:—

"Articles other than those the sale of which is licensed, or permitted without a license, under the preceding section, and not prohibited by section sixteen,

shall not be sold by hawkers or pedlers unless duly licensed as hereinafter provided."

Any person who attempts to sell under a license "which has not been issued or transferred to him, or has in his possession another's license with intent to use the same" shall be punished as provided in section 31.

The authority to grant hawker's and pedler's licenses is vested in the Director of Standards, in accordance with the provisions of G. L., c. 101, § 22, which is, in part, as follows:—

"The director may grant a license to go about carrying for sale or barter, exposing therefor and selling or bartering any goods, wares or merchandise, the sale of which is not prohibited by section sixteen, to any person who files in his office a certificate signed by the mayor or by a majority of the selectmen, stating that to the best of his or their knowledge and belief the applicant therein named is of good repute as to morals and integrity, and is, or has declared his intention to become, a citizen of the United States."

This section discloses the safeguards employed in the selection of those individuals who are to be entrusted with such licenses.

I am of the opinion that your question is answered by the express provisions of G. L., c. 101, § 13, wherein the Legislature, in defining hawker and pedler, has expressly included "any person, either principal or agent." The intent of the Legislature to forbid any person to peddle under a hawker's and pedler's license other than the one to whom such license has been issued or transferred is clearly disclosed. G. L., c. 101, § 31.

In *Commonwealth v. Hana*, 195 Mass. 262, at page 265, the court says:—

"The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation."

The language employed in the statute is unquestionably chosen in order to emphasize the fact that no one may peddle under a license except the person named therein. Accordingly, if a sale is made by an agent or representative, he and not his principal must be licensed to make such sale. See *Commonwealth v. Reid*, 175 Mass. 325; *Commonwealth v. Ober*, 12 Cush. 493.

I accordingly answer your question in the negative.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Banks and Banking — Trust Companies — Increase of Capital Stock — Amendment of Original Charter.

A trust company incorporated prior to 1888 may, by adopting G. L., c. 172, § 18, as provided in G. L., c. 172, § 3, increase its capital stock to any amount approved by the Commissioner of Banks, without the necessity of amending its original charter, even though that charter prohibited any increase of capital stock beyond \$500,000.

DEC. 31, 1923.

MR. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR:—You request my opinion in regard to the B. M. C. Durfee Trust Company of Fall River, Mass. You state that this trust company was incorporated under the provisions of St. 1887, c. 85, and that it is now desirous of increasing its capital stock beyond the limit of \$500,000 imposed by section 15 of that act. You request my opinion as to whether the adoption by this trust company of section 18 of G. L., c. 172, as provided by section 3 of G. L., c. 172, will be sufficient to enable it to increase its capital stock beyond \$500,000 without the necessity of petitioning the Legislature for an amendment to its charter permitting this increase.

The original general act for the regulation of safe deposit, loan and trust companies, St. 1888, c. 413, contained no provision by which trust companies incorporated previous to its passage might adopt the provisions contained therein. St. 1890, c. 315, § 2, however, provided:—

"Any incorporated trust company, or safe deposit and trust company, now transacting business in this Commonwealth and chartered by the legislature of this Commonwealth prior to the passage of chapter four hundred and thirteen of the acts of the year eighteen hundred and eighty-eight, may by vote of the majority of the stock represented at a special meeting of the stockholders legally called for the purpose accept and adopt as a part of their charters all the provisions of any one section or all the sections of said chapter four hundred and thirteen of the acts of the year eighteen hundred and eighty-eight; and thereafter shall have all the powers and privileges and be subject to all the duties, liabilities and restrictions set forth in such section or sections as may be thus accepted and adopted: *provided*, that a certificate signed and sworn to by the clerk of such trust company, or safe deposit and trust company, setting forth the fact of such acceptance and adoption shall be filed with the secretary of the Commonwealth and with the board of commissioners of savings banks within ten days from the date of such special meeting."

It is to be noted that this act provides that after adoption the trust company "thereafter shall have *all the powers and privileges . . .* set forth in such sections as may be thus accepted and adopted."

The language of St. 1890, c. 315, § 2, was considerably shortened at the time of its incorporation into the Revised Laws as section 2 of chapter 116, and later into the General Laws as section 3 of chapter 172. G. L., c. 172, § 3, reads as follows:—

"A trust company chartered before May twenty-eight, eighteen hundred and eighty-eight, transacting business in the commonwealth may adopt as a part of its charter this chapter, or any provision thereof which under the preceding section it may adopt, by a majority vote of the stock represented at a special meeting called for the purpose and by filing, within ten days from the date of such meeting, with the state secretary and with the commissioner a certificate sworn to by the clerk of such corporation and stating such adoption."

Despite this change of language, there seems, however, no reason to believe that any intention existed to change the force of St. 1890, c. 315, § 2, as regards the acquisition by a trust company, after adoption, of "all the powers and privileges" set forth in the adopted sections.

G. L., c. 172, § 18, is based upon R. L., c. 116, § 5, as modified by St. 1905, c. 189, and Gen. St. 1916, c. 37, and subsequent amendments thereto. R. L., c. 116, § 5, provided that the capital stock of trust companies should not be more than one million dollars; St. 1905, c. 189, permitted a trust company, subject to the approval of the Board of Commissioners of Savings Banks, to increase its capital stock up to that maximum in the manner provided for business corporations; and Gen. St. 1916, c. 37, did away with the maximum limitation and provided that trust companies, subject to the approval of the Bank Commissioner, could increase their capital stock up to any amount by the same method as that authorized in St. 1905, c. 189. The provisions of G. L., c. 172, § 18, are as follows:—

"The capital stock of such corporation shall be not less than two hundred thousand dollars, except that in a city or town whose population numbers not more than one hundred thousand the capital stock may be not less than one hundred thousand dollars, divided into shares of the par value of one hundred dollars each; and except also that in towns whose population is not more than ten thousand the capital stock may be not less than fifty thousand dollars divided into shares of the par value of one hundred dollars each; and no business shall be transacted by the corporation until the whole amount of its capital stock is subscribed for and actually paid in. Any such corporation may, subject to the approval of the commissioner, increase its capital stock in the manner provided by sections forty-one and forty-four of chapter one hundred and fifty-six. No stock shall be issued by any such corporation until the par value thereof shall be fully paid in in cash. Any such corporation may, subject to the

approval of the commissioner, decrease its capital stock in the manner provided by said section forty-one and the first sentence of section forty-five of said chapter; provided, that the capital stock as so reduced shall not be less than the amount required by this section."

It appears to me, from the above, that G. L., c. 172, § 3, read in the light of St. 1890, c. 315, § 2, permits a trust company incorporated prior to 1888 to secure the powers and privileges set forth in G. L., c. 172, § 18, even though inconsistent with a restriction contained in the original act of incorporation of such a trust company; that between 1905 and 1916 one of the privileges and powers thus acquirable would have been the power, subject to the approval of the Board of Commissioners of Savings Banks, to increase its capital stock up to one million dollars by the method provided for business corporations (now G. L., c. 156, §§ 41 and 44); and that today one of those powers and privileges is the power to increase its capital stock by a similar method to any amount approved by the Commissioner of Banks.

I am therefore led to the conclusion that the B. M. C. Durfee Trust Company can avoid the necessity of petitioning the Legislature for an amendment to its charter by the adoption of G. L., c. 172, § 18, as provided in G. L., c. 172, § 3, and I accordingly answer your inquiry in the affirmative.

Very truly yours,

JAY R. BENTON, *Attorney General*.

INDEX TO OPINIONS.

	PAGE
Aberjona River; regulations of the Department of Public Health; sewage	184
Agriculture, Department of; authority of employees to enter dwelling houses for purposes of inspection	125
Apple growers; use of risers in packing apples; marking standard boxes	142
Attorney General; approval of city ordinances	155
Member of the bar	51
Boston, city of; listing board; city department	48
Boston Elevated Railway Company; impairment of contract; eminent domain; police power	34, 42
Boston, police force of; civil service; promotions; non-competitive examinations	152
Bridge over highway; ownership of fee in public way	126
Cambridge, license commissioners of; license to maintain garage and keep gasoline; appeal to State Fire Marshal and Commissioner of Public Safety	186
Cape Cod Canal; location of terminal; directory or mandatory statute	183
Capital stock, increase of; trust companies; amendment of original charter	197
"Capital stock"; interpretation	29
City ordinances; approval by Attorney General	155
Civil service; police force of Boston; promotions	152
Probationary period; promotion	47
Veteran; discharge from draft	132
Cold storage warehouse; separate license for each plant	130
Conciliation and Arbitration, Board of; jurisdiction	115
Constitutional law; "anti-aid" amendment; extension of State retirement system to civilian employees of the Soldiers' Home	67
Lease of park lands by city; playgrounds	61
Appropriation of public funds; reimbursement of a coal company for losses sustained in deliveries of coal to schools	65
Submission to voters of an act to ascertain the will of the people with reference to the Eighteenth Amendment	86
Arbitrary discrimination; marketing contracts between co-operative agricultural associations and their members	102
Attorney General; member of the bar	51

Boston Elevated Railway Company; impairment of contract; eminent domain; police power	34, 42
Bridge over highway; ownership in fee of public way	126
Burden of proof in prosecutions for violation of hunting and trapping laws by aliens	60
Corporate records; inspection by stockholders	70
Delegation of legislative power to administrative officials; regulation of dealers in milk and cream	118
Drainage law	125
Eastern Massachusetts Street Railway Company; impairment of contract; eminent domain	34
Excise tax; motor vehicles	77
Sale of gasoline	98
Impairment of contract; disposition of land no longer adapted to public uses; public charity	97
Interstate commerce; correspondence school; agency	55
Educational institutions chartered under the laws of a foreign State; instruction within the Commonwealth	111
Intoxicating liquors; Federal permit	94
Jurisdiction of Registrar of Motor Vehicles over non-residents operating motor vehicles within the Commonwealth; service of process	75
Legislative power as to courts; district court judges sitting in the Superior Court	129
Limitation of right of persons accused of crime to a public trial; minors	71
Police power; registration of dealers in milk	115
Venue of crimes; "vicinity"	92
Co-operative agricultural associations; marketing contracts with members	102
Correspondence schools; interstate commerce; agency	55
Court records in cases involving violation of automobile laws; Registrar of Motor Vehicles	187
Credit unions; business of small loans; license	113
"Directory or mandatory" statute; interpretation	183
District court judges sitting in the Superior Court; legislative power as to courts	129
Drainage law; improvement of low lands and swamps	125
Eastern Massachusetts Street Railway Company; impairment of contract; eminent domain	34
Educational institutions chartered under laws of a foreign State; instruction within the Commonwealth; interstate commerce	111
Election; recount; registrars of voters; clerical assistance; guard rail	32
Eminent domain; notice to parties in interest; confirmatory deed	58
Firearms; minors; rifle clubs	114
Foreign corporations; allocation of income for taxation purposes; notice	145
Fraternal benefit society; mortuary funds; disbursement	158
Fugitive from justice; physical presence; constructive presence	83
Garage; license to maintain; license commissioners; appeal	186
Gasoline, excise tax upon the sale of	98
Necessary of life	160
Grand Army of the Republic; property leased; exemption from taxation	122
Great ponds; title; control; public rights; access; prescriptive rights	170
Hawkers and pedlers; agents; license	196
Hours of labor; engineers in State hospital laundries	105
Women and children in laundries in private boarding houses and hospitals	105
Income tax; interest from loans secured by mortgage	49
Inspection of dwelling houses used in the manufacture, transportation or sale of oleomargarine	125
Inspectors of slaughtering; charge for services	28

Insurance; fraternal benefit society; mortuary funds; disbursement for expense purposes	158
Joint liability of two or more companies; use of more than one name at the head of policy	66
Policies to tobacco growers for damage by hail; rates based on membership or non-membership in an association of tobacco growers; rebates	143
Insurance broker's license; veteran	120, 165
Intoxicating liquors; manufacture, etc.; Federal permit	94
Justice of the peace; residence in Massachusetts	85
Tenure of office; removal from the Commonwealth	95
Laundries in private boarding houses and hospitals; hours of employment for women and children	105
State hospitals; engineers; eight-hour day	105
License; hawkers and pedlers; agents	196
To maintain garage and keep gasoline; license commissioners; appeal	186
Marriages; authority to solemnize; Salvation Army	108
Medical milk commissions; milk certified by foreign corporations or boards	181
Metropolitan District Commission; jurisdiction; private ways adjoining roads constructed by Commission	168
Land bordering on Mystic Lakes; easement	179
Middlesex & Boston Street Railway Company; jurisdiction of Board of Conciliation and Arbitration	115
"Military supplies"; interpretation	32
Milk, certified; certification by foreign corporation or board	181
Milk, dealers in; registration	115
Regulation by Department of Agriculture	118
"Minister of the gospel," "denomination," "ordained"; interpretation	108
Mortuary funds of fraternal benefit society; disbursement for expense purposes	158
Motor vehicles; excise tax	77
Motor Vehicles, Registrar of; court records in cases involving violation of automobile laws	187
Jurisdiction over non-residents operating motor vehicles within the Commonwealth; service of process	75
Salaries of investigators; approval of Commissioner of Public Works	175
Narcotic drugs; prescriptions; use as evidence	45
National bank stock tax	85
National Guard; practising rifle or pistol shooting on rifle ranges on Sundays	141
Necessaries of life; gasoline	160
"Net income"; interpretation; corporation returns to Federal government	73
Notary public; residence in Massachusetts	85
Tenure of office; removal from the Commonwealth	95
Obsolete property of the Commonwealth, sale of; disposition of money received therefrom	97
Oleomargarine, manufacture of; search warrant; peaceable entry	125
Pharmacist; prescriptions for narcotic drugs; use as evidence	45
Plumbers, master; non-resident; registration	157
Prisoners; application for parole by person other than the prisoner	135
Minimum and maximum sentences; parole	131
Successive sentences; State prison	182
Public charity; disposition of land no longer adapted to public uses; <i>cy pres</i>	97
Public funds; extension of State retirement system; civilian employees of the Soldiers' Home	67
Reimbursement of a coal company for losses	65

	PAGE
Public Health, Department of; discharge of sewage into Aberjona River	184
Public records; public inspection	33
Public work; contract with two or more corporations, acting jointly; partnership	90
Public Works, Commissioner of; approval of increases in salaries of motor vehicle investigators	175
Registrars of voters; clerical assistance; recount	32
Salvation Army, officers of; authority to solemnize marriages	108
Savings banks and savings departments of trust companies; bonds of the Louisville & Nashville Railroad Company	136
Search warrant; peaceable entry; oleomargarine	125
"Sewage"; interpretation	184
Soldiers' Home; civilian employees; State retirement system	67
Soldiers' relief; re-enlistment of veteran in time of peace; discharge	150
Standard box for farm produce; use of risers in apple boxes	142
State employee; veteran; removal; hearing	76
State House grounds; traffic and parking regulations; Superintendent of Buildings	188
State Retirement Association; State employee; retirement; salary; payments under workmen's compensation act	194
Supervisor of Accounts; authority of Legislature to abolish office	27
Taxation; corporation returns to Federal government; interpretation of "net income"	73
Domestic business corporation; deduction on account of leasehold interest	189
Excise tax on motor vehicles	77
Exemption; Grand Army of the Republic; property leased to other organizations	122
United States Housing Corporation	22
Foreign corporations; allocation of income; notice	145
Franchise tax; interpretation of "capital stock"; trust companies	29
Income tax; interest from loans secured by mortgage	49
Legacy and succession tax upon interests of a non-resident under agreements with Massachusetts corporations	79
National bank stock tax	85
Teachers' Retirement Association; payment of back assessments in installments; payments in anticipation of membership	167
Withdrawal of membership; refund; retiring allowance	146
Tobacco growers, association of; insurance for damage by hail; rates based on membership or non-membership	143
Trust companies; abatement of taxes; interpretation of "capital stock"	29
Increase of capital stock; amendment of original charter	197
United States; jurisdiction; land acquired within the Commonwealth; application of State penal statutes	153
United States Housing Corporation; exemption from taxation	22
Veteran; insurance broker's license	120, 165
Service in the Army or Navy; discharge from the draft	132
Soldiers' relief; re-enlistment in time of peace; discharge	150
State employee not appointed under civil service provisions; removal; hearing	76
"Vicinity"; interpretation	92
Waterways and Public Lands, Division of; terminal for Cape Cod Canal; directory or mandatory statute	183
Women and children; laundries in private boarding houses and hospitals; hours of labor	105
Workmen's compensation act; injured State employee; retirement under State retirement system; salary	194
Wrentham State School; admission and discharge of pupils or other inmates	139

RULES OF PRACTICE

IN INTERSTATE RENDITION.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:—

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(b) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge

thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1924



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1924



The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 21, 1925.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1924.

Very respectfully,

JAY R. BENTON,
Attorney General.

The Commonwealth of Massachusetts.

DEPARTMENT OF THE ATTORNEY GENERAL.

State House.

Attorney General.

JAY R. BENTON.

Assistants.

ALEXANDER LINCOLN.

JOSEPH E. WARNER.

LEWIS GOLDBERG.

A. CHESLEY YORK.

JAMES H. DEVLIN.

A. PERRY RICHARDS.

DAY KIMBALL.¹

ROGER CLAPP.

CHARLES F. LOVEJOY.²

MELVILLE FULLER WESTON.²

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

¹ Resigned June 1, 1924.

² Appointed June 1, 1924.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

FOR THE FISCAL YEAR.

Appropriation for 1924	\$100,000 00
Appropriation for 1923, unexpended balance brought forward	6,069 84
Appropriation for small claims, St. 1924, c. 510	5,000 00
	<hr/>
	\$111,069 84

Expenditures.

For salary of Attorney General	\$8,000 00
For law library	599 95
For salaries of assistants	35,924 99
For clerks	7,470 00
For office stenographers	6,505 50
For telephone operator	910 00
For legal and special services and expenses	31,166 44
For office expenses and travel	3,264 78
For court expenses	11,896 10
For small claims	775 00
	<hr/>
Total expenditures	\$106,512 76

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 21, 1925.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my annual report.

The cases requiring the attention of this Department during 1924, to the number of 7,675, are tabulated below:—

Corporate franchise tax cases	439
Extradition and interstate rendition	334
Grade crossings, petitions for abolition of	61
Indictments for murder	51
Inventories and appraisals	4
Land Court petitions	103
Land-damage cases arising from the taking of land by the Department of Public Works	49
Land-damage cases arising from the taking of land by the Metropolitan District Commission	18
Land-damage cases arising from the taking of land by the State House Building Commission	1
Land-damage cases arising from the taking of land by the Department of Mental Diseases	4
Land-damage cases arising from the taking of land by the Pilgrim Tercentenary Commission	1
Miscellaneous cases arising from the work of the above-named commissions	34
Miscellaneous cases	857
Petitions for instructions under inheritance tax laws	36
Public charitable trusts	187
Settlement cases for support of persons in State hospitals	73
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	5,423

CAPITAL CASES.

Indictments for murder disposed of during the year 1924:

Berkshire County.—In charge of District Attorney Charles H. Wright: John Passo.¹

Bristol County.—In charge of District Attorney Stanley P. Hall: Frederick Brengton¹ and John E. Kennedy.¹

Essex County.—In charge of District Attorney William G. Clark: Cyrille J. Vandenhecke.

Hampden County.—In charge of District Attorney Charles H. Wright: Mary C. Sullivan and Joseph Zygarowski.¹

Hampshire County.—In charge of District Attorney Thomas J. Hammond: John Greczynski.

Middlesex County.—In charge of District Attorney Arthur K. Reading: Robert Lee Benson,¹ John Hankala, John Joseph King, Jr.,¹ Thomas Lanzo, Nicola Lupo, Michael Palmieri, Lawrence Sullivan, Frank Wilcinski and Albert Williams.

Norfolk County.—In charge of District Attorney Harold P. Williams: Michael DeBernardis and Sebastiano DeCristoforo.¹

Suffolk County.—In charge of District Attorney Thomas C. O'Brien: Massad Ayoub, David Delancey, John Harvey,¹ Walter R. Jennings and Edward Sheafe, Antonio Kondratink,¹ Giovanni Micciche, Joseph Morello, Brickinbridge Russell, Pasquale Vanello and Barbara N. Wilfert.¹

Worcester County.—In charge of District Attorney Emerson W. Baker: Ammie Pouncey, John Rea, Mitchell Shotoian and Andros Spyropoulos.

¹ Committed to State hospital.

The following indictments for murder are pending:

Berkshire County. — In charge of District Attorney Charles H. Wright: Louis Mercier.

Bristol County. — In charge of District Attorney Stanley P. Hall: Mary Juszynska.

Essex County. — In charge of District Attorney William G. Clark: Vito Caruso.

Hampden County. — In charge of District Attorney Charles H. Wright: John H. Burns, Manual Pereira and Stanley Zelenski.

Middlesex County. — In charge of District Attorney Arthur K. Reading: Hallie Mowbray, Raymond Donle Thiery and Salvatore Vona.

Norfolk County. — In charge of District Attorney Harold P. Williams: Alfred W. Bedard, Harry Goldenberg, Celestino Madeiros and James F. Weeks; and Nicola Sacco and Bartolomeo Vanzetti.

Plymouth County. — In charge of District Attorney Harold P. Williams: Jose Julio Borges.

Suffolk County. — In charge of District Attorney Thomas C. O'Brien: Frank Festa and J. Thomas Gettigan.

THE ADMINISTRATION OF CRIMINAL JUSTICE.

By virtue of his statutory powers, the Attorney General has called conferences of the several District Attorneys during the year. The purpose of these meetings is to facilitate the work of the District Attorneys, and the conferences are very helpful to the Attorney General in the performance of his duty "to consult with and advise district attorneys in matters relating to their duties." These meetings provide the best possible opportunity for consultation by the Attorney General and the members of his staff with the District Attorneys on questions that arise in the performance of official duties. The information gathered at these conferences saves a great amount of time and expense on the part of the District Attorneys as well as the Attorney General's office, and enables them to perform their duties with greater efficiency and satisfaction.

At a conference held on March 8, last, there was a discussion of matters of general policy in the prosecution of cases under the so-called "Blue Sky" Law and the statutes relating to "bucketing." The matter of enforcement of laws relative to the illegal sale of intoxicating liquors was also considered.

On September 27, last, there was a conference held at the office of the Chief Justice of the Superior Court in the Court House at Boston, at which subjects of a confidential character were considered.

At a conference held on December 6, last, the entire time was given to a discussion of proposed recommendations to be made to the General Court in the matter of needed changes in statutes having to do with the administration of the criminal law. Among others participating in the deliberations was Hon. Walter Perley Hall, Chief Justice of the Superior Court.

At the conclusion of our deliberations, it was unanimously voted to authorize me, on behalf of the District Attorneys, to make the following recommendations and suggestions:

A. Increase of Penalty for Failure of Witnesses to attend.

G. L., c. 233, § 5, provides that witnesses duly summoned and required to appear and testify, who fail to attend, may be punished by a fine of not more than \$20. Failure of an important witness to appear at the trial of a criminal case may often imperil the successful prosecution of such case. The penalty for failure to attend when summoned should be sufficiently adequate to deter witnesses from refusing to appear. It is therefore recommended that the penalty for this offence be increased to a fine of not more than \$300, or imprisonment for not more than three months, or both.

B. Prosecutions for Desertion and Non-Support.

G. L., c. 273, § 5, provides that in prosecutions for desertion and non-support the court may direct the defendant to pay to the probation officer certain sums

periodically for a term not exceeding two years and may release the defendant on probation. It frequently happens that the defendant, after the court's order, leaves the state but continues making payments for two years and then ceases. The defendant cannot be brought back through the process of interstate rendition because the court has exhausted its power under the original complaint, and, if a second complaint is made, he is not a fugitive from justice, since the new charge is based upon acts committed subsequent to his departure from the Commonwealth. Yet it is obvious that the statute ought to be broad enough to compel him to support his family. I therefore recommend that the statute be amended so as to extend the term during which the court may direct that payments be made to a period considerably longer than two years.

C. *Larceny of Property exceeding \$2,000 in Value.*

G. L., c. 266, § 30, provides for a penalty of not more than five years in State Prison for larceny of property exceeding \$100 in value. In a recent case a defendant was convicted of larceny of a huge sum of money from a bank. The larceny wrecked the bank and caused great suffering to many depositors, yet the maximum penalty was only five years in State Prison, the same penalty which might have been imposed for larceny of property of \$101 in value. While such cases may not often arise, it is desirable that the statute should be so enlarged as to meet such a situation. It is recommended that the statute be amended so as to enable the court to impose a sentence of not more than twenty years in State Prison for larceny of property which exceeds \$2,000 in value.

D. *Reduction of Minimum Penalties in Certain Cases.*

The District Attorneys recommend that legislation be enacted carrying out the suggestion of the special commission relative to the criminal law to the effect that a person convicted of any crime excepting treason or murder, punishable by imprisonment in State Prison, may be sentenced to imprisonment in a house of correction for not more than two and a half years. See Report of Special Commission to Investigate the Criminal Law, House (1923) No. 224, pp. 5, 6, Append. "C".

RECOMMENDATIONS IN PREVIOUS REPORT.

At the instance of the District Attorneys I resubmit certain recommendations made in my previous report.

1. *Conspiracy to commit a Felony.*

Under existing law a conspiracy to commit a felony is merely a misdemeanor and the maximum penalty therefor is imprisonment for two and a half years. This applies even though the conspiracy be one to commit murder or some other serious felony. It seems clear that a conspiracy to commit a felony ought to be punished at least in the same manner and to the same extent as an attempt to commit a felony. I recommend that legislation to this effect be enacted. See Attorney General's Report, 1923, p. 11.

2. *Bail in Criminal Proceedings.*

The advisability of enacting legislation providing that the liability of a bail or surety be a lien upon the real estate offered for his qualification so as to protect the Commonwealth in its monetary rights ought to be considered. For the reasons therefor see Attorney General's Report, 1923, p. 10.

3. *Certifying the Entire Record and Testimony in Certain Criminal Cases.*

I resubmit the recommendation relative to certifying to the Supreme Judicial Court the entire record and transcript in cases involving homicide where the presiding justice is of the opinion that there should be such certification. See Attorney General's Report, 1923, p. 10.

4. *Report of the Department of Mental Diseases as Evidence in Criminal Cases.*

At the request of the District Attorneys I renew my recommendation that the statute be amended by striking out the provision that the report of the Department of Mental Diseases be admissible as evidence of the mental condition of the accused. Under the law the Commonwealth may not constitutionally offer such report as evidence, but the defendant may. This is manifestly unfair. See Attorney General's Report, 1923, p. 11.

SPEEDY JUSTICE IN CRIMINAL CASES.

I respectfully ask the prompt attention of the General Court to and careful consideration of any request that may be presented by any of the District Attorneys for additional assistants.

A leading member of the Chicago bar forcibly called attention to the crying need of the hour, when he stated that, —

The history of organized government demonstrates conclusively that the speedy trial of criminal cases and the swift and certain punishment of criminals promptly effect a reduction in the volume of crime. On the other hand, increased crime follows closely on the heels of delayed trials and deferred punishment. In short, crime increases or decreases in the proportion that punishment is swift and certain. If we wish to enjoy the benefits of protection of life and the preservation of property, for which government was primarily organized, it is imperative that cases arising under the criminal laws be speedily disposed of.

Statutory legislation throughout the country has had a tendency within the last quarter of a century to be in favor of the criminal. . . .

There has been too much mollycoddling of the less than one third of one per cent of the population which is criminal.

Every District Attorney in Massachusetts should have a sufficient force of assistants to clear the dockets of the criminal court and to keep them clear.

ASSAULTS UPON POLICE OFFICERS.

The prevention, prosecution and punishment of crime is one of the most serious and difficult problems of government. Our first line of defence against the vicious, criminal elements in our community is the police. It is the duty of all citizens to stand four square behind the police in their enforcement of the laws. Police officers are public officers under a public trust to preserve the public peace and to protect society. It is the police officer's duty to face danger with the same disregard of personal consequences as a soldier. His courage must be of the highest. As His Excellency the Governor said to you in his address two weeks ago, "The fact that a police officer is engaged in an occupation which is at times full of danger is no reason why we should sit calmly by and make no effort to further protect him in the performance of his duty."

I believe that it is in the interests of the public to call attention at this time to a type of crime that is prevalent, that is notorious and shameless, and which must be stopped. I refer to cases of assault and battery upon police officers in the performance of their duties. I requested from Police Commissioner Herbert A. Wilson of Boston a list of cases of this character, and I have in my possession an itemized statement, with names and dates, showing that from January 1, 1921, to November 30, 1924, there were, in the city of Boston alone, 443 cases of this kind.

This evil must be attacked. There should be a specific law relative to this crime against the public peace, with an adequate penalty, not only for the purpose of deterring assaults upon police officers, but also for the protection of the general public, since the protection of the former is essential to the safety of the latter. There must be speedy and unrelenting prosecution by the law officers, and, most important of all, we must have an aroused public opinion, because we never want to forget that the ultimate enforcement of the law rests upon the jury box.

REINSTATEMENT OF DISBARRED ATTORNEYS — COMPENSATION OF COUNSEL.

The responsibility, imposed a few years ago, of conducting disbarment proceedings or appointing unpaid counsel to conduct them, was removed from the Attorney General, upon his recommendation, by chapter 134 of the Acts of 1924. The act provides that hereafter, when a disbarment petition is filed, "the proceedings thereafter shall be conducted by an attorney to be designated by the court."

This statute does not expressly apply to petitions for discipline or for reinstatement of members of the bar who have been disbarred. It is clear that in these two classes of cases it is equally important that the court should have the power to designate an attorney to conduct the proceedings when a petition is filed. The law should be amended to make this possible.

In my last report I pointed out that attorneys who are designated by the court to conduct proceedings of this character should be properly compensated. Any question as to the power of so compensating attorneys should be cleared up at this time.

I therefore recommend that G. L., c. 221, § 40, as amended by chapter 134 of the Acts of 1924, be further amended so that said section shall read as follows:

SECTION 40. An attorney may be removed by the supreme judicial or superior court for deceit, mal-practice or other gross misconduct, and shall also be liable in damages to the person injured thereby, and to such other punishment as may be provided by law. Whenever a petition is filed for the removal or the discipline of an attorney, or for the reinstatement of a disbarred attorney, the proceedings thereafter shall be conducted by an attorney to be designated by the court. The compensation of an attorney so designated and the expenses of the inquiry and proceedings in either court shall be paid as in criminal prosecutions in the superior court.

PROVINCETOWN TERCENTENARY COMMISSION.

When the Pilgrim Tercentenary Commission was established, with power to acquire land for its purposes in Plymouth, a plan was provided by Spec. St. 1919, c. 187, § 9, by which, upon the completion of the Commission's work, it might, with the approval of the Governor and Council, make provision for the future care and maintenance of land acquired and structures erected by the Commission, by contract with municipal bodies and private societies, so that the plans brought to completion by the Commission might not be frustrated after it had ceased to function. The Provincetown Tercentenary Commission was created by Gen. St. 1919, c. 366, to perform duties in Provincetown similar in many respects to those discharged by the Pilgrim Tercentenary Commission at Plymouth. Pursuant to the statute, the Provincetown Tercentenary Commission has created and carried out a scheme, by the acquisition of land and the erection of structures in Provincetown, suitable to the preservation of the points of historic interest at that place. The work of the Commission will fail to be of permanent value if provision is not made for entrusting the duty of the care and maintenance of the sites already owned and beautified by the Commission. No statute heretofore enacted has provided for the appointment of suitable bodies or authorities, State or otherwise, to take over this duty when the Commission ceases to exercise authority. Legislation looking to this end would seem to be advisable, as the active work of the Provincetown Tercentenary Commission is drawing to a close.

THE JUDICIAL COUNCIL.

The most important act of the last legislative session relating to the administration of justice was chapter 244, creating an advisory judicial council following the recommendation of the Judicature Commission and the Attorney General. This council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, and of the work accomplished, and the results produced by that system and its various parts, has been appointed as follows:

Hon. William C. Loring has been appointed by the Chief Justice of the Supreme Judicial Court to represent that court; Hon. Franklin G. Fessenden has been ap-

pointed by the Chief Justice of the Superior Court to represent that court; Hon. Charles T. Davis, the judge of the Land Court, represents that court.

His Excellency the Governor appointed from the Probate bench Hon. William M. Prest of the Suffolk Probate Court; from the District Court bench, Hon. Frank A. Milliken of New Bedford, chairman of the administrative committee of the district courts; and from the bar, Addison L. Greene, Esq., Frank W. Grinnell, Esq., Robert G. Dodge, Esq., and Hon. Frederick W. Mansfield.

On November 8 the new council met, and former Justice Loring was chosen chairman and Frank W. Grinnell, Esq., secretary. In view of the short time remaining of the calendar year, no report of the council was made to the Governor other than a formal report of organization. The council has held three other meetings and has under consideration the subject of references to masters for hearings on the merits in equity and other equity rules. The new council marks the beginning of a continuous constructive program for the improvement of our judicial system.

DISTRICT COURT JUDGES IN THE SUPERIOR COURT.

Another important step forward was taken when chapter 485 of the Acts of 1924 was enacted extending the jurisdiction of district court judges called to sit with juries in the Superior Court under chapter 469 of 1923 to include "any misdemeanor except conspiracy or libel"; and providing more adequate compensation for the judges thus sitting.

In the Boston Bar Bulletin for July, 1924, the following paragraph appeared in reference to this legislation:

An act was passed extending the jurisdiction to include all misdemeanors, except libel and conspiracy, and providing compensation for the judges dating back to January first. This means that the judges who sat between October and January have served without compensation and must accept the situation philosophically as the pressure of the economy argument was too strong. It is only fair, however, that they should have the satisfaction of knowing that they performed a great public service which is appreciated even though they were not paid. They helped to break the back of the worst monster in the judicial system, — the deliberate congestion of criminal cases in the Superior Court. It is a most successful experiment recommended by the Judicature Commission. Even including the back pay, for considerably less than the cost of one permanent Superior Court judge, the Commonwealth has had the services of about fifteen judges when and where needed for the business of the minor criminal offences. More cases have been tried. Still more have produced pleas of "guilty" when trial was found to be imminent, and still more have not been appealed, so that in Suffolk County alone the number of appealed cases is reported to have dropped from five hundred or more to about three hundred or less a month.

THE SPOT POND CASE.

The Legislature, in 1912, passed an act permitting the town of Stoneham to file a petition in the Middlesex Superior Court for a determination of damages sustained by the town by reason of a taking in 1898 of Spot Pond by the Metropolitan Water Board under St. 1895, c. 488.

Suit was started in 1913, and commissioners, appointed in accordance with the statute, filed a report in the fall of 1922, in which they found that the town had suffered no damage, with an alternative finding that if, as a matter of law, the town had, on the date of the taking, the right to take water for the use of its inhabitants, then damage had been incurred to the amount of \$188,000 and interest, which would approximate a total of \$500,000.

This report was reviewed by a justice of the Superior Court, who ruled that, as a matter of law, on the facts as set forth, the town did not have the right to take water from Spot Pond on the date in question, and accepted the determination of the commissioners that the petitioner suffered no damage by reason of the taking.

The case was then reported to the Supreme Judicial Court and a final decision was handed down on May 21, last, which affirmed the order of the Superior Court accepting the determination by the commissioners that the town suffered no damage by reason of the taking of Spot Pond by the Commonwealth. The suit was thus terminated in favor of the Commonwealth. The case was an important one, preparation of which involved an exhaustive study of public records and court decisions, commencing with 1635, when the Colonial Assembly enlarged the territorial boundaries of Charlestown so as to include Spot Pond. Arthur E. Sea-

grave, Esq., and E. Irving Smith, Esq., were assigned to handle the case by my immediate predecessor, and I desire at this time to commend them publicly for their very efficient, faithful and successful handling of this important suit for large damages.

ALPHA PORTLAND CEMENT COMPANY CASES.

The Alpha Portland Cement Company cases were argued in October, last, before the Supreme Court of the United States by Assistant Attorney General Alexander Lincoln. These were suits for the recovery of excise taxes assessed under the Corporation Tax Law of Massachusetts against a foreign corporation doing business in Massachusetts, which concededly was purely interstate. The question whether this law in its application to corporations like the petitioner was constitutional was thus brought directly in issue. In the Supreme Judicial Court these taxes were sustained as valid (244 Mass. 530 and 248 Mass. 156) and the suits were then taken on writ of error to the Supreme Court of the United States. The cases have not yet been decided.

PORT DIFFERENTIAL INVESTIGATION.

This proceeding of investigation was instituted by the United States Shipping Board upon its own motion, following the filing of a complaint by the Port Utilities Commission of Charleston, S. C., and the Municipal Docks and Terminals of the Port of Jacksonville, Fla., attacking the ocean differentials from the South Atlantic ports, and a related complaint by the Norfolk Port Commission, of Norfolk, Va., seeking the establishment of differentials on certain commodities on which the ocean rates are now equalized. The Board's investigation has been more comprehensive in scope than the formal complaints referred to, and brought into issue the propriety of the ocean rates from all the Atlantic and Gulf ports to the foreign countries designated in the order instituting the investigation.

As the ports of Massachusetts had an interest in the situation quite as vital as that of the southern ports, His Excellency the Governor, at the relation of Commissioner William F. Williams of the Department of Public Works, Division of Waterways and Public Lands, requested that the Attorney General attend a hearing and present arguments on behalf of the Commonwealth before the United States Shipping Board. The case was heard in Washington on November 25, last, and the Commonwealth was represented by Assistant Attorney General James H. Devlin, who stated that the position of the Commonwealth was that the Shipping Board should take no action which would result in further discrimination against the Port of Boston, and pointed out that Massachusetts had lost much of its port business on account of certain rail differentials. He further respectfully asked that the pending complaints be not acted on, and that nothing further be done in the matter of investigation until such time as Congress shall have referred the matter to some board or boards already existing or to be created, which would have the power to consider the entire subject-matter of rates, both rail and ocean.

INTERSTATE MOTOR BUS LINES.

The question to what extent motor busses engaged in carrying passengers between points outside the Commonwealth and cities and towns within its borders may be regulated by State and local authorities was presented to the Attorney General for his consideration, in an informal manner, by various local authorities. Conferences were held by the Attorney General with the representatives of various municipalities and with counsel for certain bus lines. Important questions of law as to the status of bus lines as carriers of passengers engaged in interstate commerce, and the effect of local regulation as an interference with interstate commerce, which must ultimately be determined by the Supreme Court of the United States, lie at the basis of any adequate discussion of the problems raised by a consideration of the regulation of this form of traffic by cities and towns, as well as by the Commonwealth.

Two suits arising in other jurisdictions were pending before the Supreme Court of the United States at Washington, *Duke v. Michigan Public Utilities* and *Buck v.*

Kuykendall. The decision of these cases bade fair to determine the basic questions of law involved in the regulation of the motor bus lines. An assistant attorney general attended the sittings of the Supreme Court at Washington for the purpose of conferring with counsel in these suits and hearing the cases argued.

An opinion has just been handed down by the Supreme Court in the first of the above-mentioned suits, which holds certain statutes of Michigan, intended to regulate so-called interstate carriers, to be unconstitutional, as an interference with interstate commerce. An opinion in the other suit is anticipated shortly, and the decisions in the two suits, read together, will in all probability establish the law which must be followed in the future in regulating interstate bus lines.

GASOLINE.

The gasoline investigation, begun during the previous year, has been continued during the year just past. The department has been in touch with the Attorneys General of the several States on various phases of the general problem. On March 14, 1924, your Attorney General, accompanied by Assistant Attorney General Lewis Goldberg, attended a conference of Attorneys General of the several States, held at Chicago and called by Attorney General Spillman of Nebraska pursuant to instructions given him at the prior conference. On July 7th your Attorney General, as a member of a sub-committee of Attorneys General, attended a conference in Philadelphia, and on July 9th a standing executive committee, of which your Attorney General is a member, held a conference on the gasoline situation in Washington with Hon. Harlan F. Stone, Attorney General of the United States.

In September Mr. Eugene C. Hultman, chairman of the Special Commission on the Necessaries of Life, called my attention to an alleged attempt in the western part of the Commonwealth to organize the retail dealers there for the purpose of raising and controlling the retail price of gasoline. I sent an Assistant Attorney General to Springfield to make an investigation, and, in consequence of his report, I requested the Chief Justice of the Superior Court to convene a special sitting of the Grand Jury for Hampden County to consider the evidence which had been gathered. Pursuant to the orders of the Chief Justice, the Grand Jury was convened at Springfield on October 15th and the evidence was presented under the direction of an Assistant Attorney General and an Assistant District Attorney of Hampden County. The Grand Jury after hearing evidence for some days returned an indictment charging three men with conspiracy in various counts to fix, control and unreasonably enhance the retail price of gasoline and unlawfully to restrain competition in that commodity. The Grand Jury deferred further action upon the evidence presented to its next regular sitting.

Your Attorney General has throughout received the full and efficient co-operation of the Special Commission on the Necessaries of Life.

UNCLAIMED DEPOSITS IN SAVINGS BANKS.

Acting under the provisions of G. L., c. 168, § 42, which provides that all amounts deposited with savings banks which have remained unclaimed for more than thirty years, credited to depositors who cannot be found and who have not made a deposit or withdrawal nor have had interest added upon their pass-books, and for which no claimant is known, shall, with the increase and proceeds thereof, be paid to the State Treasurer, the Attorney General, in June, 1924, began proceedings in the various Probate Courts for the collection thereof. Upon the reports submitted to him by the Commissioner of Banks it appeared that such unclaimed deposits, amounting in the aggregate to \$167,263.30, were held by 123 savings banks.

The practice in the Probate Courts requires that a petition shall be filed with relation to each savings bank, and that publication of the order of notice upon such petition shall be published three times in a newspaper within the county, and in the County of Suffolk in two newspapers. Petitions were filed and publications made. The expense incurred for such publications amounted to \$8,137.23. Before final decrees were made upon the respective petitions a very great number of depositors, or their heirs, who were apprised by the newspaper advertisements

of the existence of these deposits, came forward, established their claims and were paid by the banks, and the amounts so paid were deducted from the sums originally sought to be paid to the Treasurer. The amounts so recovered by depositors and their heirs, who learned of the existence of these unclaimed funds through the advertisements of the citations, amounted to \$54,662.98.

The total sum paid to the State Treasurer by the savings banks upon final decrees obtained by the Attorney General in the Probate Courts, to date, is \$72,-549.11. About \$2,000 is to be paid upon six petitions which are still pending.

A petition has not yet been brought against one of the savings banks in Suffolk County, which reports unclaimed deposits 20,056 in number, totalling \$38,051.21. The expense of the two publications of the citation relative to this bank will be so large that a special appropriation should be made to meet it.

THE NEW LIQUOR STATUTE.

At the election last November, chapter 370 of the Acts of 1923, being "An Act relative to intoxicating liquors and certain non-intoxicating beverages," was approved. Certain portions of this act were recommended in the annual report of 1922 on the unanimous request of the Attorney General, the Attorney General elect, district attorneys and district attorneys elect of the several districts of the Commonwealth.

Prior to the going into effect of the act last December, two conferences were held with all the members of the State constabulary, and these officers were fully advised as to their powers and duties under the act.

TAXATION OF BANKING INSTITUTIONS.

Under Res. 1924, c. 20, a special commission was appointed by the Governor to investigate the operation of the laws relative to the taxation of national banks, savings banks and trust companies and to make recommendations relative thereto.

During the past few months, upon the request of this commission, the department had given its aid and advice as to the legal effect of proposed legislation pending before it, and finally, on November 17, last, an opinion of some length was given upon questions of law relating to the powers of the General Court in the imposition of taxes upon national banking associations for their shares or property.

PUBLIC CHARITIES.

One hundred and eighty-seven matters involving public charities have been considered by the department. Most of these cases have been before the court on the petition of trustees or executors asking for instructions as to their duties or for the construction of the will or other written instrument under which they acted. Many of the cases have been before the court on petition of trustees, where the particular object of the trust had ceased to exist, asking for authority to use the fund for a purpose similar to that expressed by the donor. The following cases have deserved the especial attention of the department:

Harriet M. Huntington, late of Boston, left a fund of over \$60,000 to be held for ten years, if feasible, and then to be given "to the Hyde Park Medical Club or association for a hospital or towards supporting a convalescent home." Upon a petition by the executors for instructions, and against the opposition of the heirs and next of kin, who claimed that the trust had failed, the gift was established as a valid charitable trust, and accumulation for ten years in accordance with the terms of the will was ordered.

Rufus E. Lawrence, late of Chelsea, left the residue of his estate, amounting to approximately \$200,000, to charity. The allowance of the will was unsuccessfully contested in the Probate Court. The case is still pending, and may go to the Supreme Judicial Court.

Among other pending matters involving important charitable bequests, in which an appearance has been entered, are the petition of the Trustees of the Public Library of the City of Boston relating to the trusts under the will of Josiah H. Benton; the matter of the probate of the will of Lotta M. Crabtree, late of Boston; and the case of Visitors of The Theological Institution of Phillips Academy in

Andover against Trustees of Andover Theological Seminary *et al.*, now pending in the Supreme Judicial Court.

Another important pending matter is the Robert B. Brigham Hospital case. Under an order adopted by the city council of the city of Boston, the mayor was requested to ask the Attorney General to bring an information in equity for the purpose of procuring the proper execution of the public charity directed to be established under the will of Robert B. Brigham. It is claimed that the trust funds left by said Robert B. Brigham are being used in a way not specified in the will. The sole question is whether the terms of the will and the intent of the donor have been complied with. By reason of the importance of the case, several hearings before the Attorney General have been held, at which the city and the hospital were represented by counsel. One or two more hearings will be necessary. At the conclusion of the hearings the Attorney General will determine whether or not action should be taken as requested by the city.

INTERSTATE RENDITION.

There has been in recent years a steady and marked increase in the number of interstate rendition cases handled by this department. During the year 334 such cases were disposed of, an increase of 64 cases over the previous year's record, and approximately three times the number of interstate rendition cases handled by the department ten years ago. The cases disposed of involved all manner of crimes, from simple misdemeanors to murder. Fugitives from justice were brought back to Massachusetts from practically every part of the United States, and demand was made upon us for the return of fugitives from nearly every section of the country. It might well be noted that in not a single case has any requisition for the surrender of fugitives from the justice of Massachusetts been refused by Governors of other States upon the ground that the papers accompanying the requisition, and passed upon by this department, were not in proper form.

Hearings were held in 12 cases before Assistant Attorney General Lewis Goldberg, involving in some of them intricate and perplexing questions of law. At each of these hearings the alleged fugitive was represented by counsel, and in no case was the final decision of this department challenged in the courts.

PUBLIC ACCESS TO GREAT PONDS.

Under the provisions of St. 1923, c. 453, three petitions were received, each signed by more than ten citizens, setting forth that public necessity required a right of way for public access to certain great ponds within the Commonwealth, to wit, Long Pond in Blandford, Glen Echo Pond in Canton, and Little Pond in Sherborn, respectively.

Pursuant to the act, I designated Assistant Attorney General Lewis Goldberg to represent the Attorney General on the board.

Public hearings, which had been duly advertised, were held upon the first two petitions and evidence and arguments were heard. The joint board found that public necessity did not require a public right of way to Glen Echo Pond and so reported to the Legislature. The joint board found that there was public necessity for a right of way for public access to Long Pond in Blandford. A report containing the board's findings and recommendations has been filed with the General Court. This report makes definite recommendations as to the manner in which such rights of way should be taken, paid for and maintained, and, it is believed, proposes a reasonable and practical policy relative to future takings of rights of way for public access to great ponds.

The petition for a public right of way to Little Pond in Sherborn was received recently. A survey of the pond is now being made and a public hearing will be held speedily.

THE INVESTIGATION OF SMALL CLAIMS BY THE ATTORNEY GENERAL.

By chapter 395 of 1924, the Attorney General was called upon to investigate all claims against the Commonwealth presented to him, provided there is not any statutory authority whereby the claimant may prosecute his claim by suit, at law

or in equity, or any other mode of redress provided by law. The Attorney General is authorized to hold hearings, take evidence, administer oaths and issue subpoenas in making his investigation. Payments are to be made from the State treasury on his report of claims not exceeding \$1,000. If he finds the claimant is entitled to more, he is to report to the Legislature.

The Legislature appropriated \$2,000 for the compensation of an assistant to handle the small claims, but so far the regular staff has been able to take care of the additional work and it has not been necessary to use the appropriation. Three thousand dollars was appropriated for the balance of the year for the settlement of the claims, and to date fifteen claims have been presented, of which four claims, totalling in amount \$1,379.46, have been allowed, five claims have been disallowed, and six claims are now pending.

DEPARTMENT OF THE ATTORNEY GENERAL.

The number of official opinions rendered by the department during the year was 133.

The collections of the department for the fiscal year amounted to \$214,112.21.

One case was argued before the Supreme Court of the United States, and several hearings have been held before a special master appointed by that court. One case has been argued in the Circuit Court of Appeals for the First Circuit, four cases have been tried in the United States District Court, a hearing held in the United States Court of Claims, and a case argued before the United States Shipping Board. Fifteen cases have been argued before the Supreme Judicial Court of this Commonwealth, and there have been forty-six hearings and trials before a single justice of that court. There have been two appearances before sessions of the Grand Jury, one in Plymouth County and the other in Hampden County. There have been twenty-nine hearings and trials in the civil session of the Superior Court and twenty-two in the criminal session. Twenty-one cases have been tried in the probate courts of this State, and three cases prosecuted in the local district courts. The department has been in attendance at seventeen hearings before the Industrial Accident Board, and twelve hearings have been held in extradition cases.

Certain changes have been made in the personnel of the department during the year.

On June 1, last, Day Kimball, Esq., of Boston, who was appointed an Assistant Attorney General on February 1, 1923, resigned his office, which he had filled with commendable fidelity and conspicuous ability. Mr. Kimball has since been admitted to Gray's Inn of the Inns of Court at London, it being his purpose to become a barrister in the English courts.

On June 1, last, Charles F. Lovejoy, Esq., of Swampscott, and Melville Fuller Weston, Esq., of Reading, were appointed Assistant Attorneys General.

On September 30, 1923, Albert Hurwitz, Esq., of Boston, was designated a Special Assistant Attorney General to aid the District Attorney for the Suffolk District in the preparation and trial of certain cases that were turned over to Mr. O'Brien in 1923. On May 1, last, Mr. Hurwitz resigned to take up other work. Mr. Hurwitz has rendered faithful service in connection with the prosecution of several important criminal cases.

On June 30, last, Frank W. Kaan, Esq., of Somerville, and Matthew W. Bullock, Esq., of Boston, were appointed Special Assistant Attorneys General to assist the Metropolitan District Commission in the legal work that will have to be done in connection with the construction of a northern route to accommodate traffic between Boston and the territory north and east, as provided for in chapter 489 of the Acts of 1924.

The table of matters requiring the attention of the office, printed on page 5, while showing a total of 7,675, nevertheless does not indicate adequately the amount of business transacted during the past year, for the reason that no record is made of consultations with State officers, departments, boards and commissions. It is becoming more and more the practice of officers in all departments of the State government to consult with this office. Many such consultations are held every day, and they occupy much of the time of the Attorney General and

the Assistant Attorneys General. The practice is advantageous, and the law department is brought into close touch with all the departments of the government of the Commonwealth by thus being called upon to give help and advice necessary in solving administrative and legal tangles.

In the administration of the Attorney General's office, the faithfulness, loyalty and devotion of every member of the department, which I deeply appreciate, have played a most important part.

I annex to this report such official opinions rendered during the current year as it is thought may be of interest and which may properly be made public at this time.

Respectfully submitted,

JAY R. BENTON,
Attorney General.

OPINIONS.

Structures in Great Ponds — License.

A license is not required for a structure built in the waters of a great pond unless it is below the natural high-water mark.

JAN. 3, 1924.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR:— You request my opinion whether a license is required for the erection of a structure in the waters of a great pond, the height of which has been raised several feet and the area of which has been increased by the lawful construction of a dam, the structure being above the natural high-water mark of the pond but below the maximum flow line caused by the dam.

G. L., c. 91, § 13, provides, in part:—

“The division may license any person . . . to build and extend a wharf, pier or shore wall *below high water mark* in said river, or to build or extend a wharf, pier, dam, wall, road, bridge or other structure, or to drive piles, fill land or excavate in or over the waters of any great pond below *natural high water mark*, or at or upon any outlet thereof, upon such terms as the division prescribes; . . .”

Section 19 of the act provides, in part:—

“Except as authorized by the general court and as provided in this chapter, no structure shall be built or extended, or piles driven or land filled, or other obstruction or encroachment made, in, over or upon the waters of any great pond below the *natural high water mark*; . . .”

The basis of this legislation is found in St. 1888, c. 318, § 4, which provides that a license may be issued to build a structure, etc., in any great pond “below high-water mark,” and in St. 1888, c. 318, § 2, which provides that except as authorized in the act no structure, etc., shall be built in any great pond “below the high-water mark thereof.”

In R. L., c. 96, §§ 15 and 18, which reenact St. 1888, c. 318, §§ 2 and 4, the word “natural” was inserted, so that the law then read and now reads “below the *natural high-water mark*.” That the insertion of the word “natural” was deliberate and not accidental is shown by the fact that both G. L., c. 91, § 13, and R. L., c. 96, § 18, which provide for licenses for structures in great ponds below the natural high-water mark, also provide for licenses for structures in the Connecticut River “below high-water mark.” The original statute with respect to licenses for structures in the Connecticut River (St. 1885, c. 344, § 3) read “below high-water mark,” and this language has not been changed or amended. It is inconceivable that the Legislature, in enacting the sections referred to in the General Laws and Revised Laws, would, in the same sections, have inserted the word “natural” with respect to great ponds and have failed to make the insertion with respect to the Connecticut River unless the insertion was deliberate and designed to change the existing law.

I am therefore of the opinion that a license is not required for a structure built in the waters of a great pond unless it is below the natural high-water mark.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Savings Banks — Sale of Travelers' Checks and Letters of Credit.

A travelers' check or letter of credit is not a transmission of money or the equivalent thereof within the meaning of G. L., c. 168, § 33A.

JAN. 3, 1924.

Hon. JOSEPH C. ALLEN, *Commissioner of Banks.*

DEAR SIR:— You request my opinion as to whether G. L., c. 168, § 33A, should be so construed as to permit the sale of travelers' checks and letters of credit. Said section reads as follows:—

"Savings banks may, under regulations made by the commissioner, receive money for the purpose of transmitting the same, or equivalent thereof, to another state or country."

In the broadest sense, and a sense often used by the courts, a letter of credit is any letter whereby the writer arranges for some other person to obtain credit. 35 Harvard Law Review, 542. Daniel on Negotiable Instruments, vol. 2, 6th ed. § 1790, says:—

"A letter of credit may be defined to be a letter of request whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement, or accept bills drawn upon himself for the like amount."

See also *Leggett v. Levy*, 233 Mo. 590; *Krakauer v. Chapman*, 16 App. Div. 115.

The primary purpose of the commercial letter of credit is to enable the shipper to receive his money upon shipment; to enable the buyer to postpone actual payment until the goods have been received and resold; to enable a bank to lend its credit and not its funds; to utilize the goods as security in the meantime.

A travelers' letter of credit is similar in principle to a commercial letter, but is made use of for facilitating a supply of money required by one going to a distance or abroad, and avoiding the risk and trouble of carrying specie or buying bills to a greater amount than may be required.

A letter of credit is not drawn against any fund; it is not payable absolutely but only in the event that the letter bearer may use it; it is optional with him. It is, as viewed from the standpoint of the bank, simply the lending of the bank's credit and not of its funds.

Travelers' checks are used almost exclusively by travelers. They are generally for specific sums, and are in fact letters of credit which a banking house gives a traveler, and which are made available on presentation to any of the agents or correspondents of the house in a long list of names, the names both of the places and of the agents in them being usually stated in the instrument itself. They may be cashed only upon being countersigned by the person to whom they were issued, and ordinarily only in the presence of the person to whom they are presented for payment. It is the counter-signature by which the holder is identified in a strange place. If they are lost they are refunded. Like letters of credit, they may not be used; that is optional with the holder. He may return unused ones and be reimbursed. The check is simply a promise of the bank to pay in the event that it is presented and properly countersigned. *James Sullivan v. Wilhelm Kanuth*, 220 N. Y. 216; *Samburg v. American Express Co.*, 136 Mich. 639.

In my opinion, a travelers' check or letter of credit is not a transmission of money or the equivalent thereof, within the meaning of the statute.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Abolition of Grade Crossings — Right of Towns to a Refund from the Commonwealth for Interest paid.

St. 1914, c. 18, § 1, did not take away, as to grade crossing debts incurred prior thereto, the right of a town under St. 1908, c. 390, § 2, to a refund from the Commonwealth of the excess of the amount of interest paid by the town over the actual cost to the Commonwealth for money borrowed for the abolition of grade crossings.

JAN. 3, 1924.

Hon. JAMES JACKSON, *Treasurer and Receiver General*.

DEAR SIR:—You have brought to my attention a communication received by you from the treasurer and collector of taxes of the city of Somerville in regard to a claim of the city of Somerville for refund of interest on account of grade crossing debts.

You state that this claim is based upon the fact that the city of Somerville has paid interest at 4 per cent upon grade crossing debts incurred under St.

1908, c. 390, § 2, prior to the passage of St. 1914, c. 18, § 1, amounting in all to \$18,774.95. This sum represents interest payments made since as well as before 1914, as the rate of 4 per cent was maintained unchanged even after 1914 as to all grade crossing debts incurred prior to that date. The city of Somerville now claims a refund, as provided for in St. 1908, c. 390, § 2, equal to the difference between the amount of interest at 4 per cent paid by it and "the actual interest cost to the Commonwealth for money borrowed for the abolition of grade crossings. . . ."

Upon the above facts you request my opinion as to whether the city of Somerville has a valid claim at this time for a refund of overpayment of interest, and if so, "to what date shall the interest be figured."

St. 1908, c. 390, § 2, reads, in part, as follows:—

"The court shall, from time to time, issue its decrees for payments on the part of the railroad corporation and on the part of any street railway company, not exceeding the amounts apportioned to them respectively by said auditor in his report, and for the payment by the commonwealth of a sum not exceeding the amounts apportioned to it and to the city or town; and such city or town shall repay to the commonwealth the amount apportioned to it, with interest thereon, payable annually at the rate of four per cent from the date of the acceptance of the report of the auditor. Such repayment of the principal shall be made annually in such amounts as the auditor of the commonwealth may designate; and the amount of payment designated for the year, with the interest due on the outstanding principal, shall be included by the treasurer and receiver general in the amount charged to such city or town, and shall be assessed upon it in the apportionment and assessment of its annual state tax. The treasurer and receiver general shall in each year notify such city or town of the amount of such assessment, which shall be paid by it into the treasury of the commonwealth as a part of, and at the time required for, the payment of its state tax. When the final assessment on a city or town has been paid by it, the treasurer and receiver general shall repay to it, in reduction of said final payment, the amount of interest, if any, which has been assessed to and paid by it in excess of the actual interest cost to the commonwealth for money borrowed for the abolition of grade crossings previous to the payment of said final assessment."

St. 1914, c. 18, § 1, reads, in part, as follows:—

"Section thirty-nine of Part I of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six, as amended by section two of chapter three hundred and ninety of the acts of the year nineteen hundred and eight, is hereby further amended by striking out the words 'of four per cent,' in the thirty-fifth line, and inserting in place thereof the words:—of interest determined by the auditor of the commonwealth as approximately that paid by the commonwealth on the last money borrowed for the abolition of grade crossings,—and by striking out the last sentence, so as to read as follows:—*Section 39.* . . . The court shall, from time to time, issue its decrees for payments on the part of the railroad corporation and on the part of any street railway company, not exceeding the amounts apportioned to them respectively, by said auditor in his report, and for the payment by the commonwealth of a sum not exceeding the amounts apportioned to it and to the city or town; and such city or town shall repay to the commonwealth the amount apportioned to it, with interest thereon, payable annually at the rate of interest determined by the auditor of the commonwealth as approximately that paid by the commonwealth on the last money borrowed for the abolition of grade crossings, from the date of the acceptance of the report of the auditor. Such repayment of the principal shall be made annually in such amounts as the auditor of the commonwealth may designate; and the amount of payment designated for the year, with the interest due on the outstanding principal, shall be included by the treasurer and receiver general in the amount charged to such city or town, and shall be assessed upon it in the apportionment and assessment of its annual state tax. The treasurer and receiver general shall in each year notify such city or town of the amount of such assessment, which shall be paid by it into

the treasury of the commonwealth as a part of, and at the time required for, the payment of its state tax."

The effect of the amendment of 1914 was to repeal by implication so much of the former act as provided that the rate of interest to be paid by a city or town should be 4 per cent, and that the excess of interest paid over actual interest cost should finally be refunded. *Wilson v. Head*, 184 Mass. 515. The question is whether the amendment is applicable to grade crossing debts incurred prior to its enactment, on which interest was paid at the rate of 4 per cent not only before but after 1914.

Where a right to recover money is purely statutory it has been held to be extinguished by the repeal, without a saving clause, of that portion of the act which created it. *Wilson v. Head*, *supra*. There are analogous cases in the criminal law. *Commonwealth v. Marshall*, 11 Pick. 350. But the amendment we are considering struck out not only the right to repayment but also the requirement that the rate of interest to be paid should be 4 per cent. The substantial change made was to do away with the necessity of repayment by providing that the rate to be paid by the cities and towns should be determined by an approximation to that which the Commonwealth was obliged to pay. The natural inference is that the amendment was intended to apply only in cases where the rate of interest was to be determined as provided in the amendment, and was not intended to take away the right of refund where interest was paid under the prior statute at the flat 4 per cent rate.

Furthermore, it seems that the amending act has consistently in practice been construed by those charged with the duty of carrying its provisions into effect as applicable only to grade crossing debts incurred subsequent to its passage, since interest at the 4 per cent rate has uniformly been collected on debts which arose previously. This could only have been done on the theory that to such debts the amendment was not applicable. *Commonwealth v. Parker*, 2 Pick. 550, 557; *Tyler v. Treasurer and Receiver General*, 226 Mass. 306. It would seem, therefore, that the mutual obligations imposed upon the Commonwealth, on the one hand, and the towns, on the other, by St. 1908, c. 390, § 2, should be held to have survived the partial repeal of that act in 1914, provided this conclusion involves no violation of sound legal theory.

When the town's share of a given grade crossing assessment was paid by the State under the provisions of St. 1908, c. 390, § 2, there arose a definite obligation, contractual in its nature, which, if not a true contract, was at least one of those obligations created either by the common law, under the impulse of equitable principles, or by statute, which are grouped under the generic name of quasi contractual obligations. This quasi debt, if it may be so termed, contained within itself the definition of its own incidents, namely, the duration, interest rate and rebate feature provided for in the statute. The right to a refund was no less inherent in it than any other feature. In fact, strictly, the interest rate may be said to have been "4 per cent minus a certain unascertained future rebate," rather than simply "4 per cent." In the absence, at least, of any expression of legislative intent to the contrary, there seems no reason why such a quasi debt, being an existing, definite obligation, should not survive the repeal of the statute under which it originally arose.

In *Steamship Co. v. Joliffe*, 2 Wall. 450, the Supreme Court of the United States, in considering the right of a pilot to the compensation provided for in a statute that had been repealed after the performance of the services in question, said:—

"If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, . . . The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi contract*. . . .

The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.

And it is clear that the legislature did not intend by the repealing clause in the act of 1864, to impair the right to fees, which had arisen under the original act of 1861."

In my opinion, this language is applicable to the present case; and in view of what I have already stated I believe to be the proper inference of legislative intent to be drawn from St. 1914, c. 18, § 1, I am of the opinion that the city of Somerville has a valid claim at this time for a refund of overpayment of interest, and that the amount due should be figured to the date of the payment by the city of Somerville of the final assessment.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Public Records — Certification of Copies — Secretary of the Commonwealth.

Under G. L., c. 9, § 11, the precise form in which copies of public records shall be certified is within the discretion of the certifying officer, but the copies must be full, exact and literal: authentication by seal is impliedly authorized.

JAN. 4, 1924.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You request my opinion as to whether you "have the right to certify, substantially in accordance with the form attached to your request, to a birth, marriage or death."

G. L., c. 46, deals with the "Return and Registry of Births, Marriages and Deaths." Section 1 imposes upon each city or town clerk the duty "to receive or obtain and record" certain specified facts "relative to births, marriages and deaths in his town." Section 17 requires that certified copies of such records of births, marriages and deaths be transmitted periodically to the State Secretary. Section 18 reads:—

"The state secretary shall require . . . copies transmitted under the preceding section to be written in a legible hand."

Section 21 reads:—

"The state secretary shall cause the copies received by him for each year to be bound, with indexes thereto. He shall prepare from said copies such statistical tables as will be of practical utility, and make annual report thereof to the general court."

G. L., c. 66, deals with "Public Records." Public records are defined, in so far as is pertinent to the present inquiry, as follows:—

"Any written or printed book or paper . . . which any officer . . . of the commonwealth or of a county, city or town . . . is required to receive for filing."—G. L., c. 4, § 7, par. 26th.

Section 10 of G. L., c. 66, provides:—

"Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision, and shall furnish copies thereof on payment of a reasonable fee.

In towns such inspection and furnishing of copies may be regulated by ordinance or by-law."

Section 7 of G. L., c. 66, reads, in part, as follows:—

"The state secretary, clerks of the county commissioners and city or town clerks shall respectively have the custody of all other public records of the commonwealth or of their respective counties, cities or towns, if no other disposition of such records is made by law or ordinance, and shall certify copies thereof."

Finally, G. L., c. 9, § 11, provides:—

"The state secretary shall have the custody of the great seal of the commonwealth; and copies of records and papers in his department, certified by him and authenticated by said seal, shall be evidence like the originals."

It follows from the above:—

1. That the certified copies of the records of births, marriages and deaths filed pursuant to G. L., c. 46, with the State Secretary are public documents;
2. That he is authorized to "certify copies thereof"; and
3. That such copies, when authenticated by the great seal of the Commonwealth, "shall be evidence like the originals."

In my opinion, the phrase "shall certify copies thereof" means shall make or cause to be made a full, exact and literal copy of the record in his possession, and shall append thereto a statement to the effect that such document is in fact a full, exact and literal copy of the original record. It is unnecessary to determine whether the phrase also connotes, as an additional requirement, the authentication of the document by affixing thereunto the official seal of the certifying officer; that is, in the case of the State Secretary, the seal of the Commonwealth. See *Hartford Fire Ins. Co. v. Becton & Terrell*, 103 Tex. 236; 125 S. W. 883. In any event, such authentication is not only sanctioned by well-nigh universal practice, but is impliedly authorized by the provision in G. L., c. 9, § 11, quoted above, as to the effect of such authentication by the State Secretary.

Within the limits of the requirements set forth in the preceding paragraph, the precise form in which copies of public records shall be certified is within the discretion of the certifying officer. I see no reason to criticize adversely the form attached by you to your request, nor to doubt that you "have the right to certify, substantially in accordance with the form attached, to a birth, marriage or death." I accordingly answer your inquiry in the affirmative.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Witness Fee — Expert Witnesses — Compulsory Process — State Officers and Employees — Compensation.

The term "witness fee" applies to any sum of money paid to persons subject to compulsory process as compensation for testimony given at the trial of causes.

Expert witnesses may in all cases be compelled to appear and testify to such opinions as they may have. Such witnesses cannot be compelled to make a previous study of the case or of other testimony.

State police officers and officers and employees of the Commonwealth receiving regular compensation therefrom may not receive any compensation for testifying in a cause in which the Commonwealth is a party.

Such persons may receive from counties compensation for services which they are not by law compelled to render.

Such persons may not receive from the Commonwealth compensation for special services unless such services are performed outside of usual working hours and are not required in the performance of their duties.

JAN. 24, 1924.

HON. WILLIAM G. CLARK, *District Attorney for the Eastern District.*

DEAR SIR:— You request my opinion whether any of the persons designated in G. L., c. 262, § 56, when called by the Commonwealth to give an expert opinion in the trial of cases upon matters outside their regular duties, may receive an expert fee from the county.

G. L., c. 262, § 56, provides, in part:—

“A state police officer or an officer of the commonwealth whose salary is fixed by law, or any employee of the commonwealth receiving regular compensation therefrom, shall not be entitled to a witness fee before any court or trial justice in a cause in which the commonwealth is a party. . . .”

The act, in its scope and intent, is designed to prevent the payment of witness fees, when the Commonwealth is a party, to persons therein designated whose attendance and testimony at the trial of such causes can be secured by compulsory process. The term “witness fee,” as there used, is not restricted to the statutory witness fee. It applies to any amount of money, whether less or more than the statutory fee, paid as compensation for, or in consideration of, testimony given at the trial of causes by persons who are subject to compulsory process. Any other construction would enable one to evade the law by the simple device of paying a sum in excess of the statutory witness fee.

The answer to your inquiry depends upon the question whether persons who have no knowledge of the facts pertaining to the issues of a case and who have had no connection with it, but who, by reason of their special knowledge and training, may give an expert opinion based upon hypothetical questions, can be compelled to appear and testify. If compulsory process may issue for such persons, then the amount paid them for testifying is a witness fee within the purview of G. L., c. 266, § 56, and the persons designated in that section may not lawfully receive any compensation for so testifying. If, however, experts may not be compelled to appear and give expert opinions, the compensation paid them is not a witness fee.

Authorities are divided upon the question whether experts, so called, are subject to compulsory process. Some of the earlier cases and some English cases hold that the special knowledge of a person is his property, which may not be taken from him without reasonable compensation, and that experts may therefore not be compelled to testify as to their opinions. See *Webb v. Page*, 1 Car. & K. 23 (Eng.); *Clark v. Gill*, 1 Kay & J. 19 (Eng.); *Betts v. Clifford*, Warwick Lent Assizes, 1858 (Eng.); *Re Working Men's Mut. Soc.*, L. R., 21 Ch. Div. 831; *In the Matter of Roelker*, Fed. Cas. No. 11,995; *United States v. Howe*, Fed. Cas. No. 15,404a; *Buchman v. State*, 59 Ind. 1; *Dills v. State*, 59 Ind. 15. In Pennsylvania the rule seems to be that experts are subject to compulsory process in cases where the government is a party but not in causes between private litigants. *Pa. Co. for Insurances v. Philadelphia*, 262 Pa. 439. The weight of authority, however, inclines to the view that experts are treated like ordinary witnesses, that they can be compelled to appear in all cases and testify as to such opinions as they have, and that such compulsion is not a taking of their property. *Barrus v. Phaneuf*, 166 Mass. 123, 124; *Stevens v. Worcester*, 196 Mass. 45, 56; *Ex Parte Dement*, 53 Ala. 389, 393; *Flinn v. Prairie County*, 60 Ark. 204, 227; *People v. Conte*, 17 Cal. App. 771, 784; *County Com. v. Lee*, 3 Colo. App. 177, 180; *Dixon v. The State*, 12 Ga. App. 17; *Dixon v. People*, 168 Ill. 179; *O'Day v. Crabb*, 269 Ill. 123, 132; *Burnett v. Freeman*, 125 Mo. App. 683; *State v. Bell*, 212 Mo. 111, 126; *State v. Teipner*, 36 Minn. 535; *Main v. Sherman Co.*, 74 Neb. 155; *People v. Montgomery*, 13 Abb. Pr. Rep. (N. S.) 207, 238; *Summers v. State*, 5 Tex. App. 365, 377; *Philler v. Waukesha Co.*, 139 Wis. 211; Wigmore on Evidence (2nd ed.) Vol. IV, § 2203; Rogers on Expert Testimony (2nd ed.) § 188; 2 A. L. R. 1576.

In *Stevens v. Worcester*, 196 Mass. 45, 56, the court, in holding that a witness who had already testified to facts within his knowledge could be compelled to express an expert opinion, if he had one, said:—

"The auditor rightly ruled that the witness Eddy, being upon the stand, could be required to express an opinion, if he had one, and that he could not be compelled to study the case or perform labor in order to qualify him to express an opinion. As the witness had formed an opinion which he had committed to a paper which he had with him on the stand, the requirement that he should take the paper in his hand and examine it, to refresh his recollection, was not different in substance or legal effect from a requirement that he should use his mental faculties in listening to a question and in reflecting upon it, in order to give a proper answer. . . . It was not like a requirement that he should study a treatise on a scientific subject."

In *Barrus v. Phaneuf*, 166 Mass. 123, 124, 125, the court, strongly intimating that it had power to compel attendance of expert witnesses, said: —

"We should be slow to admit that the court would be without power to require the attendance of a professional or skilled witness, upon a summons duly served, and with payment of the statutory fees, although he was unacquainted with the facts, and could testify only to opinions; but such power would hardly be exercised unless, in the opinion of the court, it was necessary for the purposes of justice. . . . Even in such case the court would probably be without the power to compel the witness to make a study of the case beforehand, or to pay attention to the body of evidence introduced by the parties with a view to forming an opinion thereon. It would seem that one who is summoned as an expert would perform all that the court could require of him if he should hold himself in readiness to be called upon to testify to such opinions as he might have, when his turn should come."

I am therefore of the opinion, in the light of the authorities, that in this Commonwealth professional or skilled witnesses may, in the trial of all causes, be compelled to appear and give their expert opinions, if they have any, even though they have no knowledge of the facts pertaining to the issues involved and have had no connection with the case. It follows that State police officers, officers of the Commonwealth whose salaries are fixed by law, and employees of the Commonwealth receiving regular compensation therefrom, may not receive any fee or compensation for testifying before any court or trial justice in a cause in which the Commonwealth is a party.

In many cases, however, the testimony of an expert would be valueless if his opinion were not based upon some study of the case beforehand or upon some previous examination or observation of the defendant. In many cases where the defence is based upon insanity the prosecuting officer requires the assistance of a psychiatrist in the preparation of the case and in the examination of witnesses. Though an expert can be compelled to testify to such opinions as he may have when he is called to the stand, he cannot be compelled to make any previous study of the case or to render any assistance or even to listen to other testimony. In cases, therefore, which require preparation or prior study, or where assistance other than the mere testimony of the witness is desired, officers and employees of the Commonwealth designated in G. L., c. 262, § 56, may receive *from counties* compensation for services which they are not by law compelled to render. Such compensation is not a "witness fee" within the meaning of the act.

Where such services are to be paid for from the treasury of the Commonwealth a different situation arises. G. L., c. 29, § 31, provides, in part, that "salaries payable by the commonwealth . . . shall be in full for all services rendered to the commonwealth by the persons to whom they are paid." That act prohibits a person, receiving a salary from the Commonwealth, from accepting any other compensation from the Commonwealth for any services rendered during the usual hours of employment in the salaried position which he occupies. Such person may not accept another salaried position from the Commonwealth, even though the work of the second office might be done outside of the usual hours of employment of the first office. See G. L., c. 30, § 21. He may, however, receive from the Commonwealth additional compensation for special services performed outside of the usual working hours of his position

and not required in the performance of the duties of his position. See, also, II Op. Atty. Gen. 21 and 309; V. Op. Atty. Gen. 697, 698.

Persons receiving salaries from the Commonwealth may, therefore, not receive any additional compensation from the treasury of the Commonwealth for special services rendered as experts, unless such services are performed outside of the usual working hours of their employment and are not required in the performance of the duties of the positions which they hold.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Liberty of Contract — Equal Protection of the Laws — Boston Elevated Railway Company — Eastern Massachusetts Street Railway Company.

Legislative power to secure the public safety, health and morals cannot be contracted away.

Certain bills, if enacted, would be unconstitutional, for reasons stated.

A bill forbidding the employment of aliens by the Boston Elevated Railway Company, if enacted, would be an infringement of liberty of contract and arbitrarily discriminatory, and would therefore be unconstitutional.

A bill requiring the Eastern Massachusetts Street Railway Company to maintain and keep in repair the portion of highways occupied by its tracks, if enacted, would be arbitrarily discriminatory, and therefore unconstitutional.

JAN. 25, 1924.

Hon. B. LORING YOUNG, *Speaker of the House of Representatives*.

DEAR SIR: — On behalf of the committee on rules you have asked my opinion as to the constitutionality of several bills, now pending before the committee, relating to the Boston Elevated Railway Company or to the Eastern Massachusetts Street Railway Company.

In recent years the opinion of the Attorney General has on several occasions been required on questions concerning the constitutionality of proposed laws relating to the management and operation of those companies, and involving a consideration of the application and effect of Spec. St. 1918, c. 159, and Spec. St. 1918, c. 188. See Attorney General's Report, 1921, p. 140; *ibid.*, 1922, p. 23; *ibid.*, 1923, pp. 34 and 42. In these opinions the Attorney General ruled that the provisions in each of those statutes giving to the trustees the right to regulate and fix fares and to determine the character and extent of the service and facilities to be furnished constituted contracts between the Commonwealth and the companies concerned which could not be impaired without violating their constitutional rights, and that a number of the bills submitted would, if enacted into law, be unconstitutional because they contained provisions which would directly impair the contractual rights given by the two special statutes of 1918.

With respect to Spec. St. 1918, c. 159, the court has held, in *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 413, that the statute, having been accepted by the Boston Elevated Railway Company, constitutes a binding agreement between the company and the Commonwealth, according to its terms, and that it is constitutional. The court points out that the terms of the act are contractual in their nature, as is plain not only from the general scope of the act but from the express provision, in section 18, that "the provisions which define the terms and conditions under which, during the period of public management and operation, the property owned, leased or operated by the Boston Elevated Railway Company shall be managed and operated by the said trustees, and the provisions of section thirteen, . . . shall constitute a contract binding upon the Commonwealth."

But the right of the companies to insist that the contractual obligations of the Commonwealth with respect to the powers and duties of the trustees shall not be impaired by new legislation is not violated by the legitimate exercise of legislative power in securing the public safety, health and morals, since the

governmental power of self-protection cannot be contracted away. *New York & New England R.R. Co. v. Bristol*, 151 U. S. 556, 567. The limits of this power of which the Legislature cannot divest itself are not clearly defined. It is not co-extensive with the police power of the State. The right to regulate fares of transportation companies may be affected by contract with the State. *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 325; *Minneapolis v. Minneapolis St. Ry. Co.*, 215 U. S. 417; III Op. Atty. Gen. 396. An instructive discussion of the subject appears in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660-673.

I will now state my opinion in regard to the specific bills which you have submitted.

1. *Petition that the Boston Elevated Railway Company be prohibited from employing aliens while under the period of public management and control.*

The bill accompanying the petition is as follows:—

"AN ACT FORBIDDING THE EMPLOYMENT OF ALIENS BY THE BOSTON ELEVATED RAILWAY COMPANY.

SECTION 1. No person shall be employed by the Boston Elevated Railway Company during the period while under the public management and control provided by chapter one hundred and fifty-nine of the Special Acts of nineteen hundred and eighteen, who is not a citizen of the United States.

SECTION 2. This act shall not apply to the employment of any alien who at the time of its passage is in the service of such company, provided that such alien makes the primary declaration of intention to become a citizen of the United States within ninety days thereafter."

The right to purchase or to sell labor is part of the liberty of contract protected by the Fourteenth Amendment to the Constitution of the United States, which cannot be interfered with by a State beyond the limits of reasonable regulation, in the exercise of its police power. The amendment protects the right of the employer as well as of the employee, and the employer is equally entitled to rely upon its provisions. *Lochner v. New York*, 198 U. S. 45, 53; *Adair v. United States*, 208 U. S. 161, 173-175; *Coppage v. Kansas*, 236 U. S. 1, 14; *Adkins v. Children's Hospital*, 261 U. S. 525, 545; *Opinion of the Justices*, 208 Mass. 619; *Opinion of the Justices*, 220 Mass. 627; *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206; *Bogni v. Perotti*, 224 Mass. 152.

A statute prohibiting the employment of aliens in common occupations has been held to be repugnant to the Fourteenth Amendment, under which an alien who is lawfully an inhabitant of a State is entitled to the equal protection of its laws. *Truax v. Raich*, 239 U. S. 33; cf. *Opinion of the Justices*, 207 Mass. 601.

Statutes providing for the giving of preference to citizens of States and for discrimination against aliens in employment on public works by a State or a political subdivision thereof have been held to be constitutional, by application of the principle that a State, having control of its own affairs, has the right to prescribe the conditions upon which it will permit public work to be done on its behalf or on behalf of its municipalities. *Heim v. McCall*, 239 U. S. 175, 191-193; *Crane v. New York*, 239 U. S. 195; *Lee v. Lynn*, 223 Mass. 109.

The Boston Elevated Railway Company, however, is not a governmental subdivision of the State; it is only a public service corporation. To such corporations the protection of the Fourteenth Amendment in respect to the employment of labor was extended in several of the cases cited above. It is my opinion that the proposed law, if enacted, would be unconstitutional because it would deprive the railway company, and aliens employed or seeking employment by it, of that liberty of contract with respect to labor, which is protected by the Fourteenth Amendment.

The proposed law, in my judgment, is objectionable, also, because it applies to the Boston Elevated Railway Company alone, and is arbitrarily discriminatory, and denies to that corporation the equal protection of the laws, in violation of the Fourteenth Amendment. Legislation applicable to a particular class will be sustained if a reasonable basis for the distinction can be found; but it will

not be sustained where the distinction or discrimination is purely arbitrary. Classifications and distinctions must be based upon some sound reason. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558-560; *International Harvester Co. v. Missouri*, 234 U. S. 199, 210-215; *Truax v. Raich*, 239 U. S. 33, 39-43; *Tanner v. Little*, 240 U. S. 369; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 555-557; *Buchanan v. Warley*, 245 U. S. 60, 73-81; *Commonwealth v. Interstate, etc., St. Ry. Co.*, 187 Mass. 436, 438, 439; *Commonwealth v. Hana*, 195 Mass. 262, 266-268; *Commonwealth v. Titcomb*, 229 Mass. 14; *Massachusetts General Hospital v. Belmont*, 233 Mass. 190, 200-202; V Op. Atty. Gen. 56. Where a statute is directed against a particular corporation it may still be justified as founded upon a reasonable classification, and so not in violation of the right to equal protection of the laws. *Railroad Co. v. Richmond*, 96 U. S. 521, 529. It is sometimes supported as an exercise of the power to amend the charter of the corporation. *New York & New England R.R. Co. v. Bristol*, 151 U. S. 556, 567; *Selectmen of Brookline, petitioners*, 236 Mass. 260, 270-272; cf. *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 536, 544. But such a statute will be held to be unconstitutional if the selection is arbitrary and unreasonable. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 102-112. See, also, *McLean v. Arkansas*, 211 U. S. 539, 551. In my opinion, to single out the Boston Elevated Railway Company and apply to it a regulation prohibiting the employment of aliens would, on its face, be unfair and arbitrary, and would violate the company's constitutional rights.

The measure seems to be objectionable for the additional reason that it is an impairment of the company's contractual right, given by Spec. St. 1918, c. 159, to have its property managed and operated by the trustees, not justified as a reasonable exercise of the power of the State to secure the health, morals or safety of its people. Proper management and operation of the road might be seriously interfered with by such a regulation. On this account, also, I must hold the proposed law to be unconstitutional.

2. *Petition that the board of trustees of the Boston Elevated Railway Company be required to advertise for bids on certain contracts.*

The bill accompanying the petition is as follows:—

“AN ACT REQUIRING THE BOARD OF TRUSTEES OF THE BOSTON ELEVATED RAILWAY COMPANY TO PUBLICLY ADVERTISE FOR BIDS ON CERTAIN CONTRACTS.

The board of trustees of the Boston Elevated Railway Company shall advertise in two or more daily newspapers published in Boston for sealed proposals for all construction work or materials involving an expense of more than . . . dollars, stating the time and place for opening such proposals and reserving the right to reject any and all proposals. At the time and place advertised for the opening of proposals all bona fide bidders shall be admitted.”

Whether a general statute requiring street railway companies to advertise for bids for construction work or materials would be unconstitutional, as an unwarranted interference with the right of such corporations to make contracts and carry on their business, as formulated and defined in cases already cited, need not now be determined. See *Prudential Ins. Co. v. Cheek*, 259 U. S. 530. In my opinion, the proposed law would be unconstitutional because in its particular application to the Boston Elevated Railway Company it imposes upon that corporation a burden not borne by other corporations of a similar class, and therefore denies to it the equal protection of the laws; and also because such a provision would be in violation of the contractual right, with respect to the management and operation of the company's property, established by Spec. St. 1918, c. 159.

3. *Petition that the Boston Elevated Railway Company be directed to remove the subway entrances and exits at Scollay Square and Adams Square in the city of Boston.*

The bill accompanying the petition is as follows:

"AN ACT TO COMPEL THE BOSTON ELEVATED RAILWAY COMPANY TO ABOLISH THE PRESENT ENTRANCES AND EXITS TO THE SCOLLAY SQUARE AND ADAMS SQUARE SUBWAY STATIONS.

The Boston elevated railway company is hereby directed to remove on or before January 1, 1925, the present subway entrances and exits at Scollay Square and Adams Square in the city of Boston."

This legislation is apparently proposed as an exercise of the power to enforce regulations to secure the public safety, which in other cases has been held valid. *New York & New England R.R. Co. v. Bristol*, 151 U. S. 556; *Baltimore v. Baltimore Trust Co.*, 166 U. S. 673; *New Orleans Gas Co. v. Drainage Commission*, 197 U. S. 453; *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583; *Denver & R. G. R.R. Co. v. Denver*, 250 U. S. 241. Whether it is required for that reason is for the General Court to determine. If, however, the Boston Elevated Railway Company has no title or right in the premises giving it the power to remove the subway entrances and exits referred to in the bill, obviously it cannot be compelled by the Legislature to effect such removal. I had supposed that the title to these entrances and exits was in the city of Boston, and that the Boston Elevated Railway Company had no right which would entitle it to act. As to that question I am not sufficiently advised to give an authoritative opinion.

4. *Petition that the Boston Elevated Railway Company be directed to maintain toilets in the stations of the company.*

The bill accompanying the petition is as follows:—

"AN ACT DIRECTING THE BOSTON ELEVATED RAILWAY COMPANY TO MAINTAIN TOILETS IN THE STATIONS OF THE COMPANY.

The Boston elevated railway company shall keep and maintain reasonable toilet facilities for both men and women on all stations maintained by said railway company which shall be kept open at all times, that said railway station is kept open, for the convenience of its patrons."

The questions presented by this bill are similar to those presented by the bill last considered. Some such provision may be supported as a health measure, the need for which may be found by the General Court to justify the regulation. Whether the company has sufficient control of the premises occupied by its stations to be able to carry out the requirements of the bill is a matter about which I am not advised. I would suggest, also, that the meaning of the word "station" is somewhat indefinite, and that it might be construed to extend to any structure maintained for the protection of passengers while waiting for the company's cars.

5. *Petition that the Eastern Massachusetts Street Railway Company be compelled to maintain and keep in repair the portion of highways occupied by its tracks.*

The bill accompanying the petition is as follows:—

"AN ACT TO COMPEL THE EASTERN MASSACHUSETTS STREET RAILWAY COMPANY TO MAINTAIN AND KEEP IN REPAIR THE PORTION OF HIGHWAYS OCCUPIED BY ITS TRACKS.

SECTION 1. During the period of public operation of the Eastern Massachusetts Street Railway Company under the provisions of chapter one hundred and eighty-eight of the Special Acts of nineteen hundred and eighteen and acts in amendment thereof and supplementary thereto, the Eastern Massachusetts Street Railway Company shall keep in repair to the satisfaction of the superintendent of streets, street commissioners, road commissioners or surveyors of highways, or the division of highways of the department of public works, in the case of state highways, or the metropolitan district commission, in the case of metropolitan boulevards, the paving, upper planking or other surface material of the portions of streets, roads and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and

shall be liable for any loss or injury that any person may sustain by reason of the carelessness, negligence, management and use of its tracks.

SECTION 2. When a party upon the trial of an action recovers damages of the commonwealth or of a city or town for an injury caused to his person or property by a defect in a street, highway or bridge occupied by the tracks of said company, if said company is liable for such damages, and has had reasonable notice to defend the action, the commonwealth, city or town may recover of the said company, in addition to the damages, all costs of both plaintiff and defendant in the action.

SECTION 3. This act shall take effect upon its passage."

My opinion was asked last year regarding the constitutionality of a measure, in some respects similar, relating to the Boston Elevated Railway Company. In response to that request I stated my opinion to be that the bill, if enacted into law, would be constitutional, and an act was passed (St. 1923, c. 358) substantially identical with the bill which was referred to me.

As I pointed out in that opinion, St. 1897, c. 500, amending the charter of the Boston Elevated Railway Company, contained in section 10 a provision, in substance, that for a period of twenty-five years the company should not be subjected to taxes or excises not *then* in fact imposed upon street railways, with an exception not now material, nor any other burden, duty or obligation not imposed by general law on all street railway companies, but during that period should pay taxes imposed by general law as if it were a street railway company, and also an additional tax; and this provision was always regarded as a contract between the State and the company. At the time this statute was enacted street railway companies were required to keep in repair the portions of streets and bridges occupied by their tracks; but in the following year, by St. 1898, c. 578 (see G. L., c. 63 §§ 61-66), that obligation was discontinued, and the companies were required instead to pay an additional excise tax for the benefit of municipalities in which they were operating, to be applied to the construction, repair and maintenance of public ways. The Boston Elevated Railway Company was excepted from the operation of the act, doubtless because of the contract contained in St. 1897, c. 500, § 10, relieving it, for the period named, of the burden of taxes imposed by subsequent legislation. The proposed law seemed to me to violate no right given or protected by Spec. St. 1918, c. 159, and to be otherwise free from constitutional objection, because it merely continued the obligation under which the Boston Elevated Railway Company had operated for many years, and continued, also, the exemption of that company from liability to pay those taxes which in the case of other companies had been substituted for the obligation to keep in repair.

The Eastern Massachusetts Street Railway Company was organized under Spec. St. 1918, c. 188, with all the powers and privileges of a street railway company organized under general laws, so far as applicable. Section 20 of said act provides, in part, as follows:—

"The new company, during the continuance of the war and for a period of two years thereafter, shall not be required, except with the express approval of the public service commission after a hearing, to pay any part of the expense of the construction, alteration, maintenance or repair of any street, highway or bridge or any structure maintained or placed therein or thereon, or of the abolition of any grade crossing or the removal of wires from the surface of any street or highway to an underground conduit or other receptacle, and shall not, without such approval, be required directly or indirectly to make any payment or incur any expense whatsoever for or in connection with the construction, alteration, maintenance or repair of any street, highway or bridge, or the abolition of any grade crossing or the removal of wires: . . ."

In my opinion of last year I stated my view to be that the law then under consideration violated no rights given or protected by Spec. St. 1918, c. 159. In my judgment, it is even more clear that the proposed law, as to which you have asked my opinion, violates no rights given or protected by Spec. St. 1918, c. 188. There is, however, a much more serious question whether the proposed law, if enacted, would not be so arbitrarily and unreasonably discriminatory

as to violate the company's constitutional rights. The Eastern Massachusetts Street Railway Company has always been and now is subject to the excise tax first laid by St. 1898, c. 578, the object of which is to recompense municipalities, either wholly or in part, for the expense of the construction, maintenance and repair of public ways through which their lines run. The bill does not purport to free the Eastern Massachusetts Street Railway Company from that burden; but that company is singled out as one which is to be required not only to pay the tax imposed for the purpose of providing funds for the repair of roads, as I have explained, but also to keep in repair a portion of those ways. Unless there is some reasonable basis for this discrimination the bill cannot be sustained. No reasonable ground is apparent to me. On the face of the bill as it appears before me I must therefore advise you that, in my opinion, it would be unconstitutional if enacted.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Veteran — Settlement — "Actually resided."

Under St. 1922, c. 177, the place of settlement of a person inducted into the military forces of the United States under the Federal Selective Service Act is the place where he "actually resided" or was living at the time of his induction, as distinguished from the place of legal residence or domicile.

JAN. 25, 1924.

MR. RICHARD R. FLYNN, *Commissioner of State Aid and Pensions.*

DEAR SIR:— You request my opinion in regard to the legal settlement of a discharged veteran of the World War upon the basis of the following facts: A man who had a derivative settlement in Lynn, through his mother, moved with his family to Marlborough on December 29, 1915. In 1917 he deserted his family and went to West Springfield Street, Boston, to live. While living at 232 West Springfield Street, Boston, he enrolled for the draft and was inducted at Boston, July 22, 1918, giving at that time as his residence 573 Essex Street, Lynn, Mass. For three or four days prior to his induction he was visiting his brother in Lynn at that address. On July 18, 1918, four days prior to the date of his induction, he was living (according to the statement of the Marlborough overseers) in Boston. On November 23, 1918, he was honorably discharged from the service. His family have remained at all times in Marlborough.

On the basis of the above facts you request my opinion as to whether, under St. 1922, c. 177, he acquired a military settlement at:

(1) The place at which he was visiting his brother at the time of his induction into the military service, and which he gave as his residence at that time, *i.e.*, Lynn; or

(2) The place of residence of his wife and children since 1915, *i.e.*, Marlborough; or

(3) "The actual place of his residence at the time of enrollment for the draft and . . . from which he was inducted," *i.e.*, Boston.

That portion of St. 1922, c. 177, applicable to the present situation reads as follows:—

"Any person who was inducted into the military or naval forces of the United States under the federal selective service act, . . . whether he served as a part of the quota of the commonwealth or not, . . . shall be deemed to have acquired a settlement in the place where he actually resided in this commonwealth at the time of his induction or enlistment. . . ."

The settlement of the soldier in question was, therefore, the "place where he actually resided in this commonwealth at the time of his induction." The question presented is as to the proper construction of the words "actually resided."

It is well settled that the word "resided," as used in statutes relative to the acquisition of a settlement in this Commonwealth, means "domiciled."

Stoughton v. Cambridge, 165 Mass. 251; *Palmer v. Hampden*, 182 Mass. 511; *Whately v. Hatfield*, 196 Mass. 393.

In my opinion, however, the phrase "actually resided" connotes something different from *legal* residence, in the strict sense of domicile.

The phrase "actually resided" first appears in the present connection in St. 1870, c. 392, § 3. St. 1865, c. 230, conferred a settlement upon a soldier who had been enlisted and mustered as a part of the quota of a town, who was an inhabitant of that town and had resided therein six months before his enlistment. St. 1868, c. 328, struck out the requirement that the soldier should have been a resident of the town for six months. St. 1870, c. 392, § 3, struck out the requirement that the soldier should have been an inhabitant of the town of whose quota he formed a part. Section 5 of the same act provided that any person who would otherwise be entitled to a settlement under the third section of the act, but who was not a part of the quota of any city or town, should, if he served as a part of the quota of the Commonwealth, "be deemed to have acquired a settlement in the city or town where he actually resided at the time of his enlistment." As is pointed out in *Brockton v. Uxbridge*, 138 Mass. 292, 296, in striking out the need for inhabitancy in the town of whose quota the soldier formed a part, section 3 of St. 1870, c. 392, proceeded upon the theory that the town received the benefit of his military services and should therefore bear the burden of his military settlement, even though he was not an inhabitant; that is, even though he was not legally domiciled in that town or, presumably, even within the Commonwealth. By similar reasoning the fifth section of the act may be presumed to have gone on the theory that if the Commonwealth received the benefit of his military services some town within the Commonwealth should bear the burden of his military settlement, even though he was legally domiciled outside of Massachusetts; and that the proper town upon which to impose this burden was the one in which the soldier had "actually resided" at the time of his enlistment.

In 1919 the Legislature inserted into the law as it then stood a provision in regard to the military settlement of soldiers inducted into the military service of the United States during the World War (Gen. St. 1919, c. 333, § 5). In so doing, the phrase "actually resided" was again employed. It is to be presumed that that phrase, as applied in the act of 1919 to soldiers inducted under the draft, had the same significance that it had in the existing law as applied to soldiers who voluntarily enlisted. The provision as to the settlement of soldiers inducted under the draft during the World War was re-enacted, with minor modifications, as G. L., c. 116, § 1, par. 5; and finally as St. 1922, c. 177. As has been stated above, it is the true meaning of the phrase "actually resided," in this act, that is the subject of the present inquiry.

In addition to the reason, supplied by a study of its legislative history, for believing that the phrase "actually resided" means something other than "was domiciled," that belief is supported by a number of cases which distinguish between the conception of "actual residence," on the one hand, and "legal residence" or "domicil," on the other. *Bradley v. Frazer*, 54 Ia. 289; *Tipton v. Tipton*, 87 Ky. 243; *Fitzgerald v. Arel*, 63 Ia. 104; *In re Brannock*, 131 Fed. 819; *Michael v. Michael*, 34 Tex. Civil App. 630. See, also, *Martin v. Gardner*, 240 Mass. 350, and cases cited at the foot of page 353.

In my opinion, "actually resided" is used in St. 1922, c. 177, in contrast, on the one hand, to *legal* residence, *i.e.*, domicile; and on the other, to the situation suggested by such phrases as "temporarily sojourning," "merely visiting," *etc.*, *i.e.*, mere physical presence. It means the place in which at the time of his enlistment the soldier was actually *living*, in contradistinction to the place in which he merely happened to *be*; and apart from any question of his intentions as to the future.

Applying this interpretation of the phrase "actually resided" to the facts supplied by you, it seems clear that the soldier in question acquired a legal settlement in Boston at the time of his induction into the military service. The question is, of course, purely one of fact in each instance. Treating, however, as I must, the case put by you as one to be determined upon the facts as stated, no other conclusion seems possible in view of the statements that the

soldier "went to West Springfield Street, Boston, to live"; that "while living at 232 West Springfield Street, Boston, he enrolled for the draft and was inducted at Boston, July 22, 1918"; that he was merely "visiting his brother . . . in Lynn three or four days prior to his induction"; and that "Boston (was) the actual place of his residence at the time of enrollment for draft."

Very truly yours,

JAY R. BENTON, *Attorney General*.

Savings Banks — Dividends.

A savings bank is not required, even if its earnings are sufficient, to pay a regular dividend of five per cent.

JAN. 30, 1924.

HON. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR: — You request my opinion on this question: Should not a savings bank be obliged to pay regular dividends out of current earnings for a period of twelve months, up to the five per cent limitation, before it can pay an extra dividend or permit the profit and loss and guaranty fund to exceed ten and one-quarter per cent?

G. L., c. 168, § 47, provides: —

"The income of such corporation, after deducting the reasonable expenses incurred in the management thereof, the taxes paid, and the amount set apart for the guaranty fund, shall be divided among its depositors, or their legal representatives, at times fixed by its by-laws, in the following manner: an ordinary dividend shall be declared every six months from income which has been earned, and which has been collected during the six months next preceding the date of the dividend, except that there may be appropriated from the earnings remaining undivided after declaration of the preceding semi-annual dividend an amount sufficient to declare an ordinary dividend at a rate not in excess thereof; but the total dividends declared during any twelve months shall not exceed the net income of the corporation actually collected during such period, except upon written approval of the commissioner. Dividends may be declared oftener than every six months as provided in section seventeen of chapter one hundred and sixty-seven. . . . Ordinary dividends shall not exceed the rate of five per cent a year. No ordinary dividend shall be declared or paid except as above provided, . . ."

G. L., c. 168, § 50, provides: —

"Whenever the guaranty fund and undivided net profits together amount to ten and one quarter per cent of the deposits after an ordinary dividend is declared, an extra dividend of not less than one quarter of one per cent shall be declared on all amounts which have been on deposit for the six months, or not less than one eighth of one per cent on all amounts which have been on deposit for the three months, preceding the date of such dividend, and such extra dividend shall be paid on the day on which the ordinary dividend is paid; but in no case shall the payment of an extra dividend as herein provided reduce the guaranty fund and undivided profits together to less than ten per cent of the deposits."

In my opinion, the meaning of these two sections, so far as pertinent to your inquiry, is as follows: A savings bank may not declare an "extra" dividend in addition to an "ordinary" dividend unless its guaranty fund plus its undivided net profits, *after* deducting the amount of the ordinary dividend, amounts at least to ten and one-quarter per cent, and exceeds ten per cent by at least the amount of the proposed extra dividend. In other words, a savings bank is not authorized to declare a one-half per cent extra dividend unless, after deducting the amount of the "ordinary" dividend declared by it, its guaranty fund plus undivided net profits equals ten and one-half per cent of its deposits.

There is nothing in the various changes and modifications of G. S., c. 57, § 147, and St. 1876, c. 203, §§ 14 and 16, which have resulted in G. L., c. 168,

§§ 47 and 50, nor in the present wording of that act, to suggest that a savings bank which, for example, in a given period has made a net profit of four and one-half per cent, and which has on hand its full five per cent guaranty fund and five per cent net profits in addition, is compelled to declare a four and one-half per cent "ordinary" dividend or is prohibited from declaring instead an "ordinary" dividend of four per cent followed by an "extra" dividend of one-half per cent.

I am therefore constrained to answer the question propounded by you in the negative.

Very truly yours,

JAY R. BENTON, *Attorney General*.

School Pupils — Transportation — Classification of Pupils entitled to Reduced Fare on Street Railways.

With the exception of pupils in private schools and colleges which furnish a more advanced form of education than the equivalent of a public high school course, and pupils of a single class conducted independently without reference to other groups or classes having a common management, pupils who attend the public schools or private schools whose curriculum is similarly limited and pupils of vocational schools subject to G. L., c. 74, are entitled to the special rate of fare on street or elevated railways provided by G. L., c. 161, § 108.

JAN. 31, 1924.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You request my opinion upon certain matters relating to the transportation of school pupils under the provisions of G. L., c. 161, § 108.

Under the provisions of the statutes prior to St. 1906, c. 479, the requirement of a half fare rate on street railways had been applied by the Legislature only as to pupils of the public schools. This was extended by the said chapter to include the pupils of private schools as well.

In the case of *Commonwealth v. Connecticut Valley St. Ry. Co.*, 196 Mass. 309, decided in 1907, the Supreme Court construed the meaning of the word "pupils," as used in the statute of 1906, with relation to other provisions of the laws then in force, and determined that the meaning of the word "pupils," as used in the statute, with relation to public and private schools, was confined to the children and youths who attended the public day schools, including the high schools, set forth in R. L., c. 42, §§ 1, 2, 4 and 8 (now G. L., c. 71, §§ 1-5), and private schools which corresponded in their educational scope with such public day and high schools. Colleges, technical and professional schools of more advanced learning were said by the court not to be within the contemplation of the act.

The limitations upon the subjects to be taught in the most advanced of the public schools are set forth now in G. L., c. 71, §§ 1-5, substantially as they were at the time of the court's decision as to R. L., c. 42, § 1, and only private schools whose curriculum is similarly limited come within the purview of G. L., c. 161, § 108. If a private secondary school furnishes no more advanced educational facilities than those which are substantially the equivalent of the training provided by the public high schools, its pupils will be entitled to the lower rate of fare set forth in the statute. The pupils of a college, which presumably furnishes a more advanced form of education than the equivalent of a high school course, will not be entitled to the lower rate of fare.

St. 1910, c. 567, added to the school pupils enumerated in preceding statutes, who were to be carried at a lower rate of fare than other passengers, those of "industrial day or evening schools organized under the provisions of chapter five hundred and five of the acts of the year nineteen hundred and six and acts in amendment thereof," and the present act has substituted for this latter designation that of pupils of "vocational schools subject to chapter seventy-four of the General Laws."

Chapter 74, under the heading "Vocational Schools," section 1, defines "vocational education" as "education of which the primary purpose is to fit

pupils for profitable employment." It further defines "agricultural education," "industrial education" and "household arts education" as forms of vocational education. It would follow, then, that a pupil in any school provided for by chapter 74 and devoted to agricultural, industrial or household arts education, was a pupil of a vocational school within the meaning of G. L., c. 161, § 108, and was entitled to the advantages of the requirement as to lower fares.

An "independent household arts school," provided for by chapter 74, is defined in the first section of the chapter as "a vocational school," and its pupils are likewise to be included in the terms of G. L., c. 161, § 108.

A "part time class," provided for by chapter 74, is defined by the first section of the chapter as "a vocational class in an industrial, agricultural or household arts school," and the pupils attending such a class are clearly entitled to the benefit of the reduced fare.

An "independent industrial, agricultural or household arts school," provided for by chapter 74, is defined in the first section as being for all the types of vocational training defined in the section, and its pupils are clearly within the terms of G. L., c. 161, § 108. The same considerations apply to an independent agricultural school mentioned in chapter 74.

Under the heading of "Vocational Schools," section 1 of chapter 74 defines "evening class," in an industrial school, a class giving instruction for pupils employed during the working day, and which, to be called vocational, must deal with and relate to the day employment. . . . Even if the instruction which the pupil receives in the class is not, by reason of its failure to relate to the pupil's day employment, such as to be called "vocational," nevertheless, as the class itself is conducted in an industrial school, a school which by the definitions of the statute is engaged in the general course of giving vocational education, the pupils may fairly be said to be pupils of a vocational school and so be entitled to the benefits of the statute.

A "practical art class," provided for by this chapter, is defined as "a separate day or a separate evening class in household and other practical arts." A "household arts education" has already been defined in the first section of the chapter as a form of vocational training, and if such practical art class be held in connection with one of the schools connected with the arts already referred to, the pupil is entitled to the benefit of the statute. If such a class, however, provided for by section 14 of chapter 74, be formed and conducted independently of any of the schools mentioned in the chapter, the attendants upon such classes can hardly be said to be "pupils of vocational schools," and in such case would not be entitled to the benefits of the statute. A single class conducted without reference to other groups or classes having a common management is not the equivalent of a "school."

Schools such as are mentioned in section 15 of chapter 74 would seem to fall within the classification of vocational schools if their primary purpose be to give education to fit pupils for profitable employment. If such be not the primary purpose of any one of such schools, then such school cannot be said to be a "vocational school" within the meaning of chapter 161, and its pupils would not be entitled to the lower fare.

These instances appear to cover the various kinds of schools and classes which may be formed or maintained under the provisions of chapter 74, with the exception of those schools which are expressly referred to by name in the statute and explicitly declared to be "vocational." As to the status of pupils of such schools, there can be no doubt but that they are entitled to the reduced fare.

With the exception of the two instances above noted, the various types of pupils comprehended by the act would seem to fall fairly under the designation of pupils of vocational schools, and as such to be entitled to the lower rate of fare.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Membership in a political committee belonging to a political party is not a public office, and may properly be regulated by the Legislature in the exercise of the police power.

A bill providing that State committees shall consist of one committeeman and one committeewoman from each senatorial district and a number of members at large, would be constitutional, if enacted.

FEB. 6, 1924.

HON. GEORGE W. P. BABB, *Chairman, Joint Committee on Election Laws.*

DEAR SIR:—I have the honor to acknowledge receipt of your communication in behalf of the joint committee on election laws, requesting my opinion whether or not House Bill No. 473, if enacted into law, would be constitutional.

Section 1 of the bill, which presents the constitutional question to which your inquiry relates, amends section 1 of G. L., c. 52, relative to political committees, by striking out, in the fifth line, the word "member" and inserting the words "committeeman and one committeewoman," so that the first paragraph will read as follows:—

"Each political party shall, at the primaries before each biennial state election, elect a state committee, the members of which shall hold office for two years from January first next following their election and until their successors shall have organized. Said committee shall consist of one committeeman and one committeewoman from each senatorial district, to be elected at the state primaries by plurality vote of the members of his party in the district, and such number of members at large as may be fixed by the committee, to be elected at the state convention."

By section 2 of the bill, G. L., c. 53, § 34, as amended, relative to the form of ballots to be used at primaries, is further amended by adding a provision that names of candidates for State committeemen and for State committeewomen shall be arranged alphabetically under separate designations.

If membership in a political committee were a public office we should be confronted at the outset by the grave constitutional question whether the provision requiring the election of one committeeman and one committeewoman from each senatorial district did not violate article IX of the Bill of Rights, by which it is declared that "all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." Since the adoption of the Nineteenth Amendment to the United States Constitution this provision assures to both men and women, otherwise qualified, an equal right to hold public office as well as to vote. "Now that the word 'male' as a limitation upon the right to vote has been eliminated from the Constitution of Massachusetts, and the suffrage is thrown open to all citizens, all express limitation upon eligibility for office founded upon sex, created or recognized by the Constitution, disappears." *Opinion of the Justices*, 240 Mass. 601, 608, 609. A requirement as to particular public offices, that they shall be filled according to a sex distinction, although resulting in a division of offices of a certain class between men and women equally, or by any method of apportionment, would seem to be wholly inconsistent with the rule thus enunciated; but as to this I am not called upon to express a formal opinion.

It is, however, settled that membership in a political committee belonging to a political party is not a public office. The duties of the position do not involve in their performance the exercise of any portion of the sovereign power. "The fact that the Legislature has deemed it expedient to regulate by statute the election and conduct of political committees does not make the office a public one. The members of them continue to be, as before, the officers of the party which elects them, and their duties are confined to matters pertaining to the party to which they belong, and which alone is interested in their proper performance." *Attorney General v. Drohan*, 169 Mass. 534, 536; V Op. Atty. Gen. 614.

The Constitutions both of the United States and of the Commonwealth con-

tain no mention of political parties or of political committees thereof. No peculiar constitutional safeguards surround such organizations or persons connected with them. The validity of legislation affecting them depends upon ordinary constitutional principles. Political committees may properly be regulated by the Legislature in the exercise of the police power; and any such regulation will be valid unless it trenches upon the political rights of voters secured by the Constitution of Massachusetts, or unless, because it is arbitrary or unreasonable, it offends against the fundamental constitutional guaranties of due process of law and equal protection of the laws, contained in the Fourteenth Amendment to the United States Constitution and corresponding provisions of our State Constitution. *Cole v. Tucker*, 164 Mass. 486; *Jaquith v. Wellesley*, 171 Mass. 138, 143; *Commonwealth v. Rogers*, 181 Mass. 184, 186, 187; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 478; V Op. Atty. Gen. 614. The Legislature has a wide discretion in the enactment of laws for the promotion of the general welfare. They are invalid only if they are arbitrary or inappropriate to the end in view or contain some classification or discrimination which is unreasonable. *Commonwealth v. Interstate, etc., St. Ry. Co.*, 187 Mass. 436; *Commonwealth v. Strauss*, 191 Mass. 545, 553; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 478; *Commonwealth v. Libbey*, 216 Mass. 356; *Commonwealth v. Titcomb*, 229 Mass. 14; *Lawton v. Steele*, 152 U. S. 133, 137; *Tanner v. Little*, 240 U. S. 369. Every rational presumption must be made in favor of the validity of such legislation, if enacted. *Perkins v. Westwood*, 226 Mass. 268; *Attorney General v. Pelletier*, 240 Mass. 264, 298, 299.

We come now to the specific question whether the provision that a State committee shall consist of *one committeeman* and *one committeewoman* from each senatorial district is unconstitutional.

The statute today provides for the election of one member from each senatorial district. The proposed law provides for the election of a committeeman and a committeewoman from each senatorial district. The regulation does not affect the right to hold public office or the right to vote for public officers. The distinction which it makes creates no political inequality, nor does it seem to interfere with the legal rights of any person in such a way as to deny to him the equal protection of the laws. An analogy may be found in laws requiring the separation of white and colored persons in matters unconnected with the right to hold public office or vote for public officers. Such laws, when the distinction is a reasonable one, in view of the purpose contemplated, have been held not to violate the Fourteenth Amendment, because it was not intended by that amendment to prohibit all distinctions based upon color. *Plessy v. Ferguson*, 163 U. S. 537, 544; *Pace v. Alabama*, 106 U. S. 583; *Berea College v. Kentucky*, 211 U. S. 45. See also, *Civil Rights Cases*, 109 U. S. 3. The proposed act provides for an equal proportion of men and women to be elected to the State committee from each senatorial district. This, it may be presumed, corresponds roughly to the proportion of men and women qualified to vote for delegates. It cannot be said as a matter of law, in my judgment, that if the Legislature, in its discretion, deems that it is expedient so to regulate by statute the election of political committees, this regulation would be arbitrary and unreasonable. My opinion, therefore, is that the bill, if enacted, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

State Armories — Armorers and Assistant Armorers — Appointment as Special Police.

There appears to be no provision of law authorizing the appointment of armorers and assistant armorers in State armories as special police officers.

FEB. 9, 1924.

Brig. Gen. JESSE F. STEVENS, *The Adjutant General*.

DEAR SIR:— You request my opinion "as to the method of procedure for securing the appointment of armorers and assistant armorers as special police

officers," and I assume that you mean to inquire as to the possibility of such appointment.

I am unaware of any provision in the General Laws or amendments thereto, with certain exceptions not here applicable, which authorizes such appointment. Special statutes for specific municipalities have from time to time been enacted authorizing the appointment of special police officers under certain circumstances and for certain purposes. Whether armorers may be appointed as special police officers in a given community depends upon the special act applicable to that community.

As a guide to an interpretation of some of the special acts relating to special police officers I refer to the legislation affecting the city of Boston. There the Police Commissioner may appoint special police officers only under St. 1898, c. 282, § 2, and amendments thereof, which provides:—

"Said board may, if it deems it expedient, on the application of any corporation or person that said board may deem responsible, appoint special police officers to serve without pay from said city, and the corporation or person applying for an appointment under this section shall be liable for the official misconduct of the officer appointed on such application, as for the torts of any servant or agent in the employ of such corporation or person."

The "corporation or person" referred to in the act is the corporation or person employing the individual sought to be appointed as a special police officer. It seems apparent that an armorer may not be appointed a special police officer in Boston, since the Commonwealth is neither a corporation nor a person, within the meaning of the act, and no officer of the Commonwealth can by such application impose any liability upon it for the armorer's misconduct.

As a further guide to a consideration of the effect of other special acts I refer also to St. 1898, c. 282, § 3. That section provides, in part:—

"Every special police officer appointed under the provisions of this act . . . shall have the power of police officers to preserve order and to enforce the laws and ordinances of the city in and about any park, public ground, place of amusement, place of public worship, wharf, manufactory or other locality specified in the application. . . ."

In the matter of making arrests a special police officer is confined strictly to the powers given by the statutes creating his position and relating thereto. *Hull v. Boston & Maine R.R.*, 210 Mass. 159. Section 3 does not give a special police officer the full powers enjoyed by the regular police force of Boston. His powers thereunder are limited to the preservation of order and the enforcement of the laws and ordinances of the city. They could not, except with respect to the preservation of order, be exercised in armories, since armories are specifically placed under the care and control of officers of the Commonwealth and are not subject to local regulation. I Op. Atty. Gen. 290; II Op. Atty. Gen. 399; IV Op. Atty. Gen. 537.

I refrain from considering at this time what would be the respective powers of a special police officer and a commanding officer under G. L., c. 33, § 51. Such consideration may not be necessary under any existing law. I do not pass on the desirability of uniting civil and military authority in the same person, as that is beyond my province.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Insurance — Right of Domestic Mutual Companies to transact Lawful Forms of Business in Addition to those specified in their Charters — Authority of Commissioner of Insurance.

The Commissioner of Insurance does not possess a discretion as to issuing or withholding an express license to a domestic mutual company to transact a lawful form of insurance business in addition to those specified in its charter and additional to those mentioned in G. L., c. 175, § 47. If the proposed form of insurance business is lawful, and the terms and conditions for its transaction, laid down by the Commissioner, are complied with, the company is entitled to such express license as a matter of right.

Hon. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR:— You have asked my opinion whether you have discretion either to grant or to refuse a license to a domestic mutual company to transact the business of insuring against loss of use and occupancy caused by strikes and sabotage, which is a kind of business not specified in its charter or agreement of association and not included among the purposes for which an insurance company may be incorporated; or whether you are limited in your discretion to the determination of the terms and conditions under which such business shall be carried on.

G. L., c. 175, § 47, enumerates the kinds of business for the doing of which companies may be incorporated under the Massachusetts insurance law. Section 54 provides:—

“No domestic mutual company shall transact any other kind of business than is specified in its charter or agreement of association, except that it may in addition transact the kinds of business specified below by reference to the several clauses of section forty-seven, as follows:

(g) Any form of insurance not included in the provisions of section forty-seven; provided, that such form of insurance is not contrary to law and shall be transacted only upon express license of the commissioner and upon such terms and conditions as he may from time to time prescribe.”

The question is whether the right given to a domestic mutual company by G. L., c. 175, § 54, (g), to transact, in addition to the kinds of business specified in its charter or agreement of association, “any form of insurance not included in the provisions of section forty-seven,” is so limited by the proviso that it shall be transacted only upon express license of the Commissioner as to depend upon the exercise of the Commissioner’s discretion whether he will grant or refuse a license, or whether the Commissioner’s power is restricted to determining whether the proposed business is lawful and prescribing the terms and conditions under which such business may be transacted. In determining this question we must consider what authority was intended to be conferred on the Commissioner of Insurance by G. L., c. 175, § 54, (g).

The kinds of business which a domestic insurance company might be organized to do were prescribed by statute in 1872, and have been defined and limited since that time. The Legislature during this period always reserved to itself the power to pass on the advisability of the kinds of insurance that should be written, and enacted laws with appropriate restrictions. This policy was followed until 1920, at which time there were left but a few relatively unimportant kinds of insurance, with the result that the Legislature enacted a blanket clause, St. 1920, c. 327, § 2, now found in two places, to wit, G. L., c. 175, § 51, (g), and § 54, (g). To interpret these clauses as giving the Commissioner of Insurance an absolute discretion, from which no appeal may be taken, to determine what kinds of business insurance companies may transact would be saying that the Commissioner has complete authority to determine the extent of an insurance company’s corporate powers. If it had been the intention of the Legislature to vest such an absolute discretion in the Commissioner, and to depart from its long-established policy, it would have said so in plain and unmistakable language. The language of the act seems to indicate a contrary intention. In my opinion, G. L., c. 175, § 54, (g), confers upon domestic mutual companies the right, subject to certain conditions, to transact any form of insurance not included in the provisions of section 47 which is not contrary to law, and this right may not be taken away from them by the Commissioner even in the exercise of a sound and reasonable discretion.

I am accordingly of the opinion that the Commissioner of Insurance has no discretion either to grant or to refuse a license for forms of insurance which are not contrary to law, and that his discretion is restricted to determining whether the proposed business is lawful and to prescribing the terms and conditions under which such business may be transacted.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Plant Pest Control — Nurseries — Abatement of Nuisance.

The director of the Division of Plant Pest Control has no authority to abate a nuisance caused by the presence of gypsy or brown tail moths in land separated from a nursery by a public highway, but has such authority when the nuisance is caused by the presence of other serious insect pests.

FEB. 14, 1924.

DR. ARTHUR W. GILBERT, *Commissioner of Agriculture.*

DEAR SIR:— You request my opinion whether the director of the Division of Plant Pest Control has any authority to act under G. L., c. 128, §§ 24 and 28, in a case where land immediately across the road from land occupied by a nursery is badly infested with injurious insects, especially gypsy moths. I assume that you use the word "nursery" as synonymous with a place "where nursery stock is grown."

G. L., c. 128, § 24, provides, in part, that "the director, either personally or through his assistants, may inspect any orchard, field, garden, roadside or other place where trees, shrubs or other plants exist, whether on public or private property, which he may know or have reason to suspect is infested with the San José scale or any serious insect pests or plant disease, when in his judgment such pests or disease are likely to cause loss to adjoining owners," and may take steps to abate the nuisance.

Section 28 of the act provides:—

"Sections sixteen to twenty-seven, inclusive, twenty-nine and thirty, shall not apply to gypsy or brown tail moths in any stage of development except upon places where nursery stock is grown and upon property immediately adjoining the same."

The determination of your question depends upon the meaning of the words "adjoining" and "immediately adjoining" as used in the act. The prime meaning of the word "adjoining" is to lie next to or to be in contact with, excluding the idea of any intervening space. *Yard v. Ocean Beach Association*, 49 N. J. Eq. 306; *Century Dictionary*; *Standard Dictionary*. The word "adjoining" is, however, also used in the sense of adjacent, along, fronting, near, close by, and similar words. *Matheus v. Kimball*, 70 Ark. 451; *Alexander v. Big Rapids*, 76 Mich. 282; *Akers v. United New Jersey R.R.*, 43 N. J. L. 110; *Northern Pacific Ry. Co. v. Douglas County*, 145 Wis. 288. When the word is used in statutes relating to particular acts or circumstances the meaning must often be gathered from the context and the general intention of the particular statute in which it is used, and if property is the general subject of the enactment the situation and nature of the property sought to be included or excluded by the use of the word must be taken into account. *Spaulding v. Smith*, 162 Mass. 543; *Devoe v. Commonwealth*, 3 Met. 316; *St. Mary's Woolen Mfg. Co. v. Bradford Co.*, 14 Ohio C. Ct. 522; *State v. Downes*, 59 N. H. 320.

The substance of G. L., c. 128, § 24, first appeared in St. 1907, c. 321, § 4, which was made applicable to trees, shrubs or other plants "close by." The word "adjoining" appeared for the first time in St. 1909, c. 444, and was continued in the General Laws. The title of the 1909 act is, in part, "to provide for the protection of trees and shrubs from injurious insects and diseases." It seems clear both from the context and the title of the 1909 act that the Legislature did not intend to narrow the power conferred in the 1907 act, and that it used the word "adjoining" in the sense of "close by," as used in the 1907 statute. If the word "adjoining" in section 24 were given its primary meaning of "being in contact with," no effect could be given to the word "immediately" in section 28, yet it is plain that the Legislature did not regard the words "immediately adjoining," in section 28, as synonymous with "adjoining" in section 24.

Taking into consideration, therefore, the purpose sought to be accomplished and the intent of the Legislature as shown by the title of the act and by the use of the words "adjoining" and "immediately adjoining" in the same statute, I am of the opinion that the word "adjoining" as used in section 24 means adjacent, close by or near, and that the words "immediately adjoining"

as used in section 28 mean touching at some point. I am accordingly of the opinion that the director has authority, under G. L., c. 128, § 24, to take action with respect to plant disease or insect pests, other than gypsy or brown tail moths, when in his judgment the disease or pests are likely to cause loss to owners close by, even though the respective lands do not touch at any point, and that with respect to gypsy or brown tail moths he has no authority to act except upon places where nursery stock is grown or upon property immediately touching a nursery at some point.

You do not advise me as to the precise nature of the road which lies between the nursery and the infested land, but I assume that it is a public highway. Even though the fee of both owners may extend to the middle of the road and the nursery and the infested land thus legally touch one another, I am of the opinion that this is not the sort of contact contemplated by section 28. See *Spaulding v. Smith*, 162 Mass. 543.

Your question should therefore be answered in the negative so far as gypsy or brown tail moths are concerned, and in the affirmative with respect to other injurious insects.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Forfeiture of Club Charter — Intoxicating Liquors — "Conviction."

A charter of a club may be declared void by the Secretary of the Commonwealth only after conviction of a person for exposing and keeping for sale or selling intoxicating liquor on the club premises.

Only a final judgment is such conviction.

A plea of guilty and the placing of the case on file does not constitute such conviction.

A charter of a club may not be declared void upon conviction for maintaining a common liquor nuisance.

FEB. 19, 1924.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR: — You request my opinion whether, under the provisions of G. L., c. 138, § 76, you have authority to declare void the charter of a club described in G. L., c. 180, § 2, when its manager pleaded guilty to keeping and exposing intoxicating liquor for sale on the premises occupied by it and his case was placed on file, and he further pleaded guilty to maintaining a common liquor nuisance on its premises and was fined \$100, which he paid.

G. L., c. 138, § 76, provides, in part: —

"If any person is convicted of exposing and keeping for sale or selling intoxicating liquor on the premises occupied by any club or organization described in section two of chapter one hundred and eighty . . . the selectmen of the town, or the aldermen of the city, in which such club or organization is situated, except Boston, and in Boston, the licensing board, shall immediately notify the state secretary, and he shall, upon receipt of such notice, declare the charter of said club void, . . ."

The term "conviction" has been used in two different senses in our statutes. In one use it signifies a plea of guilty or a finding by the jury that the defendant is guilty. In another use it signifies a final judgment and sentence of the court upon a verdict or confession of guilt. *Attorney General v. Pelletier*, 240 Mass. 264, 310; *Munkley v. Hoyt*, 179 Mass. 108, 109; *Commonwealth v. Kiley*, 150 Mass. 325, 326; *Commonwealth v. Lockwood*, 109 Mass. 323; *Commonwealth v. Gorham*, 99 Mass. 420, 422.

Where the statute provided that the conviction of a person licensed to sell intoxicating liquors shall of itself make the license void, the court, in holding that a final judgment was necessary, said, in *Commonwealth v. Kiley*, 150 Mass. 325, 326: —

"Under this provision, the effect of a conviction of the kind named is to deprive the defendant of a valuable right, without an opportunity for further trial or investigation. We are of opinion that nothing less than a final judgment,

conclusively establishing guilt, will satisfy the meaning of the word 'conviction' as here used."

Two of my predecessors have held that the term "conviction," in statutes providing that licenses shall be void upon conviction, meant a final judgment. IV Op. Atty. Gen. 157; V Op. Atty. Gen. 401.

I am of the opinion that the instant case is governed by the rule laid down in *Commonwealth v. Kiley*, *supra*, and expressed in the opinions referred to, and that the charter of a corporation may be declared void under the provisions of G. L., c. 138, § 76, only after final judgment. The plea of guilty to the charge of keeping and exposing intoxicating liquors for sale and the placing of the case on file do not constitute a final judgment, and are not, in my opinion, a conviction within the meaning of section 76.

The corporation's manager pleaded guilty to maintaining a common liquor nuisance and paid a fine upon that plea. This constituted a final judgment, but is not one of the offenses enumerated in section 76 as a basis for declaring the charter of the club void. A person may be guilty of that offense without exposing and keeping for sale or selling intoxicating liquor. See G. L., c. 138, § 82.

I therefore advise you that you have no authority under G. L., c. 138, § 76, to declare the charter of the club void.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Boston Elevated Railway Company — Public Control — Dividends "earned and paid."

Payments by the Commonwealth to the Boston Elevated Railway Company under Spec. St. 1918, c. 159, § 11, are to be treated as earnings in determining whether said railway company has "earned and paid" dividends within the meaning of G. L., c. 168, § 54, cl. 4th.

FEB. 20, 1924.

HON. HENRY C. ATTWILL, *Chairman, Department of Public Utilities*.

DEAR SIR:—You ask to be advised whether or not the Boston Elevated Railway Company, in receiving the amounts due to it under the provisions of Spec. St. 1918, c. 159, and in paying therefrom and from its other receipts dividends to its stockholders, as provided by that act, has "earned and paid" such dividends, within the meaning of that phrase in G. L., c. 168, § 54, cl. 4th.

The first two paragraphs of G. L., c. 168, § 54, cl. 4th, read as follows:—

"SECTION 54. Deposits and the income derived therefrom shall be invested only as follows:

Fourth. In the bonds of any street railway company incorporated in this commonwealth, the railway of which is located wholly or in part therein, and which has earned and paid in dividends in cash an amount equal to at least five per cent upon all its outstanding capital stock in each of the five years last preceding the certification hereinafter provided for by the department of public utilities or its predecessors except the six months' period beginning July first and ending December thirty-first, nineteen hundred and sixteen. No such investment shall be made unless said company appears from returns made by it to the said department to have properly paid said dividends without impairment of assets or capital stock, and said department shall annually on or before June fifteenth certify and transmit to the commissioner a list of such street railway companies.

Dividends paid by way of rental to stockholders of a leased street railway company shall be deemed to have been earned and paid by said company within the meaning of this clause, provided that said company shall have annually earned, and properly paid in dividends in cash, without impairment of assets or capital stock, an amount equal to at least five per cent upon all its outstanding capital stock in each of the five fiscal years preceding the date of the lease thereof."

These two paragraphs of G. L., c. 168, § 54, cl. 4th, re-enacted, without alteration pertinent to the present inquiry, the first and second paragraphs of St. 1908, c. 59, cl. 5th. These, in turn, were based upon St. 1902, c. 483, §§ 1 and 2, which read as follows:—

“SECTION 1. In addition to the investments authorized by section twenty-six of chapter one hundred and thirteen of the Revised Laws, savings banks and institutions for savings may invest their deposits and the income derived therefrom in the bonds, approved by the board of commissioners of savings banks, as hereinafter provided for, of any street railway company incorporated in this Commonwealth, the railway of which is situated wholly or partly therein, and which has earned and paid annually for the five years last preceding the certification hereinafter provided for, of the board of railroad commissioners, dividends of not less than five per cent per annum upon all of its outstanding capital stock. In any case where two or more companies have been consolidated by purchase or otherwise during the five years prior to the certification aforesaid the payment severally from the earnings of each year of dividends equivalent in the aggregate to a dividend of five per cent upon the aggregate capital stocks of the several companies during the years preceding such consolidation, shall be sufficient for the purpose of this act. Dividends paid to the stockholders of the West End Street Railway Company by way of rental shall be deemed to have been earned and paid by said West End Street Railway Company within the meaning of this section.

SECTION 2. The board of railroad commissioners shall on or before the fifteenth day of January of each year transmit to the board of commissioners of savings banks a list of all street railway companies which appear from the returns made by said companies to have properly paid, without impairment of assets or capital stock, the dividends required by the preceding section.”

Prior to 1902, bonds of street railway companies were not legal investments for savings banks.

The change in the phraseology of the original act, St. 1902, c. 483, §§ 1 and 2, which was made in 1908, followed the recommendation of a legislative committee appointed in 1907 and charged with the duty of suggesting changes in the existing savings bank law. On page 27 of the report of this committee (House Document No. 1280) there appears the following paragraph:—

“STREET RAILWAY BONDS.

The committee have recommended no change in the paragraph relating to investments in street railway bonds, but in conformity with the plan followed under the paragraph relating to railroad bonds, they have eliminated the name of the West End Street Railway from the present law, and have provided in general terms for the situation which required its mention.”

Such expressions of legislative intent may be considered in construing the act to which they relate. *Binns v. United States*, 194 U. S. 486, 495; *Holy Trinity Church v. United States*, 143 U. S. 457, 464.

The precise legal effect upon the position of the Boston Elevated Railway Company of the so-called “control act” of 1908, Spec. St. 1918, c. 159, has not as yet been definitely determined. The important provisions of that act in regard to the payment of dividends by the Boston Elevated Railway Company are as follows:—

“SECTION 6. The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will reasonably insure sufficient income to meet the cost of the service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable, for depreciation of property and for obsolescence and losses in respect to property sold, destroyed, or abandoned, all other expenditures and charges which under the laws of the commonwealth now or hereafter in effect may be properly chargeable against income or surplus, fixed dividends on all preferred stock of the company from time to time outstanding, and dividends on

the common stock of the company from time to time outstanding at the rate of five per cent per annum on the par value thereof during the first two years, five and one half per cent per annum on the par value thereof during the next two years and six per cent per annum on the par value thereof during the balance of the period of public operation. Dividends upon the common shares shall be payable quarterly, but no dividends shall be paid upon such common shares in excess of the rates herein specified. The first payment shall be made at the expiration of six months from the commencement of public operation, and the total of the first three quarterly dividend payments shall be five per cent on the par value of the common stock.

SECTION 9. Whenever the income of the company is insufficient to meet the cost of the service as herein defined, the reserve fund shall be used as far as necessary to make up such deficiency, . . .

SECTION 11. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day of any December or June thereafter, the amount remaining in the reserve fund shall be insufficient to meet the deficiency mentioned in section nine, it shall be the duty of the trustees to notify the treasurer and receiver general of the commonwealth of the amount of such deficiency, less the amount, if any, in the reserve fund applicable thereto, and the commonwealth shall thereupon pay over to the company the amount so ascertained. Pending such payment it shall be the duty of the trustees to borrow such amount of money as may be necessary to enable them to make all payments, including dividend payments, as they become due. . . .

Spec. St. 1918, c. 159, amounted either to a lease of the railway property to the Commonwealth or to a contract for public operation upon stipulated terms. *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 416. Probably the former view is the more satisfactory. *Boston v. Jackson*, 260 U. S. 309, 314. See, also, *Opinion of the Justices*, 231 Mass. 603; V Op. Atty. Gen. 320. In either case, however, in my opinion, the phrase "earned and paid," in the first paragraph of G. L., c. 168, § 54, cl. 4th, quoted above, is broad enough to include both receipts from operation and payments, if any, by the Commonwealth under section 11 of the control act.

The word "earned" is not to be restricted to the dimes and nickels actually collected from passengers. Unquestionably it would include money received under advertising contracts and the like, or under leases of superfluous land or rolling stock. If payments by the Commonwealth under section 11 be regarded as receipts under a contract to make good possible deficiencies, they would seem, therefore, to be included within the meaning of the word "earned." Nor does there seem any sound reason for so restricting that meaning as to exclude them, even though looked upon as rental from a lease of the entire system.

Two considerations fortify me in this conclusion. R. L., c. 113, § 26, to which St. 1902, c. 483, was in fact, though not in form, an amendment, permitted savings banks to invest in the bonds of railroad corporations which complied with certain requirements. The first paragraph of the third clause of that section was as follows:—

"Third, *a*. In the first mortgage bonds of a railroad company incorporated in any of the New England states and whose road is located wholly or in part in the same, whether such corporation is in possession of and is operating its own road or has leased it to another railroad corporation, and has earned and paid regular dividends of not less than three per cent per annum on all its issues of capital stock for the two years last preceding such investment."

Originally (*i.e.*, down to P. S., c. 116, § 20, cl. 3rd), this paragraph read:—

"In the first mortgage bonds of any railroad company . . . which is in possession of and operating its own road, and has earned and paid regular dividends . . ."

Prior to 1902, however, it had been amended by St. 1889, c. 305, so as to include railroad corporations which "earned and paid regular dividends . . .," whether such corporation operated its own road or had leased it to another railroad corporation. The fact that, at the time of the adoption of St. 1902, c. 483, the law governing the legality of railroad bonds as savings bank investments had evolved to this point, indicates to my mind that the Legislature, in omitting in the first paragraph of that act any reference to the distinction between leased and operated street railways, intended the test of legality thereby established to apply equally to both.

My opinion is further fortified by the last sentence of St. 1902, c. 483, § 1 (now the second paragraph of G. L., c. 168, § 54, cl. 4th), providing that "dividends paid to the stockholders of the West End Street Railway Company by way of rental shall be deemed to have been earned and paid by said West End Street Railway Company within the meaning of this section." The existence of this final sentence, which was added to the original act as an eleventh hour amendment, is explained by the fact that, under the provisions of the lease of the West End Street Railway to the Boston Elevated Railway Company, the Boston Elevated, on stipulated dates in each year, paid directly to the stockholders of the West End Street Railway Company certain stipulated sums per share held. See *West End St. Ry. Co. v. Malley*, 246 Fed. 625, 626. Under such an arrangement it might well have been open to question whether the West End Street Railway Company earned and paid any dividends whatsoever. The amendment was undoubtedly introduced to take care of that situation; and it is to that situation that we must look in interpreting the phrase "dividends paid by way of rental," in St. 1902, c. 483, and also, in view of the intention expressed in 1908 to effect no change in existing law, in interpreting that phrase in the second paragraph of G. L., c. 168, § 54, cl. 4th.

The fact, therefore, that the Legislature, in 1902, expressly included a particular leased line among those street railway companies to which St. 1902, c. 483, was applicable, not as an exception to a general rule excluding leased lines, but in order that that particular leased line should not be debarred from the privilege accorded to leased lines in general, because of the short cut method adopted by it for distributing to its stockholders the profits of its lease, seems to me a further indication of the legislative intent that the test of legality established should apply equally to leased and to operated lines. In fact, had St. 1902, c. 483, included operated lines only and excluded in general all leased lines, a provision extending to a particular leased line the privilege denied to all others might well have been open to serious constitutional objections.

It is true that the control act contemplates that the Boston Elevated Railway Company shall ultimately repay any money paid to it by the Commonwealth. It is to do so, however, only when, and if, its earnings from operation, in addition to covering all operating expenses and dividends, have built up a new surplus exceeding by thirty per cent or more the one million dollar reserve fund originally established. Spec. St. 1918, c. 159, § 11. This provision, therefore, is independent of the Commonwealth's obligation to meet possible deficiencies. It does not in any sense render a payment by the Commonwealth under section 11 a mere loan. Upon such a payment the Boston Elevated Railway Company does not become indebted to the Commonwealth for the amount paid over to it. True, at some future date the Boston Elevated Railway Company may be operating so successfully that it will be required by section 11 to reimburse the Commonwealth. But it is equally true that this desirable condition may never come to pass. Whether it does or not will depend upon the working of the law of demand and supply under new conditions of increased rates of fare. Despite the provision for possible future reimbursements, therefore, whether the consolidation act be looked upon as a lease or a contract, payments to the Boston Elevated Railway Company under section 11 properly may be regarded as money "earned" by it.

Accordingly, in my opinion, if the Boston Elevated Railway Company, pursuant to Spec. St. 1918, c. 159, has paid dividends of at least five per cent on all its outstanding capital stock in the years 1919 to 1923, inclusive, and if in each of these years its receipts, including therein both earnings by operation and

payments, if any, by the Commonwealth under section 11, have amounted to at least five per cent of the total outstanding capital stock, it has "earned and paid" such dividends during that period, within the meaning of G. L., c. 168, § 54, cl. 4th.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Vaccination—Unvaccinated Child—Admission to Public Schools—Proof of Vaccination.

Vaccination, in its statutory meaning, is the operation known as vaccination properly performed. A successful operation is not required to constitute vaccination.

An unvaccinated child, within the purview of the statute, is a child upon whom the operation known as vaccination has not been properly performed.

Visible evidence that vaccination has been successfully performed is not a necessary requirement for the admission of a child to a public school.

Proof that a child has been properly vaccinated may be required before admission to a public school.

Mere verbal changes in the revision of a statute do not alter its meaning.

FEB. 21, 1924.

Dr. EUGENE R. KELLEY, *Commissioner of Public Health*.

DEAR SIR:—You have requested my opinion on the following questions:—

"(1) What constitutes vaccination within the meaning of G. L., c. 76, § 15?"

"(2) Is it necessary, legally, to have visible evidence that vaccination has been successfully performed?"

"(3) Inasmuch as the 'Goodall' method may or may not produce an immunity, would a certificate from a physician stating that he had vaccinated a child of school age by this method, admit the child as a vaccinated pupil to school?"

G. L., c. 76, § 15, provides, in part:—

"An unvaccinated child shall not be admitted to a public school except upon presentation of a certificate like the physician's certificate required by section one hundred and eighty-three of chapter one hundred and eleven. . . ."

G. L., c. 111, § 183, is, in part, as follows:—

"... any child presenting a certificate, signed by a registered physician designated by the parent or guardian, that the physician has at the time of giving the certificate personally examined the child and that he is of the opinion that the physical condition of the child is such that his health will be endangered by vaccination, shall not, while such condition continues, be subject to the two preceding sections."

Section 181 provides, in part:—

"Boards of health, if in their opinion it is necessary for public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants of their towns, and shall provide them with the means of free vaccination. . . ."

Section 182 provides for the vaccination of inmates of certain establishments and institutions.

The requirement that children must be vaccinated before they may be admitted to the public schools first appears in St. 1855, c. 414, § 2, which provides that "the school committee of the several towns and cities, shall not allow any child to be admitted to or connected with the public schools who has not been *duly* vaccinated."

Section 4 of that chapter provided for the enforcement of re-vaccination in cities and towns when the public health required it, with the following proviso:—

"... *provided*, that none shall be required to be re-vaccinated who shall prove, to the satisfaction of said selectmen, or mayor and aldermen, that they have been *successfully* vaccinated, or re-vaccinated, within five years next preceding; . . ."

Section 5 of the act provided that inmates of certain establishments and institutions should be "*properly*" vaccinated.

The requirement making vaccination a condition precedent to the right of a child to attend the public schools was modified by St. 1898, c. 496, § 11, which added the words "except upon presentation of a certificate signed by a regular practising physician that such child is an unfit subject for vaccination." This excepting clause was changed from time to time thereafter until it reached its present form.

The primary definition of the word "vaccination" is "inoculation with vaccine, or the virus of cowpox, as a preventive of smallpox." Century Dictionary; New International Encyclopedia.

"Vaccination" is also defined as "a method of protective inoculation against smallpox, consisting in the intentional transference to the human being of the eruptive disease of cattle, called cowpox." Encyclopedia Britannica.

It is further defined as "a process of transmitting by inoculation a specific disease, known as vaccinia, cowpox or modified smallpox, from one susceptible reagent to another." Encyclopedia Americana.

The word "unvaccinated" is defined as "not vaccinated; specifically, having never been successfully vaccinated." Century Dictionary.

"Inoculation" is defined as "the introduction of a specific animal poison into the tissues by puncture or other contact with a wounded surface." Century Dictionary.

In *Commonwealth v. Jacobson*, 183 Mass. 242, the defendant made an offer of proof, of which, as appears from the record, the ninth proposition was as follows:—

"Ninth. That vaccination consists in inoculating the human system with a specific disease, known as cowpox, by means of the insertion into the human body—by incision and absorption—of various kinds of virus, commonly known as matter or pus, generally obtained from cowpox sores upon the bodies of calves (sometimes other animals) which have been infected with this disease for the purpose of generating this virus, pus or matter."

The court said, concerning this proposition, at page 246:—

"The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial."

The decision was affirmed and the above remark was quoted with approval in *Jacobson v. Massachusetts*, 197 U. S. 11, 23.

In *Lee v. Marsh*, 230 Penn. 351, the following definition was applied in construing a statute of Pennsylvania:—

"The ordinary and usual meaning of 'vaccination,' and the sense in which it must be supposed to have been used by the legislature, is inoculation with the virus of cowpox for the purpose of communicating that disease as a prophylactic against smallpox. It indicates an operation, and not a result. If a person should take cowpox by milking cows, or otherwise, or from other contact with the disease he could not be said to have been vaccinated. The operation is comparatively old, having been in use for over 100 years, and during that time has always consisted of inoculating the body, that is, grafting upon it the disease, by inserting the virus under the skin, and the test of its success has always been considered to be the appearance of the symptoms of the disease, including those which manifest themselves on the skin."

In the medical sense, an "unvaccinated" child is generally understood to mean either a child upon whom the operation known as vaccination has never been performed or upon whom it has been performed unsuccessfully.

It thus appears that the word "vaccinated," as generally used, may apply either to the operation itself, whether successful or not, or to the successful operation.

The meaning of the words "vaccinated" or "unvaccinated," as used in the statute, must be determined from the context, the general intention of the Legis-

lature and the purpose to be accomplished. *Commonwealth v. Nickerson*, 236 Mass. 281, 290; *Hammond v. Hyde Park*, 195 Mass. 29, 30; *Chapin v. Lowell*, 194 Mass. 486, 488; *Toupin v. Peabody*, 162 Mass. 473, 476; *Sweetser v. Emerson*, 236 Fed. 161, 162.

The original act, St. 1855, c. 414, contains the words "vaccinated," "duly vaccinated," "successfully vaccinated," "properly vaccinated," and "re-vaccinated."

The word "duly" means "in a fit manner; properly; in accordance with what is required or suitable." Words and Phrases, vol. 3, p. 2259.

The terms of the act show that the Legislature understood and appreciated the double meaning of the word "vaccinated," and that vaccination did not furnish immunity for life but that re-vaccination might be required at times for the protection of public health. In some instances, I am informed, children, because of natural insusceptibility, can never be successfully vaccinated. An interpretation of the word "vaccinated" as "successfully vaccinated" would prevent such children from ever attending a public school.

Where the vaccine used is fresh and the operation is properly performed, vaccination, I am informed, will be unsuccessful in a comparatively small number of cases.

Taking all of the foregoing factors into consideration, I am of the opinion that the Legislature, by the use of the words "duly vaccinated," meant the operation known as vaccination properly performed, and did not mean the operation successfully performed.

The words "duly vaccinated" appeared in the statutes from 1855 to the Revised Laws of 1902, when in the codification the word "duly" was omitted. It is also omitted in the General Laws. The requirement of proper vaccination as a condition precedent to admission to a public school nevertheless continues. The general rule is well settled that mere verbal changes in the revision of a statute do not alter its meaning, and that the Legislature will not be presumed to have intended to alter the law unless their language plainly requires that construction. *Commonwealth v. N. Y. C. & H. R. R.R. Co.*, 206 Mass. 417, 419; *Great Barrington v. Gibbons*, 199 Mass. 527, 529; *Tilton v. Tilton*, 196 Mass. 562, 564; *Savage v. Shaw*, 195 Mass. 571; *Electric Welding Co. v. Prince*, 195 Mass. 242, 259.

Neither the language of the Revised Laws nor of the General Laws requires a construction that the Legislature intended to alter the law.

I am therefore of the opinion that an "unvaccinated child," within the meaning of G. L., c. 76, § 15, is a child upon whom the operation known as vaccination has not been properly performed.

My answer to your second question is in the negative.

You state that recently a new method of vaccination has been introduced, known as the "Goodall" method, which consists of a hypodermic injection of the virus, leaving no evidence that the operation has been performed. Whether or not such method is vaccination properly performed is a question of fact which is not within my province to determine. The question whether in a given case a child has been properly vaccinated is a question of fact, as to which the proper authorities may require proof.

G. L., c. 76, § 15, states a condition precedent, the non-fulfilment of which is an absolute bar to the right of a child to attend the public schools. But this is not the only statutory provision under which school children may be required to be vaccinated for the protection of the public health. Under the provisions of G. L., c. 111, §§ 181 and 183, boards of health may require and enforce the vaccination and re-vaccination of all the inhabitants of their towns, with the proviso, already referred to, exempting the child presenting a physician's certificate. In addition to this provision there is also the provision in G. L., c. 76, § 5, as follows:—

"Every child shall have a right to attend the public schools of the town where he actually resides, subject to the following section, and to such reasonable regulations as to numbers and qualifications of pupils to be admitted to the respective schools and as to other school matters as the school committee shall from time to time prescribe. . . ."

It has been held that by virtue of this provision school committees may adopt regulations imposing further requirements with respect to vaccination. *Hammond v. Hyde Park*, 195 Mass. 29; *Spofford v. Carleton*, 238 Mass. 528. With respect to the character of such regulations the only requirement imposed by the statute is that they shall be "reasonable." Whether regulations prescribing methods of vaccination or the submission of proof of successful vaccination would be reasonable I do not undertake to determine.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Elections — Presidential Primaries — Candidates for Delegates to National Party Conventions — Preferences.

A nomination paper of a candidate for delegate to a national party convention at a presidential primary sufficiently states the preference of the candidate in accordance with G. L., c. 53, § 68, if it bears the words "pledged to . . ."

FEB. 25, 1924.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth*.

MY DEAR SIR:— You request my opinion on a question arising out of the performance of your official duties in preparing the official ballot for use in the coming presidential primaries, at which delegates to the national conventions of political parties are to be elected.

G. L., c. 53, § 68, provides, in part, that —

"The ballot shall also contain a statement of the preference, if any, of each candidate for delegate as to a candidate for nomination for president, provided that such statement appears in his nomination papers; . . ."

You state that nomination papers are now in circulation bearing the words "pledged to . . ."

You ask to be advised as to whether or not the use of the statement in this form is permissible.

The statement is unambiguous, and the words clearly and unmistakably indicate the candidate's preference and choice as to a candidate for nomination for president. In my judgment, the use of such a statement is, as a matter of law, permissible, and a candidate is entitled to have placed upon the ballot such a statement of his preference, upon his complying with the other provisions of said section 68. It is not necessary that the word "preference" shall be used upon a nomination paper if a "statement" unmistakably connoting the same meaning is used.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Rearrangement of the Constitution — Adoption of Rearranged Constitution.

Under the Constitution an amendment may be made by initiative petition, by legislative substitute and by legislative amendment.

The Legislature has no power to initiate a new or revised constitution.

The proposed rearrangement of the Constitution is not an amendment but a revision, and cannot, under the Constitution, be submitted to the voters by the Legislature.

MARCH 4, 1924.

Joint Committee on Constitutional Law.

GENTLEMEN:— You have submitted to me Senate Resolve No. 54 of 1924, and have asked my opinion upon the following questions of law in relation thereto:—

"1. Is it constitutionally competent for the General Court to act upon the 'Resolve to provide that the Rearrangement of the Constitution adopted by the voters in November, nineteen hundred and nineteen, amended to conform to existing law, shall be the Constitution of the Commonwealth' (Senate No. 54),

under the provisions of article XLVIII of the amendments to the Constitution or under any other provision of the Constitution?

2. Would the adoption of a revised or rearranged constitution be an amendment of the Constitution of the Commonwealth, within the meaning of article XLVIII of the amendments to said Constitution?

3. May a revised or rearranged constitution be constitutionally adopted in any other manner than through the instrumentality of a constitutional convention?"

It is the official duty of the Attorney General to advise a committee of the Legislature only with respect to such bills as may be actually pending before it. III Op. Atty. Gen. 111; Attorney General's Report, 1921, p. 140. Cf. G. L., c. 12, § 9. The justices of the Supreme Judicial Court, in rendering opinions under Mass. Const., pt. 2d, c. III, art. II, follow a similar rule. *Opinions of the Justices*, 122 Mass. 600; 226 Mass. 607, 612. Your first question relates directly to a measure pending before you, and hence requires full consideration. Your second and third questions are general in form, but you state that they are asked in connection with the pending resolve. For that reason, I shall treat them as incidental to the main inquiry in your first question.

Furthermore, I assume that your questions refer solely to the authority of the General Court under the existing Constitution and to the operation and effect of that instrument. In response to an inquiry concerning possible methods of amending the Constitution, the justices of the Supreme Judicial Court, in an opinion rendered in 1833 (*Opinion of the Justices*, 6 Cush. 573, 574), said:—

"The court do not understand, that it was the intention of the house of representatives, to request their opinion upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing constitution to accomplish the objects for which it was designed, to provide for the amendment or alteration of their fundamental laws; nor what would be the effect of any change and alteration of their constitution, made under such circumstances and sanctioned by the assent of the people. Such a view of the subject would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing constitution of the commonwealth, and the laws made under it. We presume, therefore, that the opinion requested applies to the existing constitution and laws of the commonwealth, and the rights and powers derived from and under them."

Accordingly, I discard from consideration all question of the validity of legislative action under altered constitutional conditions, or of the possible efficacy of unauthorized legislative action by virtue of hypothetical future happenings.

I also assume, from the form of your questions and the caption of the resolve, which purports to provide that the rearrangement "shall be the Constitution of the Commonwealth," that the very essence of the proposed measure is the substitution of a new for an existing constitution, and that the term "revised or rearranged constitution," as you use it, means such a substituted constitution.

What are the provisions in the existing Constitution for its amendment, revision or rearrangement?

In the Constitution originally adopted there are two references to possible changes. The first is in article VII of the Bill of Rights, providing that—

"Therefore the people alone have an incontestible, unalienable, and infeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it."

The second is in chapter VI, article X, of the Frame of Government, which provides that—

"In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary,"—the General Court in 1795 shall take steps for the calling of a constitutional convention to consider revising or amending the Constitution.

No convention was called in 1795, as directed by that provision, but in 1820 a convention was held which submitted to the people a number of amendments, of which nine were adopted, becoming the first nine articles of amendment to the Constitution. The ninth amendment provided for amendments to the Constitution, in the following terms:—

“If, at any time hereafter, any specific and particular amendment or amendments to the constitution be proposed in the general court, and agreed to by a majority of the senators and two-thirds of the members of the house of representatives present and voting thereon, such proposed amendment or amendments shall be entered on the journals of the two houses, with the yeas and nays taken thereon, and referred to the general court then next to be chosen, and shall be published; and if, in the general court next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of the senators and two-thirds of the members of the house of representatives present and voting thereon, then it shall be the duty of the general court to submit such proposed amendment or amendments to the people; and if they shall be approved and ratified by a majority of the qualified voters voting thereon, at meetings legally warned and holden for that purpose, they shall become part of the constitution of this commonwealth.”

Articles X to XLIV, inclusive, of the amendments were adopted under the provisions for amendment made by article IX.

Another constitutional convention was held in 1853. This convention submitted to the people a revised constitution, which was rejected by them.

Articles XLV to LXVI, inclusive, of the amendments were submitted to the people by the Constitutional Convention of 1917, and were adopted at subsequent elections in 1917 and 1918. The forty-eighth amendment repealed the ninth amendment, substituting therefor provisions for amendment by initiative petition as well as by proposals introduced in the Legislature. The sixty-seventh and last amendment was submitted to the people under the provisions for amendment contained in the forty-eighth amendment, and was approved in 1922.

The forty-eighth amendment is known as the Initiative and Referendum Amendment. It begins with the following declaration of principle:—

“Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection.”

Then follow provisions which are grouped under three general headings: “The Initiative,” “The Referendum” and “General Provisions.” The provisions relating to constitutional amendments are contained under the heading “The Initiative.”

Subdivision II of that heading states the requirements with respect to the contents and mode of originating initiative petitions and their transmission to the General Court, providing that certain excluded matters specified in section 2 shall not be proposed by such a petition. Subdivision III, section 2, provides for the submission to the people of a legislative substitute for any measure introduced by initiative petition. The measures proposed by initiative petitions may be either constitutional amendments or laws.

Subdivision IV is entitled “Legislative Action on Proposed Constitutional Amendments.” The provisions of that subdivision are as follows:—

“SECTION 1. *Definition.*—A proposal for amendment to the constitution introduced into the general court by initiative petition shall be designated an initiative amendment, and an amendment introduced by a member of either house shall be designated a legislative substitute or a legislative amendment.

SECTION 2. *Joint Session.*—If a proposal for a specific amendment of the constitution is introduced into the general court by initiative petition signed by not less than twenty-five thousand qualified voters, or if in case of a

proposal for amendment introduced into the general court by a member of either house, consideration thereof in joint session is called for by vote of either house, such proposal shall, not later than the second Wednesday in June, be laid before a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof.

SECTION 3. *Amendment of Proposed Amendments.*—A proposal for an amendment to the constitution introduced by initiative petition shall be voted upon in the form in which it was introduced, unless such amendment is amended by vote of three-fourths of the members voting thereon, in joint session, which vote shall be taken by call of the yeas and nays if called for by any member.

SECTION 4. *Legislative Action.*—Final legislative action in the joint session upon any amendment shall be taken only by call of the yeas and nays, which shall be entered upon the journals of the two houses; and an unfavorable vote at any stage preceding final action shall be verified by call of the yeas and nays, to be entered in like manner. At such joint session a legislative amendment receiving the affirmative votes of a majority of all the members elected, or an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court.

SECTION 5. *Submission to the People.*—If in the next general court a legislative amendment shall again be agreed to in joint session by a majority of all the members elected, or if an initiative amendment or a legislative substitute shall again receive the affirmative votes of at least one-fourth of all the members elected, such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next state election. Such amendment shall become part of the constitution if approved, in the case of a legislative amendment, by a majority of the voters voting thereon, or if approved, in the case of an initiative amendment or a legislative substitute, by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment."

By subdivision VIII under the heading "General Provisions" article IX of the amendments to the Constitution is annulled.

By the terms of the provisions quoted above it will be seen that a constitutional amendment may be made in one of three ways,—(1) by initiative petition; (2) by legislative substitute; and (3) by legislative amendment. When the requirements governing the methods of proposal have been complied with, and when the amendment has been approved by the people in accordance with the provisions of section 5, "such amendment shall become part of the constitution."

Aside from the provision in article VII of the Bill of Rights, declaring the right of the people to reform, alter or totally change their government, the only provisions contained in the existing Constitution for making changes therein are in the forty-eighth amendment. This amendment speaks only of *amendments* to the Constitution. If, then, a "revision" or a "rearrangement" of the Constitution means something different from an amendment, there is no provision in the forty-eighth amendment for such a change.

The meaning of the words "rearrangement" and "revision" received careful consideration in *Opinion of the Justices*, 233 Mass. 603, and in *Loring v. Young*, 239 Mass. 349. According to the views there expressed, "rearrangement" means a change in form without change in substance, while "revision" means a change in substance as well as form and contemplates the substitution of the new for the old. The word "amendment," on the other hand, whatever else it may connote, at least implies that one thing is to be altered or added to by another. It presupposes an existing structure. *Shields v. Barrow*, 17 How. 130, 144; *Gagnon v. United States*, 193 U. S. 451, 457. It contemplates that, upon adoption, the thing so designated shall become a part of that pre-existing structure. An amendment is not a self-supporting entity. It must be an amendment to something. It is incapable of existing *in vacuo*.

Both a revision and a rearrangement which substitute a new constitution for the old are essentially different from an amendment. This was the conclusion of the justices in *Opinion of the Justices*, 233 Mass. 603, 609, and in both majority and minority opinions in *Loring v. Young*, 239 Mass. 349, 373, 375, 380, 400. In chapter VI, article X, of the original Constitution the words "revision" and "amendment" are used disjunctively, and in Gen. St. 1916, c. 98, relative to the calling and holding of a constitutional convention, the purpose of the proposed convention is stated to be "to revise, alter or amend the constitution of the commonwealth," and the delegates were authorized to "take into consideration the propriety and expediency of revising the present constitution of the commonwealth, or making alterations or amendments thereof."

I conclude, therefore, that the power to amend the Constitution is different from the power to establish a new constitution superseding and replacing the old. The power to amend the Constitution is the power to add to or alter, but not to supersede. That the power conferred upon the General Court by the forty-eighth amendment to the Constitution is the power to initiate amendments to the Constitution, not to initiate a revision of that Constitution, seems to me beyond question. *Amendments* are to be submitted to the voters; and such amendments are to "become part of the Constitution if approved."

Senate Resolve No. 54 is entitled "Resolve to provide that the Rearrangement of the Constitution adopted by the voters in November, nineteen hundred and nineteen, amended to conform to existing law, shall be the Constitution of the Commonwealth"; and purports to propose "articles of amendment" providing that "the Constitution or form of government of the Commonwealth of Massachusetts, adopted in seventeen hundred and eighty, and the sixty-seven articles of amendment thereto, are hereby deemed and taken to be revised, altered and amended by the Rearrangement of the Constitution adopted by the voters at the State election in November, nineteen hundred and nineteen, which is hereby declared to be the Constitution of the Commonwealth of Massachusetts," with certain specified amendments thereto; and that "the Constitution or form of government for the Commonwealth of Massachusetts will then be as follows."

The court held in *Loring v. Young*, 239 Mass. 349, that the Rearrangement of the Constitution submitted to the voters in 1919 contained changes in substance as compared with the Constitution of 1780 and its amendments, that the Rearrangement, however, provided that in case of conflict the old Constitution and its amendments should prevail, that the voters did not intend to adopt a new form of government, and that, accordingly, the old Constitution and its amendments was still the fundamental law. It is this very Rearrangement, set out anew in Senate Resolve No. 54, with some amendments introducing further changes in substance, as to which my opinion is now required.

The proposed resolve is, in my opinion, open to the objection that it is a revision of the Constitution rather than an amendment. Such is the plain purport of the provisions that the so-called "Rearrangement" "is hereby declared to be the Constitution of the Commonwealth of Massachusetts" and that "the Constitution or form of government for the Commonwealth of Massachusetts will then be as follows." It proposes to substitute a new constitution for the old. In my opinion, therefore, this "Rearrangement" is not within the terms of the amending power as defined in the forty-eighth amendment.

As I have said, the Constitution provides no method for making changes in it, except as set out in the forty-eighth amendment, unless such provision is to be found in the seventh article of the Bill of Rights. By virtue of this declaration, the court has intimated that "the people of the Commonwealth have under the Constitution the right to alter their frame of government according to orderly methods as provided by law, and through the medium of an act of the Legislature," and that therefore the calling of a constitutional convention may be sanctioned by the Constitution. *Opinion of the Justices*, 226 Mass. 607, 610. See also *Opinion of the Justices*, 6 Cush. 573.

But this does not mean that the Legislature may initiate a revision of the Constitution. It has no inherent power to submit to the people for ratification a new constitution, nor can such a proceeding be supported either by custom or as an orderly method provided by law. See Jameson on Constitutional Con-

ventions, 4th ed., §§ 570 and 574 *h*. The proposing of constitutional amendments or of new constitutions is hardly to be deemed a normal exercise of legislative function, authority for which may be sought and found in the general grant of legislative power under the Constitution. 1 Deb. Mass. Conv. 1820, pp. 405, 407. See Jameson on Constitutional Conventions, 4th ed., §§ 549 and 551. A suggestion has been made that the Legislature, in passing a legislative amendment, should be regarded as a constitutional convention, because the proposal must be acted upon in a joint session of the Legislature. But the distinction between a joint session of the Legislature and a constitutional convention is, to my mind, both clear and fundamental. A constitutional convention is perhaps the most solemn, deliberate and highest assembly which can be convened in this Commonwealth. *Sproule v. Fredericks*, 69 Miss. 898. Constitutional conventions have been held only three times since the adoption of the Constitution in 1780. Delegates are elected to a constitutional convention for the sole purpose of determining whether the Constitution shall be revised, altered or amended. Legislative sessions are held annually. Members of the Legislature are elected for the important purpose of enacting all manner of wholesome and reasonable laws for the general welfare of the people. It was never contemplated that the duties of the two bodies should be merged in the General Court, or that the Legislature, of its own initiative, should have the right to submit a new constitution to the people.

My answer to your first question is therefore in the negative. Reiterating, to avoid the possibility of misunderstanding, that I interpret your questions as referring to the existing Constitution and to the rights and powers derived therefrom, and that by a "revised or rearranged constitution" you mean a new constitution substituted in place of and superseding the constitution now in force, what I have already said covers your second and third questions.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Taxation of Legacies and Successions — Uniting Interests passing to One Beneficiary.

A statute amending G. L., c. 65, § 1, as amended, so as to provide that all interests in property passing or accruing to the same beneficiary, by any of the methods therein specified, shall be united and treated as a single interest for the purpose of determining the tax thereunder, would be constitutional.

MARCH 22, 1924.

His Excellency CHANNING H. COX, *Governor of the Commonwealth*.

SIR:— You have transmitted to me for examination and report House Bill No. 146, entitled "An Act providing for uniting interests in connection with the taxation of legacies and successions" and reading as follows:—

"Section one of chapter sixty-five of the General Laws, as amended by chapter three hundred and forty-seven and by section one of chapter four hundred and three both of the acts of nineteen hundred and twenty-two, is hereby further amended by adding at the end thereof the following new paragraph:— All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder."

G. L., c. 65, § 1, as amended by St. 1922, c. 347 and c. 403, § 1, omitting the table of rates, is as follows:—

"All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth or any interest therein and all stock in any national bank situated in this commonwealth or in any

corporation organized under the laws of this commonwealth belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by laws regulating interstate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts."

The table of rates gives different percentages, from one per cent to twelve per cent, varying with the value of the property or interest and with the class of relationship.

This section imposes a legacy and succession tax on property and interests therein, subject to the limitations and exceptions therein provided, passing or accruing either (1) by will, or (2) by laws regulating intestate succession, or (3) by deed, grant or gift made in contemplation of the death of the grantor or donor, or (4) by deed, grant or gift made or intended to take effect in possession or enjoyment after his death, or (5) by survivorship in any form of joint ownership to which the decedent contributed.

In cases which have been before the court the Commissioner of Corporations and Taxation has assessed taxes on property and interests therein passing or accruing to a single person by more than one of the methods specified in section 1, treating the different interests as a whole for the purpose of determining the rate and amount of the tax and the exemption. In *Marble v. Treasurer and Receiver General*, 245 Mass. 504, taxes so assessed upon property passing under a will and an interest in joint savings bank deposits were held to be valid; and in *Pratt v. Dean*, 246 Mass. 300, taxes so assessed upon property passing by will and beneficial interests in trusts created during the testator's lifetime, taking effect in enjoyment after his death, were sustained by the court. In these cases the court intimates that the rule would be different in the case of an interest vesting in enjoyment or possession independently of the death of the donor or testator. Therefore, as the statute now stands it would be doubtful whether a gift made in contemplation of death could be united with property passing in the other ways described in section 1, for the purpose of assessing the tax thereunder. Apparently, also, it would be doubtful whether a future interest could be so united; although in *Moors v. Treasurer and Receiver General*, 237 Mass. 254, taxes which seem to have been assessed in that way were approved. The proposed amendment relieves the uncertainty and provides a uniform rule applicable to all the cases specified in section 1.

In my opinion, the proposed law, if enacted, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Pilots — Suspension — Revocation of Commission — "Active Service."

Under the statutes, a commissioner of pilots may suspend a pilot whom he finds to be guilty of misconduct, carelessness or neglect of duty, and he may revoke the pilot's commission only with the concurrence of the trustees of the Boston Marine Society.

Under the rules and regulations for pilotage for the Fourth Pilot District a pilot holding a commission for service there may not be suspended except for misconduct, carelessness or neglect of duty.

Such a pilot, if not under suspension or leave of absence, is in active service, and should be assigned to pilotage duty.

APRIL 1, 1924.

MR. D. GARDINER O'KEEFE, *Deputy Commissioner of Pilots, Fourth Pilot District, Taunton, Mass.*

DEAR SIR:— You ask my opinion regarding the extent of your powers under St. 1923, c. 390, to suspend or revoke the commissions of pilots in your district and to assign them to duty.

St. 1923, c. 390, made many important changes in the previous law as to pilots, contained in G. L., c. 103. Section 1 of said chapter 390 strikes out the first fourteen sections of said chapter 103 and substitutes therefor six sections, which provide, among other things, in substance, for the division of the shore line of the Commonwealth into four districts, the appointment of commissioners and deputy commissioners of pilots therefor, the formulation of rules and regulations for pilotage and establishment of rates, the granting of commissions to pilots, their suspension, and the revocation of their commissions.

Under the previous law pilots, except for the harbor of Boston, might be removed only by the Governor and Council. G. L., c. 103, §§ 6–11, 13. This provision was changed by the statute of 1923. G. L., c. 103, § 3, as thus amended, is as follows:—

"The commissioners, subject to the approval of the trustees of said society, shall formulate rules and regulations for pilotage and establish rates within their respective districts, . . . The commissioners also, in accordance with such rules and regulations, shall grant commissions as pilots for their districts or for special locations therein, to such persons as they consider competent; provided that for district one such persons shall first be approved by said trustees. The commissioners may, upon satisfactory evidence of his misconduct, carelessness or neglect of duty, suspend any such pilot until the next meeting of said trustees and may thereafter continue such suspension until the close of the next stated meeting of said trustees, but no longer for the same offense. If said trustees decide at either of said meetings that the commission of such pilot ought to be revoked, the commissioners may revoke it at any time after said decision is rendered and before it is reversed. The commissioners shall cause the laws and regulations for pilotage within their district to be duly observed and executed, and shall receive, hear and determine complaints by and against pilots for said district."

The society therein referred to is the Boston Marine Society, and the trustees are the trustees of that society.

On the subject of commissions of pilots St. 1923, c. 390, § 6, further provides:—

" . . . But nothing herein contained shall affect the commissions of pilots of any kind, except that after this act takes effect they may be removed for the causes specified and in the manner provided in section three of said chapter one hundred and three, as amended by this act. . . ."

These provisions make it clear that the pilots in your district may be removed and their commissions revoked by the Commissioner in the way, and only in the way, provided by section 3, quoted above. The Commissioner may, upon satisfactory evidence of the misconduct, carelessness or neglect of duty of a pilot, suspend such pilot until the next meeting of the trustees of the

Boston Marine Society, and may continue such suspension thereafter until the close of the next stated meeting of the trustees. If the trustees decide at either of those meetings that the commission of the pilot ought to be revoked, the Commissioner may then revoke it. The Commissioner's power, therefore, is limited to suspending, in the first instance, a pilot whom he finds to be guilty of misconduct, carelessness or neglect of duty, and he may revoke the pilot's commission only after the trustees of the Boston Marine Society have decided that the commission ought to be revoked. He has no power to suspend a pilot except upon such a finding.

In the case of *Lunt v. Davison*, 104 Mass, 498, 502, the meaning of the words "misconduct, carelessness or neglect of duty," as used in a similar statute, was considered by the court, and the court said:—

"The causes of removal are very general and indefinite,— 'misconduct, carelessness or neglect of duty.' It is only requisite that the evidence of either of these should be satisfactory to the commissioners. From the nature of the case, this involves not merely the credibility and sufficiency of the proof of the facts relating to the conduct of the pilot, but also the question whether the facts so proved furnish satisfactory evidence of misconduct, carelessness or neglect of duty. The propriety of the conduct of a pilot, in the performance of his official duties, as observed by the commissioners or shown by evidence brought to them, can be judged of best by men having constant familiarity with the circumstances and requirements of the service. If from neglect, inattention, or any want of faithfulness, the service of a pilot should fall short of that which is due to the responsibilities of the position, we think the terms of the statute would authorize the commissioners to regard that deficiency as satisfactory evidence of carelessness or neglect of duty, although no specific act of misconduct should be alleged."

You have submitted to me a copy of rules and regulations for pilotage for the Fourth Pilot District, formulated and approved as required by said section 3. Rules 1, 23 and 24 are as follows:—

"1. All pilots shall hold themselves in readiness for pilotage service at all times, provided, however, that the Commissioner may grant permission for leave of absence from such duty in his discretion.

23. All pilots in active service shall be assigned to pilotage duty by the Commissioner. The work shall be apportioned equally among said pilots, and all income from said pilotage, after deducting the necessary expenses incident to the work of pilotage, shall be equally divided among said pilots every thirty days.

24. Any pilot proven to have violated these regulations, or the state laws which accompany them, except for reasons which meet with approbation of the Commissioner, shall be liable to suspension."

The words "in active service," as used in rule 23 with reference to pilots, naturally designate all pilots not under suspension or leave of absence as provided by rule 1, and in the absence of information as to a different practical construction I so construe them. It is my judgment that a pilot holding a commission for service in your district may not be suspended by you except for misconduct, carelessness or neglect of duty, and that, since the passage of the statute of 1923 and the adoption of the rules and regulations, such a pilot, if he is not under suspension or leave of absence, is in active service within the meaning of those words as used in rule 23, and should be assigned by you to pilotage duty.

You also ask with respect to a pilot who has been out of active service in local waters for some period of time, whether you have the power to assign him to go along with another pilot of experience, and under his guidance, for a number of trips sufficient to enable him to familiarize himself with any changes which may have occurred in those waters since the time of his last service.

Rule 23 requires you to assign all pilots in active service to pilotage duty. The words "pilotage duty," as used in rule 23, plainly mean the duty of acting

as pilot for vessels entering or leaving the waters within the district. See *State v. Turner*, 34 Ore. 173; MacLachlan's Law of Merchant Shipping, 6th ed., p. 207. For performing this service a pilot is entitled to receive pilotage fees. It is no part of the duty of a pilot either to instruct or to receive instruction from another pilot. The powers and duties of pilots and of the Commissioner are determined by the statutes and the rules and regulations, but they contain no provision for the instruction of pilots. I am therefore of the opinion that you have no power to assign the pilot you refer to to serve with and under the guidance of another pilot.

I do not, of course, intimate that the pilot you mention has no duty in the premises. He is by statute made liable for all damages accruing from his negligence, unskilfulness or unfaithfulness. G. L., c. 103, § 18. If, owing to absence, he has become unfamiliar with the waters in his district, it would seem a natural precaution that he should make himself familiar with them. This duty is well stated in *Atlee v. Packet Co.*, 21 Wall. 389, 396, 397, as follows:—

“In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity, his skilled knowledge, very seriously in the course of a long voyage. He should make a few of the first ‘trips,’ as they are called, after his return, in company with other pilots more recently familiar with the river.”

Very truly yours,

JAY R. BENTON, *Attorney General*.

District Attorneys—Traveling Expenses—Other Expenses.

Except in Suffolk County, traveling expenses of district attorneys and assistant district attorneys, necessarily incurred in the performance of their official duties, are to be paid by the Commonwealth and not by the county.

All other expenses necessarily incurred are to be paid by the county for the benefit of which they were contracted.

APRIL 7, 1924.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:—You request my opinion whether traveling expenses of district attorneys and assistant district attorneys are to be paid by the Commonwealth or by the county for the benefit of which they were contracted.

G. L., c. 12, § 23, provides:—

“Except in the Suffolk district, district attorneys and assistant district attorneys shall receive for traveling expenses necessarily incurred in the performance of their official duties such sums as shall be approved by a justice of the superior court, to be paid by the commonwealth.”

Section 24 of the act provides:—

“A district attorney, in the name of any county in his district, may contract such bills for stationery, experts, travel outside of the commonwealth by witnesses required by the commonwealth in the prosecution of cases, for necessary expenses incurred by officers under his direction in going outside of the commonwealth for the purpose of searching for or bringing back for trial persons under indictment in said county, and for such other expenses as may in his opinion be necessary for the proper conduct of his office in the investigation of or preparation and trial of criminal causes; and all such bills shall be paid by the county for the benefit of which they were contracted upon a certificate by the district attorney that they were necessarily incurred in the proper performance of his duty, and upon approval of the auditor of Suffolk county if the bills were incurred for said county, otherwise upon the approval of the county commissioners or of a justice of the superior court.”

The two sections must be read together. So read, they clearly differentiate between traveling expenses of district attorneys and assistant district attorneys and other expenses incurred by such officers. Accordingly, I am of the opinion that, except in Suffolk County, traveling expenses of district attorneys and

assistant district attorneys necessarily incurred in the performance of their official duties are to be paid by the Commonwealth and not by the county. All other expenses incurred by the district attorney, which in his opinion are necessary for the proper conduct of his office in the investigation of or preparation and trial of criminal causes, are to be paid by the county for the benefit of which they were contracted.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Board of Registration in Pharmacy — Agent — Powers — Inspection of Drug Stores — Right to use Force — Taking of Samples.

The inspection of drug stores, which an agent of the Board of Registration in Pharmacy may make, must be reasonable, with a view to accomplishing the purpose of the statute.

Opening closets, pulling out drawers and examining the contents of cans, jugs and other containers is a reasonable mode of inspection.

Such agent may probably not use force to gain entry to a drug store for the purpose of making an inspection.

If peaceable entry is obtained, an inspection may probably be made against the owner's will.

Right to take samples is not incidental to or part of the right to inspect.

The agent of the Board of Registration in Pharmacy may not take samples without the consent of the person in charge of the store.

APRIL 8, 1924.

Department of Civil Service and Registration.

GENTLEMEN:—On behalf of the Board of Registration in Pharmacy you ask my opinion on questions of law relative to the powers of the agent of that board appointed under G. L., c. 13, § 25, as amended by St. 1922, c. 441. That act reads as follows:—

“The board (of registration in pharmacy) shall appoint and fix the compensation, with the approval of the governor and council, of an agent who shall be allowed his necessary traveling expenses. He shall inspect drug stores and make a daily report of his doings pertaining thereto, and report all violations of the laws relating to pharmacy.”

Your first question is as follows: “Has the agent the power to open closets, pull out drawers, examine contents of cans, jugs and other containers in a drug store which he is engaged in inspecting?”

An inspection is “a strict or prying examination; a close or careful scrutiny; a critical examination; a formal or official inquiry by actual observation into the state, efficiency, safety, quality, etc., of something of special moment, as drugs.” *Century Dictionary*; 32 C. J. 930.

In *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, 62, the court said:—

“What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test.”

An inspection may be very general or it may be very minute. 32 C. J. 930. The manner in which an inspection shall be made depends entirely upon the requirements of the statute and the nature of the merchandise to be inspected. 22 Cyc. 1366. It must be reasonable, of such a nature as to be of value and must have a rational connection with the end to be accomplished. *Commonwealth v. Moore*, 214 Mass. 19.

The statute in question provides that an agent of the Board of Registration in Pharmacy shall inspect drug stores and report all violations of the laws relating to pharmacy. The language of the act is comprehensive; its object is to protect and promote public health. It is manifestly within the police power of the State. *Commonwealth v. Moore*, 214 Mass. 19; *Commonwealth v. Wheeler*,

205 Mass. 384; *Commonwealth v. Carter*, 132 Mass. 12; *Pittsburg & Southern Coal Co. v. Louisiana*, 156 U. S. 590, 599. The inspection which may be made by the agent of the board must be reasonable, with a view to accomplishing the purpose of the statute.

Taking into consideration the foregoing factors, I am of the opinion that opening closets, pulling out drawers and examining the contents of cans, jugs and other containers is a reasonable mode of inspection. Accordingly, I am of the opinion that your first question should be answered in the affirmative.

The agent may, however, probably not use force to gain entry to a drug store for the purpose of making an inspection. The cases sustaining the right of officers authorized by statute to make entry for the purpose of inspection refer to peaceable entry. They do not hold that entry may be made by force against the will of the owner or occupant. Whether such entry would be lawful is left in doubt. See Attorney General's Report, 1921, p. 279. If, however, peaceable entry to the drug store has been obtained, the court seems to intimate that an inspection can be made even against the will of the owner. *Commonwealth v. Smith*, 141 Mass. 135, 139. This question, however, is not free from doubt.

Your second question is as follows: "Can the agent take a sample of suspected illegal liquor for analysis, for presentation as evidence before the Board of Registration in Pharmacy, without the consent of the person in charge at the store?"

The right to take samples is not, in the absence of express authority, incidental to or part of the right to inspect. In *Commonwealth v. Smith*, 141 Mass. 135, 139, the court said:—

"The right to take samples of milk against the will of the owner can only be justified by an act of the Legislature regulating a business which otherwise might become injurious to the community."

This right cannot be extended beyond its express scope. *Dunn v. Lowe*, 203 Mass. 516; *Commonwealth v. Smith*, 141 Mass. 135, 139. Wherever in this Commonwealth samples may be taken by inspectors, the right has been expressly conferred by statute. G. L., c. 94, § 304, specifically provides for the furnishing of samples of drugs to an officer or agent of the Department of Public Health upon tender of the value thereof.

G. L., c. 13, § 25, as amended, does not authorize the taking of samples. I am therefore of the opinion that, in the absence of specific authorization, the agent of the board may not take samples, and that your second question should be answered in the negative.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Plumbers — Apprentice — Journeyman — Probationary License.

A person learning the business of plumbing may not lawfully be sent out to do the work of a journeyman plumber unless he is registered or has been licensed as required by G. L., c. 142, § 3, except that a person who has worked as an apprentice or under a verbal agreement for instruction, for not less than three years, and has complied with the requirements of G. L., c. 142, § 4, may have issued to him a probationary license under which he may be sent out to do the work of a journeyman.

APRIL 8, 1924.

State Examiners of Plumbers.

GENTLEMEN:— You request my opinion on questions of law arising out of R. L., c. 103, § 9, and St. 1909, c. 536, § 2.

The Revised Laws were supplanted by the General Laws, which took effect from and after December 31, 1920. G. L., c. 282, expressly repeals both R. L., c. 103, § 9, and St. 1909, c. 536, § 2. It is clear that it would serve no useful purpose to discuss questions of law involving the interpretation of statutes that have been repealed. I am, however, going to take the liberty of discussing the questions raised by you in the light of the provisions of the statutes that exist today in our General Laws.

Your first question, revised, would read as follows: Does G. L., c. 142, § 14, prohibit an apprentice or learner from working without a license?

Said section 14 reads as follows:—

"Sections one to sixteen, inclusive, shall apply to all persons learning the business of plumbing when they are sent out to do the work of a journeyman."

Therefore, section 3 of said chapter 142 applies to persons learning the business of plumbing when they are sent out to do the work of a journeyman plumber. Said section 3 prohibits any person from engaging in the business of working as a journeyman plumber unless he is lawfully registered or has been licensed by the examiners, as provided in this chapter; so that, answering your first question, a person learning the business of plumbing may not be sent out to do the work of a journeyman plumber unless he is lawfully registered or has been licensed.

Your second question, revised, would read as follows: Does the probationary license, as described in and issued under G. L., c. 142, § 4, fill any gap left in G. L., c. 142, § 14?

So far as is pertinent to your inquiry said section 4 reads as follows:—

"The examiners may, without payment of any fee, issue a probationary license in force for six months to a person who, having worked as an apprentice, or under a verbal agreement for instruction, for not less than three years, presents an application therefor with the signed endorsement of his employer agreeing to be responsible for all work done under the license and to have the licensee, at the expiration of the license, present himself for examination as a journeyman."

Consequently, as the law stands today, a person, having worked as an apprentice or under a verbal agreement for instruction, for not less than three years, and complying with the other requirements set forth above, may have issued to him a probationary license under which he may be sent out to do the work of a journeyman.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Metropolitan Police Officer — Expenses as Witness — Reimbursement.

A metropolitan police officer who attends as a witness in a criminal case at a place other than his residence, and whose attendance is not in the performance of the duties for which he is paid a salary, is entitled to a witness fee.

In all other cases, with certain minor exceptions, the expenses of such officer, necessarily and actually disbursed by him for testifying in a criminal case in the Superior Court, should be paid by the county. If the case is tried in a district court or before a trial justice, such expenses should be paid by the town where the crime was committed.

APRIL 9, 1924.

Metropolitan District Commission.

GENTLEMEN:— You request my opinion whether a metropolitan district police officer who, by the order of the district attorney, appeared as a witness in the Superior Court held at Brockton at the trial of a person charged with crime, and who incurred expenses in so appearing, is entitled to be reimbursed by the county where the trial was held.

G. L., c. 262, § 50, provides, in part:—

"No . . . police officer who receives a salary or an allowance by the day or hour from the commonwealth or from a county, city or town shall, except as otherwise hereinafter provided, be paid any fee or extra compensation . . . for testifying as a witness in a criminal case during the time for which he received such salary or allowance; . . . but his expenses, necessarily and actually incurred, and actually disbursed by him in a criminal case tried in the superior court, shall, except as provided in section fifty-two, be paid by the county where the trial is held . . ."

Section 52 provides:—

“Except in Suffolk county, the fees and expenses of officers in the apprehension, trial or commitment of a person arrested or tried as a tramp or vagrant shall be paid by the county where the offence was committed.”

Section 53 provides, in part, as follows:—

“Any officer named in section fifty who attends as a witness at a place other than his residence shall, instead of his expenses, be allowed the witness fee in the court or before the trial justice where he testifies. . . .”

In my opinion, a metropolitan district police officer is included in the class of persons enumerated in section 50. Sections 56 and 57 have no application to such officer.

In construing R. L., c. 204, §§ 42 and 44, now G. L., c. 262, §§ 50 and 53, above referred to, the court said, in *Sackett v. Sanborn*, 205 Mass. 110, 112:—

“The object of the statute is to provide that officers who receive compensation for their services by salary or otherwise, and attend court in the discharge of duties which they are thus paid to perform, shall not receive further compensation by way of witness fees, but that any expenses necessarily and actually incurred or disbursed by them in the performance of such duties in attending court in criminal cases shall be reimbursed to them. If they attend court, but *not in the performance of the duties for which they are paid*, at a place other than their residence, then, . . . instead of their expenses they are to be allowed witness fees.”

I am accordingly of the opinion that if a metropolitan district police officer attends as a witness at a place other than his residence, and his attendance is not in the performance of the duties for which he is paid a salary or allowance, he is entitled to a witness fee in the court or before the trial justice where he testifies. In all other cases, with the exception of the cases referred to in G. L., c. 262, § 52, the expenses of such officer, necessarily and actually incurred and actually disbursed by him for testifying as a witness in a criminal case tried in the Superior Court, should be paid by the county where the trial is held; and if the case is tried in a district court or before a trial justice, such expenses should be paid by the town where the crime was committed.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Undertakers — Licenses — Registered Embalmers.

A statute limiting the issuance of undertakers' licenses to registered embalmers would be unconstitutional.

The presumption of constitutionality does not attach to a bill not yet enacted into law.

APRIL 10, 1924.

MR. PRINCE H. TIRRELL, *Chairman, House Committee on Bills in the Third Reading.*

DEAR SIR:—You request my opinion as to whether House Bill No. 615, with certain changes indicated by you, would be constitutional if enacted into law.

House Bill No. 615 is entitled “An Act to require undertakers to be registered embalmers,” and, with the changes specified in your letter, would read as follows:—

“Chapter one hundred and fourteen of the General Laws is hereby amended by striking out section forty-nine and inserting in place thereof the following:—*Section 49.* Boards of health shall annually, on or before May first, license a suitable number of undertakers who can read and write the English language and who shall be registered embalmers. Such license shall be issued upon such terms and conditions as the board of health may prescribe, and may be revoked at any time by the board if its terms or conditions or any requirements of law relative thereto have been violated by the undertaker. An undertaker so licensed

may act in any town. Nothing herein contained shall prevent such board from granting a license to any person licensed as an undertaker prior to June first, nineteen hundred and twenty-four."

In *Wyeth v. Board of Health of the City of Cambridge*, 200 Mass. 474, decided in 1909, the Supreme Court held that a regulation of the Board of Registration in Embalming, requiring all undertakers to be licensed embalmers, was unconstitutional, and that the refusal of the respondents to grant to an applicant a license as an undertaker, solely upon the ground that the applicant was not a licensed embalmer, was an invasion of a constitutional immunity, to redress which a writ of mandamus would issue. In the course of the opinion Knowlton, C. J., speaking for the court, said:—

"We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation within the exercise of the police power by the State. If such a regulation had been made by an act of the Legislature, with all the strong presumptions of constitutionality which attach to legislative action, we should hesitate to affirm the constitutionality of the act. But action by such a board, under mere general authority to make rules and regulations, does not carry with it these strong presumptions. We consider this action without foundation in law or reason, and in violation of the constitutional rights of our citizens.

A statute of New York, which provided, among other things, that no person should engage in the business of undertaking unless he had been duly licensed as an embalmer, was held unconstitutional by a unanimous decision in the appellate division of the Supreme Court of that State. *People v. Ringe*, 125 App. Div. (N. Y.) 592."

In the face of so clear an intimation of the opinion of the Supreme Court there appears little room for speculation in the present case. Further, the "strong presumptions of constitutionality which attach to legislative action," referred to in the opinion, are inapplicable to a bill not yet enacted into law. The presumption is justified by the belief that the enactment of a law presupposes that the Legislature, in the light of its own knowledge and of the best legal advice available to it, has determined that authority to pass such a law is included within the powers delegated to it by the Constitution. To invoke the presumption during the consideration of a proposed enactment would be to destroy the very foundation upon which that presumption rests.

I am accordingly constrained to advise you that, in my opinion, House Bill No. 615, with the changes specified by you, if enacted into law would be unconstitutional.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Highways — State Highways — Layout.

Under St. 1922, c. 501, as amended by St. 1923, c. 481, providing for the laying out and construction, by the Division of Highways, of a highway in the city of Revere, the city cannot be required to make the layout, and no part of the cost may be assessed upon the county.

A way does not become a State highway, under G. L., c. 61, until it has been "laid out and taken charge of" by the division in behalf of the Commonwealth.

Since St. 1922, c. 501, as amended, does not require the division to take charge of the proposed highway, it was not intended to provide that the highway should be a State highway.

APRIL 14, 1924.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You request my opinion as to the proper procedure in laying out the highway authorized by St. 1922, c. 501; and put the three following questions:—

"1. Shall it be laid out as a State highway under the provisions of G. L., c. 81?"

2. May the division require the city of Revere to make the layout?"

3. If laid out as a State highway, can 25 per cent of the cost be assessed upon the county, under the provisions of G. L., c. 81, § 9, as amended by St. 1921, c. 112, § 2, and St. 1923, c. 362, § 63?"

St. 1922, c. 501, as amended by St. 1923, c. 481, reads as follows:—

"SECTION 1. The division of highways of the department of public works is hereby authorized and directed to lay out and construct a highway in the city of Revere beginning at the Malden line on or near the present way leading from Revere to that part of the city of Malden known as Linden and extending to Broadway in said city of Revere. The route of such layout and construction may be along existing public or private ways or over private land; provided that no work shall be done on the construction of said highway until satisfactory releases have been obtained from the owners for all land to be used for said highway without expense and that the city of Malden shall have made the necessary appropriations and undertaken the construction of connections satisfactory to said division, said connection in Malden to run from the Revere line through Linden square, Beach and Salem streets and over private land to the Newburyport Turnpike.

SECTION 2. For the purposes of this act, the division may expend a sum not exceeding one hundred thousand dollars. Of the total amount expended, one half shall be assessed upon the metropolitan parks district and the balance shall be paid by the commonwealth from item number six hundred and thirty-one of the general appropriation act of the current year."

Section 2 was superseded by St. 1923, c. 494, item 623 *b*, which provides as follows:—

"For the construction of a highway in the city of Revere, as authorized by chapter five hundred and one of the acts of nineteen hundred and twenty-two, as amended by chapter four hundred and eighty-one of the acts of the present year, at a cost not exceeding one hundred thousand dollars, one half of which shall be assessed upon the metropolitan parks district, and the balance of fifty thousand dollars shall be paid from Motor Vehicle Fees Fund . . . \$50,000 00"

G. L., c. 81, entitled "State Highways," provides, in sections 4 to 12, inclusive, for the laying out of State highways by petition by county commissioners, aldermen or selectmen to the Division of Highways, determination by the division that public necessity and convenience require that the proposed way should be laid out and taken charge of by the Commonwealth, and the filing of a plan and certificate showing that the division has laid out and taken charge of the way in accordance with the plan. Provisions prescribing the method to be followed are contained in sections 4 and 5 as follows:—

"SECTION 4. If county commissioners, aldermen or selectmen adjudge that public necessity and convenience require that the commonwealth lay out and take charge of a new or existing way as a highway in whole or in part, in their county, city or town, they may apply, by a written petition, to the division, requesting that said way be laid out and taken charge of by the commonwealth.

SECTION 5. If the division determines that public necessity and convenience require that such way should be laid out or be taken charge of by the commonwealth, it shall file in the office of the county commissioners for the county where the way is situated a certified copy of a plan thereof, a copy of the petition therefor, and a certified copy of a certificate that it has laid out and taken charge of said way in accordance with said plan, and shall file in the office of the clerk of such town a copy of the plan showing the location of the portion lying in each town and a copy of the certificate that it has laid out and taken charge of said highway in accordance with said plan . . ."

Section 5 provides that "thereafter said way shall be a State highway, and shall be constructed by the division at the expense of the Commonwealth."

Section 24 provides as follows:—

“The division may, whenever any money is appropriated by the general court for its use in the construction or improvement of any particular way, expend such money in constructing or improving the whole or such part of said way as it deems best, either upon the location of the existing way or upon any new location that may be established by the county commissioners or the selectmen, and no part of the way so improved shall thereby become a state highway or be maintained as such. The division may, however, lay out the whole or any part of any such way as a state highway.”

Section 13 provides that “state highways shall be maintained and kept in good repair and condition by the division at the expense of the Commonwealth,” and section 18 provides that “the Commonwealth shall be liable for injuries sustained by persons while traveling on state highways, if the same are caused by defects within the limits of the constructed traveled roadway, in the manner and subject to the limitations, conditions and restrictions specified in sections fifteen, eighteen and nineteen of chapter eighty-four,” with certain exceptions therein specified. G. L., c. 84, § 1, provides that “highways and town ways shall, unless otherwise provided, be kept in repair at the expense of the town in which they are situated”; and section 15 provides that the “county, city, town or person by law obliged to repair the same” shall be liable in damages for injuries from defects therein.

In view of the plain provisions in St. 1922, c. 501, as amended, authorizing and directing the Division of Highways to lay out and construct the highway in question, and providing for payment of the cost of construction, one-half by the metropolitan parks district and the balance from the motor vehicle fees fund, it is my opinion that the division may not require the city of Revere to make the layout, and that no part of the cost may be assessed upon the county. I therefore answer your second and third questions in the negative.

Your first question, whether the highway shall be laid out as a State highway under the provisions of G. L., c. 81, depends upon the proper construction of St. 1922, c. 501, as amended, in the light of general statutory provisions. The answer requires consideration of the legislative intention with respect to the burden of maintenance and liability for injuries due to defects—whether it was intended that those obligations should be borne by the Commonwealth or by the local communities. If the former, then clearly the way is to be laid out as a State highway; otherwise not.

The direction to the division is “to lay out and construct a highway, etc.” The highway is not designated as a State highway, and the statute contains no direction to the division requiring it to take charge of the highway. In those respects the statute differs from other statutes providing for the construction of other particular highways. See, for example, St. 1907, c. 574, providing that “the Massachusetts highway commission shall lay out, take charge of and construct as a state highway” a part of Washington Street in the West Roxbury district of Boston. The words “lay out,” when used in statutes with reference to highways, mean locating and establishing a new highway. The imposition upon certain public authorities of the duty of laying out a highway does not necessarily carry with it the right of control by them and the further duty of maintaining that way when laid out and constructed. *Foster v. Park Commissioners*, 133 Mass. 321, 329, 333; *Leahy v. Street Commissioners*, 209 Mass. 316, 317. For that reason the words “take charge of” are used in G. L., c. 61, in conjunction with “lay out,” and a way does not become a State highway under that chapter until it has been “laid out and taken charge of” by the division in behalf of the Commonwealth. I Op. Atty. Gen. 284.

It is my opinion that the Legislature, in providing that the division shall lay out and construct the proposed highway, did not intend to require the division also to take charge of and maintain the highways or to impose on the Commonwealth liability for injuries from defects therein, and that therefore it did not intend to provide that the highway so laid out and constructed should be a State highway. I therefore answer your first question in the negative.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Police Power — Restriction of Importation of Cattle.

State laws requiring inspection of property intended for domestic use, passed for the protection of the public health, morals or safety, or to guard the public from fraud, are not open to attack as in contravention of the commerce clause of the Constitution of the United States unless they directly discriminate against interstate commerce or are inconsistent with Federal legislation under the commerce clause.

A statute providing that no cattle which react to the tuberculin test shall be shipped into the Commonwealth would be in direct conflict with national legislation contained in the Act of February 2, 1903, c. 349, § 1 (32 Stat. 791), and would therefore be invalid.

APRIL 16, 1924.

House Committee on Bills in the Third Reading.

GENTLEMEN:—You have asked my opinion as to the constitutionality of House Bill No. 382, entitled “An Act to prevent the shipment into the Commonwealth of diseased cattle.” The bill provides for the amendment of G. L., c. 129, § 27, by adding at the end thereof the following:—

“No cattle to be used for dairy purposes shall be shipped into the commonwealth unless such cattle have been given a tuberculin test, and declared to be free from dangerous diseases, by a competent veterinary surgeon, approved by the director. No cattle which react to the tuberculin test shall be shipped into the commonwealth.”

The proposed law, if valid, evidently must be supported as a proper exercise of the State police power. If it is invalid, the objection to it must be that it is an unlawful interference with interstate commerce. State laws requiring inspection of property intended for domestic use, passed for the protection of the public health, morals or safety, or to guard the public from fraud, are not open to attack as in contravention of the commerce clause of the Constitution of the United States unless they directly discriminate against interstate commerce or are inconsistent with Federal legislation under the commerce clause. *Plumley v. Massachusetts*, 155 U. S. 461; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345; *Savage v. Jones*, 225 U. S. 501.

The United States Supreme Court has held unconstitutional a statute restraining the importation of cattle into a State in such a way as to prevent the bringing in of cattle which are healthy as well as those that are diseased, on the ground that such legislation was in conflict with the commerce clause. *Railroad Co. v. Husen*, 95 U. S. 465. So, also, statutes in the guise of inspection laws employed to exclude the products and merchandise of other States have been held unconstitutional because they discriminated against interstate commerce. *Minnesota v. Barber*, 136 U. S. 313; *Voight v. Wright*, 141 U. S. 62. On the other hand, it has held that a statute prohibiting transportation of cattle into a State without inspection by State or national officials was constitutional, such legislation not being in conflict with any act of Congress. *Reid v. Colorado*, 187 U. S. 137; *Asbell v. Kansas*, 209 U. S. 251.

I am of the opinion that the proposed law is in conflict with national legislation, to which it must yield. In the Act of February 2, 1903, c. 349, § 1 (32 Stat. 791), it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or other livestock and found them free from infectious, contagious or communicable disease, “such animals, so inspected and certified, may be shipped, driven, or transported . . . into . . . any State or Territory . . . without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.” Concerning this very statute the court said, in *Asbell v. Kansas*, *supra*, 258:—

“There can be no doubt that this is the supreme law, and if the state law conflicts with it the state law must yield.”

The provision in the proposed law that “no cattle which react to the tuberculin test shall be shipped into the commonwealth” appears to be in direct conflict with this provision.

In my opinion, therefore, the bill would not be valid if enacted, because of the superior authority of the Federal statute.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Hunting and Fishing — Certificate of Registration — Violation of Fish and Game Laws.

Every certificate to hunt, trap and fish issued under G. L., c. 131, §§ 3-14, as amended, becomes void upon the conviction of the holder thereof of any violation of the fish and game laws, and no such certificate may be given to any person so convicted during the period of one year from the date of his conviction.

APRIL 17, 1924.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:— You request my opinion on the following questions relative to the granting and revocation of fishing and hunting certificates:—

"1. Under G. L., c. 131, § 14, would a person convicted of any violation of any section or any provision of a section of G. L., cc. 130 and 131, forfeit any fishing or hunting certificate he may possess?

2. Would a conviction of a violation of a fish law or of a game law prevent a person from securing both a hunting and a fishing certificate during the period of one year following the conviction?

3. Would a person who did not hold either a hunting or a fishing certificate and who was convicted of a violation of any provision of chapters 130 and 131 forfeit his right to secure a certificate for a period of one year from the date of his conviction?"

G. L., c. 131, §§ 3-14, as amended by St. 1921, c. 467, provide for three classes of certificates of registration, namely, a combination certificate to hunt, trap and fish, a certificate to hunt and trap, and a certificate to fish. Section 14, as amended by St. 1921, c. 467, § 8, provides, in part:—

"... Every certificate issued under sections three to fourteen, inclusive, held by any person convicted of a violation of the fish and game laws or of any provision of said sections, shall be void, and shall immediately be surrendered to the officer securing such conviction. The officer shall forthwith forward the certificates to the director, who shall cancel the same, and notify the clerk issuing them of the cancellation thereof. No person shall be given a certificate under authority of said sections during the period of one year from the date of his conviction as aforesaid. Any such certificate issued to a person within one year of his conviction as aforesaid shall be void, and shall be surrendered on demand of any officer authorized to enforce the fish and game laws. . . ."

It is plain that under the statute *every* certificate issued under G. L., c. 131, §§ 3-14, as amended, becomes void upon the conviction of the holder thereof of *any* violation of the fish and game laws, and that no certificate of any class may under these sections be given to any person so convicted during the period of one year from the date of his conviction.

I am accordingly of the opinion that all of your questions should be answered in the affirmative.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Tuberculosis Hospitals — Apportionment of Cost.

In providing for an apportionment of the cost of a public undertaking among cities and towns or other political subdivisions of the Commonwealth benefited thereby, and also in shifting the burden thereof, the Legislature has a large measure of discretion, the exercise of which is not subject to judicial control, on constitutional grounds, unless it is purely arbitrary.

A statute changing the previous law by including in the district served by the Essex County Tuberculosis Hospital cities previously exempted, and requiring them to bear a part of the burden of the cost of its construction and maintenance, apportioned in a way which, under all the circumstances, would be fair and reasonable, would be constitutional.

MAY 5, 1924.

To the Honorable Senate.

GENTLEMEN:— You have submitted to me Senate Bill No. 468, entitled "An Act to enlarge the present tuberculosis hospital district within the county of Essex and to apportion certain costs incident thereto," and have requested my opinion on the following questions relative to said bill:—

"(1) Inasmuch as the cities in Essex county now exempt from the provisions of sections seventy-eight to ninety of chapter one hundred and eleven of the General Laws have a majority of the registered voters who elect the trustees of the tuberculosis hospital for said county, does not such control constitute said cities actual parties in interest with respect to the financial cost and administration of said hospital?"

"(2) Has the General Court the constitutional right to add to the Essex county tuberculosis hospital district, established under said sections seventy-eight to ninety, said cities now exempt, in the manner provided in the bill printed as Senate document number four hundred and sixty-eight?"

Sections 78 to 90, inclusive, of G. L., c. 111, as amended by St. 1922, c. 393, contain provisions requiring the county commissioners of certain counties, including Essex, to provide tuberculosis hospitals for cities and towns having a population of less than fifty thousand which do not already have adequate hospital provision. It is provided that the county commissioners, subject to the approval of the Department of Public Health, shall erect one or more hospitals, with an exception in the case of counties having a total population of less than fifty thousand; that they shall apportion the cost to the several towns liable, in accordance with their valuation used in assessing county taxes; that they shall also apportion the cost of maintenance of such hospitals in the same manner; that all sums collected shall be paid into the county treasury; and that the county commissioners shall be trustees of the hospitals so erected. Section 91 provides:—

"Cities having more than fifty thousand inhabitants, and also cities and towns having less than fifty thousand inhabitants and already possessing and continuing to furnish adequate tuberculosis hospital provision, shall be exempt from the provisions of sections seventy-eight to ninety, inclusive."

St. 1923, c. 429, entitled "An Act authorizing the apportionment of the expense incurred by the county of Essex for a tuberculosis hospital within said county," contains provisions relative to the apportionment of expenses already incurred and the total cost of the tuberculosis hospital constructed in the county of Essex under the provisions of G. L., c. 111, §§ 78-91, inclusive, to the cities and towns in said county, except the cities of Haverhill, Lawrence, Lynn, Newburyport and Salem, and the collection of sums so apportioned in conformity with the corresponding provisions in said chapter.

By your first question I understand you intend to ask whether, under existing law, the cities in Essex County now exempt are under any liability for the cost of construction and maintenance of the tuberculosis hospital for Essex County. Since the statutes referred to impose the whole burden of construction and maintenance on the remaining cities and towns, for the benefit of whose inhabitants the hospital was erected, and expressly exempt the five cities enumerated, I see no ground upon which it can be said that the exempted cities are under any obligation whatever in the matter. I therefore answer your first question in the negative.

The fundamental inquiry presented by your second question is whether a part of the cost of construction and maintenance of the tuberculosis hospital for Essex County may be assessed upon the five cities in said county exempted by the provisions of previous enactments.

In providing for an apportionment of the cost of a public undertaking among cities and towns or other political subdivisions of the Commonwealth benefited thereby, and also in shifting the burden thereof, the Legislature has a large measure of discretion, the exercise of which is not subject to judicial control, on constitutional grounds, unless it is purely arbitrary. It is not essential that the burden should be imposed in proportion to the benefits received. The expense may properly be assessed with regard to other considerations as well, such as population, extent of territory and ability to bear the burden. The subject was carefully reviewed in *Opinion of the Justices*, 234 Mass. 612, in which the justices advised the Senate that in their opinion a statute changing a previous apportionment of the cost of the bridge across the Connecticut River between Springfield and West Springfield, confirmed by final decree of court, and providing for a new apportionment among the county and certain towns therein by fixed percentages, would be constitutional. See also *Norwich v. County Commissioners*, 13 Pick. 60; *Scituate v. Weymouth*, 108 Mass. 128; *Agawam v. Hampden*, 130 Mass. 528; *Kingman, petitioner*, 153 Mass. 566; *Kingman, petitioner*, 170 Mass. 111; *Boston, petitioner*, 221 Mass. 468.

It is my opinion that a statute changing the previous law by including in the district served by the Essex County tuberculosis hospital the five cities previously exempted, and requiring them to bear a part of the burden of the cost of its construction and maintenance, apportioned in a way which, under all the circumstances, would be fair and reasonable, would be constitutional. Without information as to the basis of the assessments on the five cities provided by the bill, the amounts already assessed to and collected from the remaining cities and towns, the comparative valuations of all cities and towns in the county, the extent and condition of hospital facilities now provided by the five cities, and other pertinent facts, I cannot answer more definitely your question whether the bill as drawn would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Insurance — Accident Insurance — Group Policies.

Group or blanket policies against loss resulting from accidental injuries are not authorized under the provisions of the statutes, except such as are within the provisions of G. L., c. 175, §§ 110 and 133, as amended.

MAY 5, 1924.

Hon. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You have asked my opinion upon three questions relative to accident insurance, two of them concerning forms of policies which you have attached to your letter.

Your questions are as follows:—

“1. May the commissioner lawfully approve either or both of these forms as complying with G. L., c. 175, §§ 108 and 109?

2. May a company lawfully issue these forms of policies, assuming that they each contain the provisions required by said section 108?

3. Do the provisions of said section 108 require or contemplate the issuance of individual policies to individual insureds?”

The forms of policies which you have transmitted plainly come within the type of policy known as the “group” policy, which in certain of its forms is sometimes referred to as a “general” or “blanket” policy, as in G. L., c. 175, § 110. The apparent purpose of each of these forms of policies transmitted is to insure a group of persons, as and while they are members of a designated club or association, against loss resulting from accidental injuries. In each form it is recited that the required premium is paid by the club or association, and that the members of the club or association at any given time, whose names appear in a schedule of members attached to the policy, are the insureds. Persons ceasing to be members cease to be insured, and new members may be added to the schedule. From the nature of the insurance itself it is manifest that the club or association is not a beneficiary and secures for itself no pro-

tection under the policy. It is plain that the relation of employer and employees does not exist between the club, in the one instance, and the association, in the other, and their respective members.

G. L., c. 175, § 3, provides that—

“No company shall make a contract of insurance upon or relative to any property or interests or lives in the commonwealth, . . . except as authorized by this chapter or chapters one hundred and seventy-six and one hundred and seventy-seven.”

There is no specific authority given by chapter 175 to issue any general, blanket or group policy other than group life insurance policies, defined by G. L., c. 175, § 133, as amended by St. 1921, c. 141, and those mentioned in G. L., c. 175, § 110, as amended by St. 1921, c. 136. The forms of policies under consideration do not come within the terms of either of these last mentioned enactments, whose provisions relate to groups in which the relation of employer and employees exists as between the one paying the premium and the insureds.

In my opinion, general, blanket or group accident insurance policies of the character of those transmitted with your letter may not be lawfully written, in view of the wording of G. L., c. 175, § 3, and of the fact that there is no specific statutory authorization for such forms of policies.

I therefore answer your first two questions in the negative. I answer your third question to the effect that G. L., c. 175, § 108, construed in connection with the said chapter as a whole, requires and contemplates the issuance of individual policies to individual insureds as opposed to general, blanket or group policies.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Inspector of Animals—Nomination—Approval by Director of Animal Industry—Board of Selectmen—Term of Office.

No nominee for the position of inspector of animals can be appointed until approved by the Director of Animal Industry.

A nomination made by a board of selectmen may be withdrawn by a new board of selectmen and another nominee named if no action has in the meantime been taken by the Director of Animal Industry with respect to the first nomination.

A former appointee holds over and can legally perform the duties of inspector of animals until the approval by the Director of Animal Industry of one nominated as his successor.

MAY 9, 1924.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR:—You request my opinion as follows:—

“In the town of Bedford the regular annual election of a member of the board of selectmen took place during the first week in March. A man by the name of Kelley was said to have been elected by two votes. A recount was asked for and the election for selectman was declared a tie.

On March 22 the board of selectmen, under G. L., c. 129, § 15, sent in the nomination of Dr. Chester L. Blakely as inspector of animals for the year ending March 31, 1925. This nomination, however, did not bear the signature of the newly elected (?) Kelley, but did bear the name of Duane F. Carpenter, whom Kelley (if elected) was to succeed.

The Director of Animal Industry was interviewed by a representative of the losing side at the regular town election, whose candidate was Claude A. Palmer, and was asked to hold up the matter of approval of the nomination of Dr. Blakely.

The Director of Animal Industry desires an opinion by the Attorney General as to whether this nomination of Dr. Blakely is properly before him for action.

A special town election was held March 31, 1924, and Kelley was defeated by Claude A. Palmer by six votes. Directly thereafter, on March 31, a meeting of the new board of selectmen was held, and a majority of the board, Palmer

and another, drafted a letter to the director nominating as inspector of animals Dr. Immanuel Pfeiffer.

The Director of Animal Industry desires the opinion of the Attorney General as to whether this nomination of Dr. Immanuel Pfeiffer to the position of inspector of animals is properly before him for action.

If in the opinion of the Attorney General both nominations are properly before the director for action, does the decision rest with him as to which nomination shall be approved, assuming that, in his opinion, both nominees possess the proper qualifications for the position?

The opinion of the Attorney General is requested as to whether, in case no action is taken by the director, the appointee of last year (1923) holds over, and can he legally perform the duties of the position?"

G. L., c. 129, § 15, provides as follows:—

"The mayor in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the director. In cities at least one such inspector shall be a registered veterinary surgeon."

Under this section no nominee can be appointed until approved by the Director of Animal Industry. Under the facts submitted by you it does not appear that the director approved or took any action respecting the nomination of Dr. Chester L. Blakely as inspector of animals, which nomination was forwarded to the director on March 22, 1924. Subsequently, on March 31, 1924, a meeting of the new board of selectmen was held and a majority of said board drafted and forwarded to the Director of Animal Industry a communication wherein it is stated that the director is "respectfully requested to disregard the nomination of Dr. Chester L. Blakely of Lexington, as made on or about March 22, 1924, and to consider instead the appointment of Dr. Immanuel Pfeiffer."

Where an authority is conferred on a board in relation to public business it may be exercised by a majority and all need not join. *Codman v. Crocker*, 203 Mass. 146; *Cooley v. O'Connor*, 12 Wall. 391.

The board of selectmen is a continuing body, and, as such, acted within its rights when it withdrew a nomination which had not been acted upon and substituted therefor a new nomination. It accordingly follows that the nomination of March 31st is the nomination now before the Director of Animal Industry for his approval or disapproval, and I so answer your first, second and third questions.

The general rule is that, unless otherwise provided, an officer continues to hold office until the appointment or election and qualification of his successor. See G. L., c. 41, § 2. *Boston v. Sears*, 22 Pick. 122, 130. In accordance with this rule I am of the opinion that the appointee of last year (1923) holds over and can legally perform the duties of the position of inspector of animals until the approval of a nominee by the Director of Animal Industry, and I so answer your fourth and last question.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Hawkers and Pedlers — License — Alien.

A local ordinance or regulation providing for the licensing of hawkers and peddlers of fish, fruit and vegetables, passed under authority of G. L., c. 101, § 17, is void if it purported to authorize the granting of a license to an alien who has not declared his intention of becoming a citizen of the United States.

MAY 13, 1924.

Hon. E. LEROY SWEETSER, *Commissioner of Labor and Industries*.

DEAR SIR:—You have requested my opinion as to whether or not a licensing board or other officer of any city where there is an ordinance or regulation

providing for the licensing of hawkers and peddlers of fish, fruits and vegetables, may grant such a license to an alien who has not declared his intention of becoming a citizen of the United States.

First, I think I ought to point out that the Attorney General does not give authoritative opinions to municipal officers, it having been held many times that they are not entitled to such an opinion, and therefore are not bound by it. There was some intimation that this opinion concerned a local situation in New Bedford; but I am proceeding upon the ground that the question is asked because the information is necessary in the discharge of the duties of the Division of Standards under G. L., c. 101, and particularly section 32.

Coming now to your specific question. G. L., c. 101, § 17, is based upon R. L., c. 65, § 15. This section of the Revised Laws was the subject of numerous amendments. In 1916, as a result of Gen. St. 1916, c. 242, § 3, the pertinent provisions read as follows:—

“Cities and towns may by ordinance or by by-law, not inconsistent with the provisions of this chapter, regulate the sale and exposing for sale by hawkers and peddlers of said articles without the payment of any fee, and may affix penalties for the violation of such regulations. Cities and towns may require hawkers and peddlers of fish, fruit and vegetables to be licensed, provided that the license fee does not exceed that prescribed by section nineteen of this chapter, as amended, for a license embracing the same territorial limits.”

The next amendment, Gen. St. 1918, c. 257, § 261, changed the form of this part of section 15 so as to read as follows:—

“Cities and towns may by ordinance or by-law, not inconsistent with the provisions of this chapter, regulate the sale or barter, and the carrying for sale or barter or exposing therefor, by hawkers and peddlers, of said articles without the payment of any fee; may in like manner require hawkers and peddlers of fish, fruit and vegetables to be licensed, provided, that the license fee does not exceed that prescribed by section nineteen of this chapter, and acts in amendment thereof and in addition thereto, for a license embracing the same territorial limits; and also may in like manner affix penalties for the violation of such regulations, ordinances and by-laws.”

The final change to date was by St. 1923, c. 285. The pertinent provision of the statute with which we are now concerned reads as follows:—

“The aldermen or selectmen may by regulations, not inconsistent with this chapter, regulate the sale or barter, and the carrying for sale or barter or exposing therefor, by hawkers and peddlers, of said articles without the payment of any fee; may in like manner require hawkers and peddlers of fish, fruit and vegetables to be licensed except as otherwise provided, and may make regulations governing the same, provided that the license fee does not exceed that prescribed by section twenty-two for a license embracing the same territorial limits; and may in like manner affix penalties for violations of such regulations not to exceed the sum of twenty dollars for each such violation. A hawker and pedler of fish, fruit and vegetables licensed under this section need not be licensed under section twenty-two.”

The insertion by this amendment of the phrase “in like manner” discloses, in my opinion, a legislative intent that the aldermen or selectmen may require hawkers and peddlers of fish, fruit and vegetables to be licensed, etc., only by regulations not inconsistent with the other provisions of G. L., c. 101. G. L., c. 101, § 22, clearly indicates an intention that hawkers and peddlers shall be licensed to sell fish, fruit and vegetables only if they are citizens of the United States or have declared an intention to become citizens of the United States. I am therefore of the opinion that a city ordinance which purported to authorize the granting of a hawker's and pedler's license for the sale of fish, fruit and vegetables to an alien who had not declared his intention of becoming a citizen of the United States would exceed the authority granted by G. L., c. 101, § 17, and would be void.

A further practical argument in favor of this view is found in the last sentence of G. L., c. 101, § 17, which provides that “a hawker and pedler of

72 fish, fruit and vegetables licensed under this section need not be licensed under section twenty-two." This provision was added by an amendment subsequent to Gen. St. 1918, c. 257, § 261, quoted above, and I do not, therefore, rest my opinion upon it. It would, however, seem a further indication of a legislative intent that only those hawkers and pedlers who could be licensed under section 22 should be eligible for a license under section 17.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Eminent Domain—Extent of Taking—Fixtures.

Floats used by a yacht club, and not attached to the land otherwise than by moorings, are personal property, and are not included in a taking of realty.

MAY 19, 1924.

HON. JAMES A. BAILEY, *Commissioner, Metropolitan District Commission*.

DEAR SIR:—You have asked my opinion as to whether certain floats, formerly the property of the Savin Hill Yacht Club, were at the time of the taking of land of the Savin Hill Yacht Club by the Board of Metropolitan Park Commissioners, on or about December 23, 1914, real or personal property.

A taking was made by the board, recorded in Suffolk Deeds, book 3856, page 241, of "all lands and rights in land, all easements, privileges and appurtenances of every name and nature thereto belonging," among other parcels, of "land and lands of the Savin Hill Yacht Club" (bounded and described) "and flats above or under water in Dorchester Bay and Savin Hill Cove and creeks and streams flowing into said cove."

I am informed that at the time of the taking there was a building on the land, firmly affixed to the soil, with an elevated platform leading from the building, which was used as a yacht club, to a runway, which in turn led to the floats in question. The upper end of the runway was affixed to the platform and its lower end rested upon the float nearest shore, but was not affixed thereto otherwise than by its weight. The floats in question, of which there were several, during the season when sailing for pleasure was practicable, floated on the surface of the water and were kept from drifting away or out of alignment by chains, which were run through rings or holes made for the purpose in the floats and were then fastened to piles driven into the mud in a line extending out from the shore. The floats were not attached to these piles by any rigid connections. They rose and fell with the tide. They were the ordinary type of float used for landings for small boats, and were capable of being towed from place to place, and might be used in connection with other landing places. They were easily unloosed from their moorings to the piles. During the seasons when sailing near the club was not practicable they were often unmoored from the pilings and dragged upon the beach, where they were left without any permanent fixation to the land until again required for use, when they were once more placed in the water and moored to the piles. I am also informed that these floats, when detached from their moorings, can be sold and used by purchasers in other places of a similar character to which they can be towed.

If these floats had been so attached to the land by the previous owners of the soil as to become fixtures, they would have become real property as between the Commonwealth and the Yacht Club, and title to them would be vested in the Commonwealth under the terms of the taking.

In determining whether articles which in their original condition were personal property, as were these floats, have become fixtures, a variety of tests have to be taken into consideration. These tests, as between vendor and vendee of the land upon which the property is situated, and for the purpose of determining the question here involved, wherein the Commonwealth and the Yacht Club are to be treated substantially as vendor and vendee, have been laid down by our courts as follows: The nature of the article, the object, the effect and the mode of its annexation. *Smith v. Bay State Savings Bank*, 202 Mass. 482; *Houle v. Abramson*, 210 Mass. 83. Neither of these tests is of itself sufficient.

The floats in question are, in their general nature, personalty. They are

capable of being moved from place to place and of being used effectively in other locations than this particular estate. Their bulk is not an insuperable obstacle to their transportation by land, and they can easily be moved by water. There is nothing about their general form or design which tends to show any particular object or motive in the minds of the owners relative to a particular or unusual relation between them and the realty with which they were connected, nor were they of such a character or construction as to have in themselves any peculiar relation to the surrounding land which might enhance its value or usefulness more than any other articles of a similar type. They were not annexed to the piles or to the land in any manner or by any means which prevented them from being easily separated therefrom.

Taking all these facts into consideration, I am of the opinion that the floats at the time of the taking were not fixtures in such a sense that they had become part of the realty, and that they were personal property, title to which remained in the owner notwithstanding the taking.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Labor — Children — Regulation of Employment.

The provisions of G. L., c. 149, §§ 61, 62 and 65, regulating the employment of minors, are applicable to minors when employed in co-operating factories, manufacturing, mechanical or mercantile establishments or workshops, unless such employment is in the course of receiving manual training or industrial education in an approved school, under G. L., c. 149, § 85. A child between the ages of fourteen and sixteen employed in any such establishment is required by G. L., c. 149, § 86, to secure a special certificate.

MAY 27, 1924.

HON. E. LEROY SWEETSER, *Commissioner of Labor and Industries*.

DEAR SIR:— You request my opinion on the following questions:—

“1. Do the regulations relating to hours of employment and night work for minors under sixteen apply to such minors when employed in a co-operating factory, manufacturing, mechanical or mercantile establishment or workshop; or may such minors be employed in such establishments for more than eight hours in any one day or for more than forty-eight hours in any one week?

2. May such minors be employed in co-operating establishments at the occupations and processes listed in G. L., c. 149, §§ 61 and 62, as prohibited employments for minors under sixteen years of age and minors under eighteen years of age?”

Provisions regulating the employment of children of various ages are contained in G. L., c. 149, §§ 60 to 83, inclusive, some of which were amended by St. 1921, cc. 351 and 410. Special reference should be made to the following sections:

Section 60, as amended by St. 1921, c. 410, § 2, prohibits the employment of minors under fourteen in any factory, workshop, manufacturing, mechanical or mercantile establishment or in certain specified occupations, and regulates their hours of labor.

Sections 61 and 62 prohibit the employment of minors under sixteen and eighteen, respectively, in certain specified hazardous occupations.

Section 65, as amended by St. 1921, c. 351, § 1, and c. 410, § 3, regulates the hours of labor of children under sixteen. It is as follows:—

“No person shall employ a minor under sixteen or permit him to work in, about or in connection with any establishment or occupation named in section sixty, or for which an employment certificate is required, for more than six days in any one week, or more than forty-eight hours in any one week, or more than eight hours in any one day, or, except as provided in section sixty-nine, before half past six o'clock in the morning, or after six o'clock in the evening. The time spent by such a minor in a continuation school or course of instruction as

required by section twenty-two of chapter seventy-one shall be reckoned as a part of the time he is permitted to work."

Section 69, as amended by St. 1921, c. 410, § 1, regulates the employment of children in so-called street trades.

Section 85 contains certain limitations upon the application of sections 60 to 83, inclusive. It is as follows:—

"Sections sixty to eighty-three, inclusive, shall not apply to the juvenile reformatories, other than the Massachusetts reformatory, or prevent minors of any age from receiving manual training or industrial education in or in connection with any school which has duly been approved by the school committee or by the department of education."

Section 86, as amended by St. 1921, c. 351, § 2, requires employees of children between fourteen and sixteen in any factory, workshop, manufacturing, mechanical or mercantile establishment, or in any industrial employment, to procure and keep employment certificates, with the following proviso:—

"... provided, that pupils in co-operative courses in public schools may be employed by any co-operating factory, manufacturing, mechanical or mercantile establishment or workshop, or any employment as defined in section one, upon securing from the superintendent of schools a special certificate covering this type of employment. . . ."

It requires also special certificates covering the employment of children between fourteen and sixteen in private domestic service or service on farms.

The inquiry made by your questions is: How far do section 85 and the proviso in section 86 limit the application of the preceding sections?

The proviso in section 86, in my opinion, is merely an exception to the preceding provision in that section. It relates to the employment of pupils in co-operative courses in public schools. The term "co-operative courses" is defined in G. L., c. 149, § 1, as meaning "courses approved as such by the department of education and conducted in public schools where technical or related instruction is given in conjunction with practical experience by employment in co-operating factories, manufacturing, mechanical or mercantile establishments or workshops." Such pupils may be so employed upon securing a special certificate instead of the employment certificate otherwise required.

Section 85 contains two different provisions with respect to sections 60 to 83, inclusive: first, that they shall not apply to juvenile reformatories other than the Massachusetts Reformatory; and secondly, that they shall not "prevent minors of any age from receiving manual training or industrial education in or in connection with any school which has duly been approved by the school committee or by the department of education." I interpret this to mean that courses of instruction in manual training or industrial education may be given in approved schools although they involve employments and hours of labor which are contrary to the provisions of sections 60, 61, 62 or 65, and that schools giving courses of instruction inconsistent with the terms of those sections may be approved by the school committee or by the Department of Education. Of course, the statutory regulations are not to be lightly disregarded; they should be followed as far as possible consistently with the educational object sought to be achieved.

It may be suggested that so far as concerns sections 60 and 65, section 85 is impliedly repealed by St. 1921, c. 410. That act amended G. L., c. 149, § 69, by adding a provision permitting boys over twelve to engage in certain street trades under certain circumstances. It also amended G. L., c. 149, §§ 60 and 65, in substance, by inserting the words "except as provided in section sixty-nine" before certain substantive provisions of those sections. In my opinion, the Legislature did not mean, by expressing this exception, to exclude the exception expressed in section 85. They observed a possible inconsistency between section 69, with which they were principally dealing, and some portions of sections 60 and 65; and so they provided that in case of conflict section 69 should prevail.

My answer to your questions, specifically, is that the regulations of sections

61, 62 and 65 are applicable to minors when employed in co-operating factories, manufacturing, mechanical or mercantile establishments or workshops, unless such employment is in the course of receiving manual training or industrial education in connection with an approved school, under G. L., c. 149, § 85. In that case those regulations will not prevent the giving of such instruction to minors of any age. A child between fourteen and sixteen employed in any such establishment is required by section 86 to secure a special certificate covering that type of employment.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Insurance — Laundry Insurance — Bond — Rebate.

- A foreign insurance company not authorized to transact the kinds of business specified in the first, second or eighth clauses of G. L., c. 175, § 47, cannot insure a laundry company against hazards necessarily incidental to such kinds of business, but may, under section 105, execute, as surety, a bond to protect the customers against the default of the laundry company to pay losses from such hazards.
- A retention of a portion of the service charge made by the laundry company for the payment of premiums does not, under certain circumstances, constitute an unlawful rebate.

MAY 27, 1924.

Hon. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You have requested my opinion upon certain questions relative to a transaction between an insurance company and a laundry company.

The facts connected with this transaction, as set forth in your letter, differ materially from those which existed in two cases concerning transactions between insurance companies and laundry companies upon which I rendered opinions to your department on June 29, 1923. You state in your letter:—

“Some further question is now raised as to the legality of the proposition presently employed by this company. This company is a foreign insurance company licensed to transact in this Commonwealth the classes of business specified in the fourth, fifth, sixth, seventh and twelfth clauses of section 47 of said chapter 175. It cannot, under sections 51 and 152 of said chapter, lawfully transact the kinds of business specified in the first, second or eighth clauses of said section 47.

The laundry company enters into an agreement with the insurance company. The laundry company executes as principal what purports to be a bond, which is also executed by the insurance company as surety, guaranteeing the performance of said agreement.

It appears from a letter written on behalf of the insurance company that the agreement is apparently intended to cover loss or damage caused by fire, stealing, burglary or, in fact, any hazard.

The particular laundry company referred to in the documents attached to my letter, I am informed, retains fifty per cent of the premiums which it collects, remitting the balance to the insurance company. Twenty per cent of the premiums retained by this laundry company is for a reserve fund out of which it may pay claims of its customers, not exceeding \$100. The remainder it retains ostensibly for other costs. It apparently makes no express written contract with its clients, but collects from them one cent for each bundle of laundry and specifically charges said sum to the client upon its bill.

I respectfully request your opinion on the following questions:

- (1) Is the said agreement one which the insurance company may lawfully make under said chapter 175?
- (2) Is the said agreement or bond in effect a contract of insurance made by this insurance company against loss or damage by fire or any of the other hazards specified in the first, second or eighth clause of said section 47?
- (3) Does said agreement or bond constitute an insurance contract by this

insurance company against the hazards specified in more than one of the clauses of said section 47, and is it, therefore, contrary to section 52 of said chapter 175?

(4) If the preceding question is answered in the affirmative, may the commissioner lawfully approve said agreement or said bond under said section 52?

(5) Is the said bond an obligation upon which the said insurance company may lawfully act as surety under section 105 of said chapter 175?

(6) Does the allowance to a laundryman by the insurance company of a portion of the premiums collected by him constitute a rebate in violation of sections 182 to 184 of said chapter 175, (a) if used in whole or in part by the laundryman to pay claims of his customers; (b) if used in part to pay such claims and in part to defray expenses in connection with the operation of the plan; and (c) if retained entirely by the laundryman for his personal use?"

In the case presented by your letter and the documents annexed thereto it appears that a surety bond in which a laundry company is named as principal and certain of its customers severally appear to be obligees, with an insurance company designated as surety, has been executed by the laundry company and the insurance company. In this bond it is recited that the laundry company has voluntarily waived its legal defenses to any claim of its customers for any bundle of laundry delivered to the laundry company and not returned by it in like good order, ordinary laundry wear excepted, and that the laundry company is desirous of giving further assurance to its customers that their claims will be promptly adjusted. The laundry company binds itself, to each of its customers who shall pay a service charge, that it will pay promptly, as liquidated damages, to any one of them in settlement of any claim made by any of them for any bundle delivered to the laundry company and not returned in like good order, ordinary laundry wear excepted, as that in which it was received, the fair value of the goods; provided that the claim is not in excess of a stated amount and is made within thirty days. And the insurance company obligates itself to pay to any of such customers the amount so due upon any claims against the laundry company, in the event that the laundry company fails to make payment.

I am informed that the laundry company sends to each of its customers a slip, of which the following is a copy:

"A NEW SERVICE

Do you know that a laundry is not legally responsible for the customer's goods unless the laundry is proven negligent? While we try to use all reasonable care, accidents do happen from many causes, causing substantial loss. We prefer to adjust such matters promptly and to avoid the delay, friction and expense of litigation, in order to give our customers the most complete service. We, therefore, voluntarily waive our legal defenses to any claim made for any bundle delivered to us and not returned in like good order, ordinary laundry wear excepted, and we have taken a surety company bond to secure prompt payment to you, as liquidated damages in settlement of any such claim, the fair value of the goods, but not exceeding twenty times the laundry charge.

The charge for this service is one cent per bundle to defray the expense of the service and of the surety company bond. We will arrange for this service with our next delivery."

It is to be noted that in this slip the laundry company states:

"We, therefore, voluntarily waive our legal defenses to any claim made for any bundle delivered to us and not returned in like good order . . . and we have taken a surety company bond to secure prompt payment to you, as liquidated damages in settlement of any such claim, the fair value of the goods, but not exceeding twenty times the laundry charge."

Concurrently with the execution of the bond the insurance company and the laundry company execute an "agreement." Clause 8 of this agreement reads as follows:—

"The laundry may settle, and charge to the account of the corporation, claims other than those enumerated in paragraph 3 above; provided that settle-

ments so made and charged shall not exceed 10% per 100 bundles, delivered or returned to customers, in any calendar month, except with the consent of the corporation. If and when such settlements for any calendar month exceed 10¢ per 100 bundles, the corporation will pay the excess.

The laundry shall promptly furnish to the corporation such information as may be required by it in reference to claims paid or filed, and the corporation shall have the option of adjusting the pending claim direct with the customer.

In event claim for any one or more of several bundles, resulting from any one event, be settled for less than the maximum limit per bundle fixed in paragraph 2, the difference may be applied to settlement for the other bundles for which the laundry deems it necessary to pay more than the agreed limit; provided that the maximum liability of the corporation be not thereby increased."

The purport and intent of the agreement are to provide for the payment to the laundry company by the insurance company of the amount of all losses which the former may sustain by reason of damage to the contents of the laundry bundles of its customers while in its possession. The agreement permits the adjustment and payment of claims in the first instance by the laundry company, but reserves to the insurance company the right, at its option, of making any particular adjustment with the customer direct. The agreement is in effect a policy of insurance by the insurance company against loss which the laundry company may sustain by damage from all causes or hazards to the property of its customers, of which it is the bailee. The liability of the insurance company upon this agreement is in addition to its liability as surety upon the bond, and is of a different character. The voluntary waiver by the laundry company of defenses, and acceptance of a certain mode for the purpose of determining liquidated damages, does not affect the nature of its agreement with the insurance company. Upon its bond the insurance company is liable to the laundry company's claimants upon the default of the laundry company in paying their just claim for damages. Upon the agreement the insurance company is liable to the laundry company for the amount of the latter's losses upon such claims.

You inform me in your letter that this insurance company cannot lawfully transact the kind of business specified in the first, second, or eighth clauses of G. L., c. 175, § 47. The agreement which the insurance company enters into with the laundry company is in effect a contract of insurance against losses to property in the possession of the laundry company from any and all causes or hazards. Many of such causes or hazards, against which the agreement purports to protect the laundry company, are those specifically mentioned in the first, second and eighth clauses of section 47. As business relative to insurance against such causes cannot lawfully be transacted by this insurance company, this agreement, which purports to insure against damage from such causes, among others, is not one which this company may lawfully make. I therefore answer your first question in the negative.

I answer your second question, so far as it relates to the agreement, in the affirmative, but in the negative as it relates to the bond.

I answer your third question, in so far as it relates to the agreement, in the affirmative, and, in so far as it relates to the bond, in the negative.

I answer your fourth question to the effect that the bond is not a contract of insurance and does not require the approval of the Commissioner under the provisions of G. L., c. 175, § 52. So far as your question relates to the agreement, I answer that in its present form, for the reason that it covers losses from causes as to which this insurance company is not authorized to transact business, the Commissioner may not lawfully approve it.

I answer your fifth question in the affirmative.

Construing the terms of the particular agreement now before me, I am of the opinion that the retention of money arising from the service charge mentioned in paragraph 4 of the agreement by the laundry company does not constitute a rebate in violation of G. L., c. 175, §§ 182 to 184, under any of the conditions mentioned in your question as (a), (b) and (c). A particular arrangement not provided for in the agreement, by which a particular assured was permitted to retain a portion of the premium mentioned in paragraph 7 for any purpose

other than the payment of claims upon which the insurance company was to indemnify the laundry company, would be unlawful under the terms of sections 182 to 184.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Insurance — Investment of Funds of Domestic Life Companies — Securities of Equipment Trusts.

G. L., c. 175, § 66, does not prohibit a domestic life insurance company from investing one-quarter of its reserve in the notes of an equipment trust not a corporation, the owners of whose stock or evidences of indebtedness may be liable to an assessment except for taxes.

Section 66 does not prohibit a domestic life company from investing three-quarters of its reserve in equipment trust notes which comply with paragraph 6 of section 63, nor does it forbid investment of one-quarter of the reserve in an unincorporated business or its securities, provided that such investment be secured by collateral.

MAY 27, 1924.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You have asked my opinion regarding various matters connected with the investment of certain funds of domestic life insurance companies under G. L., c. 175, as amended.

Your first question is:—

“Does G. L., c. 175, § 66, as amended, prohibit any domestic life company from investing one-quarter of its reserve in equipment trust notes not complying with the provisions of paragraph 6 of section 63?”

St. 1923, c. 297, amends G. L., c. 175, as previously amended by St. 1921, c. 215, by striking out sections 63 and 66 and inserting in place thereof two new sections, numbered 63 and 66, respectively.

Section 63 now provides, in part:—

“The capital of any domestic company, other than life, and three fourths of the reserve of any domestic stock or mutual life company, shall be invested only as follows:— . . .

6. In the notes of any equipment trust created in behalf of any railroad coming within the terms of paragraph four or five, provided that the plan of such trust, in case of any railroad coming within the terms of paragraph four, includes an initial cash payment of at least twenty-five per cent, and, in case of any railroad coming within the terms of paragraph five, of at least forty per cent, and that such notes mature not later than fifteen years from the date of issue.”

Section 66, as now amended, provides, in part:—

“Except as hereinbefore authorized, no domestic life company shall invest any of its funds in any unincorporated business or enterprise or in the stocks or evidence of indebtedness of any corporation the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes, nor shall such life company invest any of its funds in its own stock or in the stock of any other company. No such company shall invest in, acquire or hold directly or indirectly more than ten per cent of the capital stock of any corporation, nor shall more than ten per cent of its capital and surplus be invested in the stock of any one corporation. No such company shall subscribe to or participate in any underwriting of the purchase or sale of securities or property, or enter into any transaction for such purchase or sale on account of said company jointly with any other person nor shall any such company enter into any agreement to withhold from sale any of its property, but the disposition of its property shall be at all times within the control of its board of directors.

Nothing in this section or in section sixty-three shall prevent such company from investing or loaning any funds, not required to be invested as provided

in section sixty-three, in any manner that the directors may determine; provided, that such funds shall not be invested in the purchase of stock or evidence of indebtedness prohibited by the preceding paragraph, and provided that no loan of such funds shall be made to an individual or firm unless it is secured by collateral security."

The manner in which a domestic life insurance company shall deal with the investment of three-fourths of its reserve is governed by said sections 63 and 66. The manner in which it shall deal with the remaining one-fourth of its reserve is governed by the second paragraph of said section 66. As regards the investment of one-fourth of its reserve, the directors are free to make any reasonable investments, subject only to prohibitions against investment in stocks or evidence of indebtedness forbidden by the first paragraph of section 66, and unsecured loans to individuals. The second paragraph of section 66 does not contain any prohibition against the purchase of notes of equipment trusts not complying with the provisions of paragraphs 4 or 5 of section 63. The second paragraph of section 66, by reference to the first paragraph, does contain a direct prohibition against the investment of any funds of such a company "in the stocks or evidence of indebtedness of any corporation the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes." This prohibition is binding upon the directors of the company as to their investment of the one-fourth part of the reserve under consideration.

I therefore answer your question to the effect that, if an equipment trust is not a corporation, the owners of whose stock or evidences of indebtedness may be liable to an assessment except for taxes, then the provisions of section 66 do not prohibit a domestic life insurance company from investing one-quarter of its reserve in the notes of such an equipment trust.

Your second question is as follows:—

"Does said section 66 permit a domestic life company to invest three-quarters of its reserve in equipment trust notes which comply with the provisions of said paragraph 6, (a) if the trustee is not a corporation, and (b) if the trustee is a corporation?"

The investment of three-quarters of the reserve of a domestic life insurance company is governed primarily by section 63. Section 66 sets forth certain prohibitions relative to the investment of the funds of domestic life insurance companies, but these prohibitions are effective only if preceding sections of the chapter have not authorized the acts which the terms of section 66 purport to prohibit. Section 66 begins with the words "except as hereinbefore authorized." Section 63 specifically authorizes, in paragraph 6, the notes of equipment trusts which comply with the provisions therein set forth for investment of three-fourths of the reserve of a domestic life insurance company, and makes no limitation relative to such investment based upon the trustee being a corporation or unincorporated.

The prohibition contained in section 66, concerning investments in unincorporated enterprises, does not apply to investments in the equipment trusts mentioned in section 63, because as to these the investment has, in the language of section 66, "hereinbefore been authorized." Accordingly, I answer your question, both as to subsections (a) and (b), in the affirmative.

Your third question is as follows:—

"Does said section 66 prohibit a domestic life company from investing one-quarter of its reserve in any unincorporated business or enterprise or in any securities excepting stocks or evidence of indebtedness of any corporation, the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes?"

I answer this question in the negative, adding that section 66 forbids the making of a loan to a firm or individual without securing such loan by collateral security.

Your fourth question is as follows:—

"Is a domestic life insurance company owning notes or certificates of an equipment trust described in paragraph 6 of said section 63 a creditor of the trust?"

The word "certificates" is not used in section 63. In the ordinary acceptance of the word, a "note" is a promise to pay money, which creates as between the maker and the payee the relation of debtor and creditor.

I am informed that these equipment trust notes are commonly called, also, participation certificates, and that in the form in which they are sometimes issued they are in realty certificates of part ownership in physical property, the title to which is held by the trustee for the benefit of all the owners of such certificates. When so issued they are not in the nature of promises to pay to the holder by the trust, and the relation of creditor and debtor does not exist. Whether or not the holder of one of these notes or certificates issued by an equipment trust in any given instance can be termed a creditor of the trust, depends upon the form and wording of the instrument which is purchased from the trust.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Insurance — Single Premium Deferred Annuity Policy — Cash Value.

The cash value of, "a single premium deferred annuity policy," called a "deferred income bond," to be paid at the death of the insured, is to be computed under the provisions of G. L., c. 175, §§ 132 and 142.

MAY 28, 1924.

Hon. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR:— You have asked my opinion relative to certain provisions of "a single premium deferred annuity policy." In your letter you state:—

"One of our domestic life companies has submitted to this department for approval a single premium deferred annuity policy which the company has designated 'deferred income bond,' which contains a provision that: 'In case the said bondholder should die before the.....day of.....one thousand nine hundred and, no income payment will be made under this contract, but if the contract is in force at the death of the bondholder, the cash value of this contract at the end of the contract year in which death occurs, less any indebtedness to the company hereunder, shall, upon receipt of due proof of such death, be paid to the executors or administrators of the bondholder, unless otherwise provided.'

On a policy of this kind with a single premium of \$1,000, the cash value of the policy at the end of thirty years is \$2,680, the additional \$1,680 representing accumulated interest on the original single premium of \$1,000.

In view of the fact that the statute requires annuity policies to contain in substance all of the provisions required of life and endowment policies unless the refund on the death of the annuitant is limited to a 'sum not exceeding the premiums paid thereon,' I desire your opinion as to whether or not the statute permits such refund to include any or all of the interest accretions from said premiums.

If the words 'any sum not exceeding the premiums paid thereon' are construed as including interest accretions, what is the maximum rate of interest which should be allowed. (See G. L., c. 175, § 9.)"

It is apparent from the terms of the policy as set forth in your communication that the payee, at the death of the insured, would receive the cash value of the policy at the end of the year in which the death occurs, and that this cash value would be greater than the amount of the premium paid for the policy. The policy is therefore not one of the annuity or endowment policies which, under the terms of G. L., c. 175, § 132, are excepted from the general requirement that policies shall not be issued unless they contain in substance the provisions of section 132, clauses 8 to 12, so far as applicable to single premium contracts. The words "sum not exceeding the premiums paid thereon," limiting

the class of policies which are not required to contain the other provisions of the statute, do not include in their connotation accretions by way of interest to such premiums, but are limited to the amount of the actual premiums paid. What the payee will receive on this policy is stated to be "the cash value of this contract at the end of the contract year." As the policy must contain the other provisions of section 132, the cash value of the policy which is to be paid at the death will be computed as indicated therein and in the general mode of making such computations as set forth in section 142. The reserve of the insurance company may not be unduly entrenched upon for the benefit of policy holders of this particular contract by a mode of computing cash value or reckoning interest, which shall be peculiarly favorable to them, and so work a diminution of the funds to the detriment of other classes of insureds.

In view of the opinion which I have expressed herein, the question contained in the last paragraph of your letter does not require a further answer.

Very truly yours,

JAY R. BENTON, *Attorney General*.

State Retirement System—Salary or Wages.

Extra compensation for special services out of office hours is not "salary," within the meaning of G. L., c. 30, § 21.

Under G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, additional compensation for discontinuous employment out of office hours is not "salary or wages," and should not be considered in computing a pension payable under G. L., c. 32, § 5, par. (2) C (b).

JUNE 2, 1924.

HON. JAMES JACKSON, *Chairman, State Board of Retirement*.

DEAR SIR:— You have requested my opinion as to the meaning of the words "salary or wages," defined by G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, as applied to the case stated by your letter. You state that a member of the State Retirement Association created by G. L., c. 32, who has been employed continuously since November 28, 1902, in the Department of Conservation, Division of Animal Industry, must now be retired from the service on account of age. You further state that the member, in addition to the regular salary received by him from the Department of Conservation, acted as a member of three separate boards of civil service examiners, as provided by G. L., c. 13, § 6, and received for this additional service, as compensation for marking the examination papers, a sum amounting to \$500 or \$600 per year. Upon the basis of these facts you ask whether such compensation received by the member, in addition to the amount paid him for the work performed in regular office hours as an employee of the Department of Conservation, should be deemed by you "salary or wages" in determining the amount of pension payable under G. L., c. 32, § 5, par. (2) c (b). You further ask whether similar compensation received by an employee of one department from a department other than the one in which he is required to give full time should be considered irregular compensation and not subject to annuity deductions.

G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, defines the words "salary or wages" as follows:—

"'Salary or wages,' cash received for regular services together with such allowance for other compensation not paid in cash as may be hereinafter provided."

Section 4 of G. L., c. 32, provides for the creation of an annuity and pension fund from deposits by members and contributions by the Commonwealth. Section 5 provides for the administration of annuity and pension funds by the payment to members, upon retirement, of annuities from employees' deposits [par. (2) B], and pensions derived from contributions by the Commonwealth [par. (2) C]. These pensions are divided into two classes,— (a) pensions based upon service subsequent to June 1, 1912, and (b) pensions based upon service prior to that date.

G. L., c. 32, § 5, par. (2) C (b), provides, in part, as follows:—

"Pensions based upon prior service. Any member of the association who reaches the age of sixty and has been in the continuous service of the commonwealth for fifteen years or more immediately preceding and then or thereafter retires or is retired, and any member who completes thirty-five years of continuous service and then or thereafter retires or is retired, shall receive, in addition to the annuity and pension provided for by paragraphs (2) B and (2) C (a) of this section, an extra pension for life as large as the amount of the annuity and pension to which he might have acquired a claim if the retirement system had been in operation at the time when he entered the service of the commonwealth, and if accordingly he had paid regular contributions from that date to June first, nineteen hundred and twelve, at the same rate as that first adopted by the board, and if such deductions had been accumulated with regular interest."

In order to compute the pension to which a retiring member is entitled, in accordance with the above provision, it is accordingly necessary to estimate the amount of the annuity and pension to which, if the retirement system had been in operation at the time when he entered the service of the Commonwealth, he might have acquired a claim under the provisions of paragraph (2) B and (2) C (a) of section 5.

Paragraph (2) C (a) of section 5 provides that a retiring member shall receive a pension equivalent to the annuity to which he is entitled under paragraph (2) B; and paragraph (2) B provides as follows:—

"Annuities from Employees' Deposits.—Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for fifteen years immediately preceding and then or thereafter retires or is retired, . . . shall receive an annuity to which the sum of his deposits under section four (2) A, with such interest as shall have been earned thereon, shall entitle him, . . ."

It follows that the amount both of pensions based upon subsequent service and of pensions based upon prior service depends upon the size of the annuity from employees' deposits, to which the retiring member is entitled under section 5, paragraph (2) B; and that the size of this annuity, in turn, depends upon the amount of the deposits which the member was required to make by section 4, paragraph (2) A.

Section 4, paragraph (2) A, reads as follows:—

"Deposits by Members.—Each member shall deposit in this fund from his salary or wages, as often as the same are payable, not less than one nor more than five per cent thereof, . . ."

The question asked by you resolves itself, therefore, into an inquiry as to the meaning of the phrase "from his salary or wages" in the above provision.

Had G. L., c. 32, contained no definition of the phrase "salary or wages," I am of the opinion that that phrase would not include such additional and irregular compensation for special work, performed out of regular office hours, as that set forth by you in your letter. It has been determined by this department repeatedly that such extra compensation for special services out of office hours is not "salary," within the meaning of G. L., c. 30, § 21, which provides that no person shall at the same time receive more than one salary from the treasury of the Commonwealth. See II Op. Atty. Gen. 21 and 309; V Op. Atty. Gen. 697, 699. As stated in the last opinion cited above, the word "salary" is normally limited to "compensation established on an annual or periodical basis and paid usually in instalments, at stated intervals, upon the stipulated per annum compensation."

In any event, the definition of "salary or wages" introduced into the act by the amendment of 1922 would seem conclusive on this point. In my opinion, additional compensation for discontinuous employment out of office hours cannot be considered "cash received for regular services"; and it is, I think, obvious that the last phrase of the definition, "together with such allowance for other compensation not paid in cash as may be hereinafter provided," has no application to the case put by you.

I am accordingly of the opinion that upon the facts stated in your letter additional compensation of the kind in question would not be subject to annuity deductions under G. L., c. 32, § 4, par. (2) A; and should therefore, of course, not be considered in computing a pension payable under section 5, paragraph (2) C (b). I therefore answer your first question in the negative, and your second question also in the negative so far as it is applicable to the case which you have presented.

Very truly yours,
JAY R. BENTON, *Attorney General*.

State Retirement Association — Membership — Age.

The State Board of Retirement would not be justified in retiring a person who purported to join the association after June 1, 1912, at the supposed age of fifty-three years but who, in fact, at that time had passed the age of fifty-five years, such person not being a member of the association, and accordingly not entitled to retirement.

JUNE 3, 1924.

Hon. JAMES JACKSON, *Chairman, State Board of Retirement*.

DEAR SIR:— You have requested my opinion as to whether G. L., c. 32, § 2, par. (1), qualifies St. 1911, c. 532, § 3, par. (2), so that the board would be justified in retiring a person who purported to join the association in 1912 at the supposed age of fifty-three years, but who, in fact, at that time had passed the age of fifty-five years. I assume that the person in question was not in the service of the Commonwealth on or prior to June 1, 1912, which is referred to as the date on which the State Retirement Association was established. G. L., c. 32, § 2, par. (1).

G. L., c. 32, § 2, par. (1), reads as follows:—

“All persons who are now members of the state retirement association established on June first, nineteen hundred and twelve, shall be members thereof.”

St. 1911, c. 532, § 3, par. (2), reads as follows:—

“All employees who enter the service of the commonwealth after the date when the retirement system is established, except persons who have already passed the age of fifty-five years, shall upon completing thirty days of service become thereby members of the association. Persons over fifty-five years of age who enter the service of the commonwealth after the establishment of the retirement system shall not be allowed to become members of the association, and no such employee shall remain in the service of the commonwealth after reaching the age of seventy years.”

G. L., c. 32, § 2, par. (1), corresponds to and is substituted for St. 1911, c. 532, § 3, par. (1). This latter section reads as follows:—

“All employees of the commonwealth, on the date when the retirement system is established, may become members of the association. On the expiration of thirty days from said date every such employee shall be considered to have elected to become, and shall thereby become, a member, unless he shall have within that period, sent notice in writing to the state insurance commissioner that he does not wish to join the association.”

The difference in phraseology is due to the fact that in 1911 the association had not come into existence, whereas, at the time when the General Laws were drafted the association was established. There seems to be nothing in G. L., c. 32, § 2, par. (1), which can be construed as indicating an intent to change in any way the qualifications of membership in the association; or to confirm membership in any who may previously have been improperly regarded as members.

I am of the opinion that G. L., c. 32, § 2, par. (1), does not make the person referred to a member of the association and thereby entitled to retirement under G. L., c. 32, § 2, par. (9), as amended.

Yours very truly,
JAY R. BENTON, *Attorney General*.

Constitutional Law — Theatres — Regulation of Resale of Tickets.

Dealers in the resale of tickets to places of amusement may be required to be licensed.

The original price of such tickets may be required to be printed upon the face thereof.

The resale price of such tickets may be restricted to an advance of not over fifty cents above the original price.

JUNE 5, 1924.

His Excellency CHANNING H. COX, *Governor of the Commonwealth.*

SIR: — I have the honor to acknowledge the submission to me for examination and report of Senate Bill No. 510, entitled "An Act to regulate the sale and resale of tickets to theatres and other places of public amusement, as a matter affected with a public interest, in order to prevent fraud, extortion and other abuses."

Proposed legislation, having marked fundamental similarities to the provisions embodied in this bill, has been at various times before this office for examination, and it has been the uniform opinion of my predecessors in office that those various items of legislation were unconstitutional. Opinions to this effect are found in III Op. Atty. Gen. 491; IV Op. Atty. Gen. 519; Attorney General's Report, 1922, p. 72.

It will perhaps not be serviceable, in view of the recent opinion of the justices of the Supreme Judicial Court, to consider in detail whether the present bill can be distinguished as to its constitutionality from those earlier proposed measures.

By Senate order under date of March 28, 1924, in connection with the consideration of House Bill No. 1038, the opinion of the justices of the Supreme Judicial Court was required upon a series of questions bearing upon the validity of regulations of ticket speculation. The opinion of the justices in response to that order is found in 247 Mass. 583. It answers in the affirmative subdivisions (A), (C), (D), (E) and (F) of question (1), and in the negative subdivision (B), and continues

"Although we do not observe any unconstitutional provision in the proposed bill, we respectfully ask to be excused from answering question (2) touching its constitutionality in all its provisions."

A textual comparison of the present bill with House Bill No. 1038, as then submitted to the consideration of the justices, does not disclose the addition of any provisions which affect adversely the constitutionality of the bill. On the contrary, certain features of House Bill No. 1038 have been eliminated; perhaps the most significant elimination, from the point of view of constitutionality, is that which makes the proposed section 185 (A) of chapter 140 of the General Laws, as found in the present bill, deal only with the business of reselling tickets, whereas the corresponding section in House Bill No. 1038 dealt also with any and every resale, however casual.

The proposed section 182 (A), as found in the present bill, seems clearly covered as to its constitutionality by the answer made by the justices to question 1 (A). Sections 185 (A), (B), (C), (E), and some aspects of (F), as found in the present bill, are similarly covered by the answer made by the justices to questions 1 (C) and 1 (D). Any claim that the statute as now drawn gives to the Commissioner of Public Safety powers so broadly expressed as to be conceivably susceptible to abuse through arbitrary action is probably answered by *Douglas v. Noble*, 261 U. S. 165. Section 185 (D) and some aspects of section 185 (F) are similarly covered by the answer of the justices to question 1 (F). Section 185 (G) in the present bill does not seem to establish any unreasonable classifications.

The Court of Appeals of New York, in *People v. Weller*, 237 N. Y. 316, has also held constitutional a statute of that State quite similar to the present bill. The court points out the fact that theatres and other places of amusement are in numerous aspects the unquestioned subject of police power regulation,

that there are certain tendencies to monopoly occurring in the business of reselling tickets, and that the business of speculating in theatre tickets is one "through which the general public is compelled to pay a group of men for services which, at least in part, are not desired by the public." The reasoning of the justices in the opinion rendered to the Senate relies largely upon the ground that "the maintenance of theatres and other places of amusement is for the use of the public and affected with a public interest."

The three main features of the statute are the requirement of printing the price on the tickets, the licensing of dealers in tickets, and the restricting of the profits which such dealers may make upon resales. If the price-fixing aspect should be taken as the central feature of the statute, the other provisions would be reasonably calculated to aid in its enforcement, and might be constitutional for that reason, if for no other, if the price-fixing provision is constitutional. Assuming, however, that these three main divisions of the bill are separable, there would still probably be little difficulty in holding constitutional the parts relating to the printing of the price and to licensing, as measures for the prevention of frauds.

The constitutionality of fixing the resale price is intrinsically a much more doubtful question, upon which differences of opinion are not merely likely but inevitable. I feel constrained, in the light of the opinion of the justices referred to above, to say that the proposed bill will, if enacted, be constitutional.

I would respectfully call attention to the form of proposed section 185 (G). As that section now stands, the words "the six preceding sections" would seem to mean the six sections preceding section 182 (A) of chapter 140 of the General Laws; whereas, it is plain that the reference was meant to be to the six sections, 185 (A) to (F), inclusive, which in the proposed bill immediately precede section 185 (G). There might also be some question as to what terms are modified and governed by the words "religious, educational or charitable," which immediately precede the words "institutions, societies or organizations or civic leagues or organizations not organized for profit, etc." I would suggest that by eliminating the two commas which follow, respectively, the words "religious" and "institutions," and by inserting a comma between the word "organizations" and the words "or civic leagues," the probable intention of this provision would be more clearly expressed.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Ratification of Proposed Amendment to the Federal Constitution — Submission to the People for an Expression of Opinion.

An act to ascertain the opinion of the people of the Commonwealth as to the desirability of ratifying a proposed amendment to the Constitution of the United States, by submitting the question to the voters at a State election, would be constitutional.

JUNE 5, 1924.

His Excellency CHANNING H. COX, *Governor of the Commonwealth.*

SIR:— You have submitted to me for examination and report House Bill No. 1828, entitled "An Act to ascertain the opinion of the people of the Commonwealth as to the ratification of the proposed amendment to the Constitution of the United States empowering the Congress to limit, regulate and prohibit the labor of persons under eighteen years of age."

This proposed act provides, in substance, that for the purpose of ascertaining the opinion of the people of the Commonwealth as to the desirability of ratifying the proposed amendment to the Constitution of the United States, referred to in the title, there shall be placed upon the ballot to be used at the biennial State election in the current year the question: "Is it desirable that the General Court ratify the following proposed amendment to the Constitution of the United States?"— the terms of the proposed amendment being then set out; that the votes upon said question shall be received and counted; that the Governor shall make known the result; and that a statement of the result shall be submitted to the General Court during the first week of the session in the year 1925.

By St. 1920, c. 560, entitled "An Act to provide for ascertaining the opinion of the people as to proposed amendments to the Federal Constitution," it was provided that "if a proposed amendment to the Federal Constitution is duly submitted to the General Court, as provided in article five of the Constitution of the United States, and is not ratified at the session at which it is submitted," the question whether such ratification is desirable shall be submitted to all the voters of the Commonwealth at a subsequent State election. It may be a matter of some doubt whether or not the proposed amendment to which the pending bill relates has yet been duly submitted to the General Court, within the terms of that statute; but that question is immaterial to the present discussion. The only question is whether the proposed measure in any respect violates any provision of either the State or the Federal Constitution.

The Supreme Court of the United States has held that a requirement in a State constitution that the question of ratification of a proposed amendment to the Constitution of the United States should be referred by a referendum to the electors of the State for ratification was inconsistent with the Constitution of the United States. *Hawke v. Smith*, No. 1, 253 U. S. 221; *Hawke v. Smith*, No. 2, 253 U. S. 231; *Leser v. Garnett*, 258 U. S. 130, 137. But the distinction between the requirement held unconstitutional by the United States Supreme Court and the provision in the proposed act is fundamental. The provision which the Supreme Court declared to be unconstitutional attempted to give the people power to pass finally upon the question of ratification, substituting the electors of the State for the Legislature as the ratifying body. The proposed act, however, seeks only to obtain the opinion of the electors as a preliminary to subsequent independent action by the Legislature itself. In my opinion, therefore, the proposed act is in no respect in violation of the United States Constitution.

There remains the question whether any provision of the Constitution of Massachusetts is violated by this act. A similar question was considered in an opinion rendered by me under date of April 26, 1923, to the committee on bills in the third reading of the House of Representatives, by whom my opinion was requested as to the constitutionality of a bill entitled "An Act to ascertain the will of the people of Massachusetts with reference to the Eighteenth Amendment to the Constitution of the United States and the enforcement thereof." Attorney General's Report, 1923, p. 86. In that opinion I expressed the view that the proposed act there in question was within the power given to the Legislature by Mass. Const., c. I, § 1, art. IV, "to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions not repugnant or contrary to the constitution, as they shall judge to be for the good and welfare of the Commonwealth"; that the spending of public money for printing the questions referred to in the act and tabulating the returns of votes was an expenditure for a public purpose; and that the proposed bill, if enacted, would not be repugnant or contrary to the Constitution, and would be constitutional. For the same reasons it is my opinion that the bill now before me, if enacted, would not be violative of any provision of the State Constitution.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Eligibility of a Member of the General Court to Other Employment by the Commonwealth — Salary.

A member of the General Court is not eligible for other employment by the Commonwealth if his compensation for such other employment is "salary," or if such other employment in any way infringes upon the duties of the member as a legislator.

JUNE 9, 1924.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You have asked my opinion as to "whether a member of the General Court is eligible, during the term for which he was elected, for tem-

porary employment on matters relating to primaries and elections in the Department of the Secretary of the Commonwealth."

G. L., c. 30, § 21, provides:—

"A person shall not at the same time receive more than one salary from the treasury of the commonwealth."

Since there can be no doubt that the compensation received by a member of the Legislature is "salary," it follows that a member of the Legislature can receive no compensation from your department if such compensation would properly be described as "salary."

Whether a particular compensation is or is not to be termed "salary" is sometimes a troublesome question. I am not sufficiently advised as to the form and nature of the compensation to be paid by your department to express an opinion as to whether it should be termed "salary" or not. The following quotation sets forth the general considerations bearing on the question (V Op. Atty. Gen. 699):—

"Salary" . . . is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called 'piece work' basis, and are more frequently subject to deductions for loss of time."

Even if it be clear that the compensation to be paid by your department is not salary, there is still another question to be considered. In return for the salary paid by the Commonwealth to a member of the General Court the Commonwealth is entitled to so much of the member's time and effort as is requisite for the performance of his duties. In order, therefore, that a member of the General Court should be employed in your department, it should be clear that the work required would in no way interfere with his duties as a member of the General Court. The work required by your department would have to be in the nature of overtime work. See II Op. Atty. Gen. 309; V Op. Atty. Gen. 697. This is a question of fact which you would have to determine, in the exercise of sound discretion.

In order, therefore, to make the employment suggested, you would have to determine, first, that the compensation to be paid would not be "salary"; and, secondly, that the work to be performed would be in the nature of overtime work and would in no way infringe upon the member's duties as a legislator.

Very truly yours,

JAY R. BENTON, Attorney General.

Gasoline — State Fire Marshal — Powers — Appeal — "Person Aggrieved" — Revocation of Permits — Street Commissioners of Boston.

The use of land for the keeping, storage and sale of gasoline, in the absence of a restrictive statute, is lawful.

The powers of the State Fire Marshal, being purely statutory, can be exercised only in accordance with the statute.

If the State Fire Marshal delegates his power to grant licenses or permits, and the delegated officer acts thereunder, the Fire Marshal has no power to hear and determine the question except on appeal by a "person aggrieved."

A "person aggrieved" is one whose personal or property rights are or may be adversely affected in a special manner by the action of the licensing authority.

A person whose rights may be affected only in so far as he is a member of the general public, and only to the same extent as other members of the public, is not a "person aggrieved."

The State Fire Marshal may revoke any permit, but such revocation cannot be made arbitrarily.

The street commissioners of Boston have no authority to issue permits to store, handle or sell gasoline except as the State Fire Marshal delegates such authority to the board.

JUNE 20, 1924.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR:—You request my opinion whether the State Fire Marshal has jurisdiction to pass upon the action or order of the board of aldermen of Chelsea granting a license for the storage of gasoline, under power duly delegated by the State Fire Marshal, on an appeal, which does not recite, or in which the evidence, after hearing, does not disclose, the appellant to be a person aggrieved by reason of any special personal or property right injuriously affected by said action or order.

G. L., c. 148, § 30, provides, in part:—

“The marshal shall have within the metropolitan district the powers given by section ten, . . . to license persons or premises, or to grant permits for, . . . the keeping, storage, use, . . . sale, handling . . . of . . . crude petroleum or any of its products . . .”

Section 31, as amended by St. 1921, c. 485, § 5, provides:—

“The marshal may delegate the granting and issuing of any licenses or permits authorized by sections thirty to fifty-one, inclusive, . . . to the head of the fire department or to any other designated officer in any city or town in the metropolitan district. . . . Any such permit may be revoked by the marshal or by the officer designated to grant it.”

Acting under this section the Fire Marshal delegated the granting and issuing of licenses in Chelsea to the board of aldermen of that city.

Section 28 provides that “the metropolitan district shall include . . . Chelsea.”

Section 45 provides:—

“The marshal shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons acting or purporting to act under his authority, done or made or purporting to be done or made under the provisions of sections thirty to fifty-one, inclusive, and shall make all necessary and proper orders thereon. Any person aggrieved by any such action of the head of a fire department or other person may appeal to the marshal.”

The use of land for the keeping, storage and sale of gasoline, in the absence of a restrictive statute, is lawful. The statute under which licenses or permits for such purposes are required and granted is a regulation of the right of ownership in land.

In *General Baking Co. v. Street Commissioners*, 242 Mass. 194, 196, the court said:—

“The building of a garage, when there is no restrictive statute, is a lawful improvement of land. When limitation upon that right is imposed, it is reasonable to presume a purpose by the Legislature that the landowner be furnished by the terms of the law with necessary information touching all the restrictions under which he must act. When permission is obtained, the landowner reasonably may infer that, so long as he complies with the requirements under which the privilege has been granted, he may claim protection until further legislation impairs his rights.”

It follows that the restrictions placed upon the use of land for such purposes must not be broader in scope than the statute authorizes. The powers of the State Fire Marshal, being purely statutory, can be exercised only in accordance with the statute. *Welch v. Swasey*, 193 Mass. 364, 376; *Commonwealth v. Maletsky*, 203 Mass. 241; *Goldstein v. Conner*, 212 Mass. 57; *Kilgour v. Gratto*, 224 Mass. 78; *Wright v. Lyons*, 224 Mass. 167, 168; *Commonwealth v. McCarthy*, 225 Mass. 192, 195; *Commonwealth v. Atlas*, 244 Mass. 78, 82. The statute prescribes only two methods of action by the Fire Marshal upon the question of such licenses or permits. He may pass on the question himself, in the first instance, or he may delegate the authority to a local officer, and hear and determine appeals from the action of such officer made by any person aggrieved. If the Fire Marshal delegates the power to grant licenses or permits, and the

delegated officer acts in a specific instance, the Fire Marshal has exhausted his power to pass upon the matter as an original question, and his only power then is to hear and determine an appeal from the action of the delegated officer, when made by a person aggrieved.

I am not unmindful of a contrary opinion given by my predecessor, to the effect that the Fire Marshal may pass upon the question as if no delegation had been made. See Attorney General's Report, 1921, pp. 319, 321. That opinion, however, was rendered prior to the opinion of the Supreme Judicial Court in *General Baking Co. v. Street Commissioners*, 242 Mass. 194. I cannot, therefore, concur with the opinion of my predecessor. In my opinion, the Fire Marshal, in the case you present, has no authority to pass upon the question of granting the license. He should, however, hear and determine the appeal, if properly made.

The right of appeal is, by section 45, given only to persons "aggrieved" by the action of the board of aldermen, and not to others. A person aggrieved, within the purview of the statute, is one whose personal or property rights are or may be adversely affected in a special manner by the action of the board. *Wiggin v. Swett*, 6 Met. 194, 197; *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 101; *Pierce v. Gould*, 143 Mass. 234; *Norton v. Shore Line Electric Ry. Co.*, 84 Conn. 24, 33. A person whose rights may be affected only in so far as he is a member of the general public, and only to the same extent as other members of the general public, is not a person "aggrieved," within the meaning of the act. *Wesson v. Washburn Iron Co.*, *supra*.

The appeal from the action of the board of aldermen was not made by a person who was specially affected in his personal or property rights. I am accordingly of the opinion that there is no lawful appeal pending, and that you have no authority to pass upon the action of the board of aldermen.

I deem it my duty to call your attention to G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 5, which authorizes you to revoke any permit authorized by sections 30 to 51, inclusive. Such revocation cannot, however, be made arbitrarily. *Welch v. Swasey*, 193 Mass. 364, 376; *Commonwealth v. McGann*, 213 Mass. 213, 215; *Commonwealth v. Slocum*, 230 Mass. 180, 192; *Yick Wo v. Hopkins*, 118 U. S. 356.

You further request my opinion as to whether the State Fire Marshal has jurisdiction to review and to overrule, on appeal, the decision of the board of street commissioners of the city of Boston, without regard to the provisions of St. 1907, c. 584, in granting a license to store gasoline in an underground tank and a license to install a pump permanently at the curb of the sidewalk in a public street, said board having been delegated by the State Fire Marshal with power to grant licenses or permits for the keeping, storage and sale of gasoline.

St. 1907, c. 584, is an act relative to the use of the public streets of the city of Boston for the storage and sale of merchandise. By the provisions of G. L., c. 148, § 30, the Fire Marshal is given authority to regulate the storage, keeping, use, sale and handling of gasoline in the metropolitan district, which includes Boston. The street commissioners of Boston have no authority to issue permits for such purposes except as the Fire Marshal delegates such authority to the board. *Foss v. Wexler*, 242 Mass. 277, 279; Attorney General's Report, 1922, p. 202; V Op. Atty. Gen. 718.

The board of street commissioners, in granting a permit to store, use and sell gasoline, acted solely by virtue of the authority delegated to it by the Fire Marshal under the provisions of G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 45. Under the provisions of section 45 an appeal from the action of the board may be made to the Fire Marshal by any person aggrieved. The powers of the Fire Marshal in this respect are in nowise affected by St. 1907, c. 584. If an appeal from the action of the board has been made by a person aggrieved by such action, it is the duty of the Fire Marshal to hear and determine such appeal, without regard to St. 1907, c. 584.

Very truly yours,

JAY R. BENTON, *Attorney General*.

State Constitution — Blue Book.

Mass. Const., pt. 2nd, c. VI, art. XI, does not require that the constitution be printed in the Blue Book.

JUNE 21, 1924.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR:— You request my opinion as to whether or not the provisions of Mass. Const., pt. 2nd, c. VI, art. XI, require that you shall print the Constitution in the Blue Book, notwithstanding the provisions of St. 1924, c. 462.

In my opinion, you are not required to do so.

The provision of the Constitution to which you refer reads as follows:—

“ This form of government shall be enrolled on parchment and deposited in the secretary’s office, and be a part of the laws of the land — and printed copies thereof shall be prefixed to the book containing the laws of this commonwealth, in all future editions of the said laws.”

It is my opinion that the editions referred to are books which purport to contain all the statutes of the Commonwealth, and not books containing only the laws of one or more sessions.

At the time of the adoption of the Constitution it was the custom to publish the laws of each session by annexing them as part of an existing book of laws, until a book became of sufficient bulk to make it desirable that a new book be started. One book, entitled “ Massachusetts Perpetual Laws,” contained all the laws passed from 1692 to 1774. A book of a similarly comprehensive nature was, no doubt, referred to by the phrase “ the book containing the laws of this commonwealth,” as used in article XI above cited.

My opinion that article XI does not refer to a publication of the acts passed at a particular session is confirmed by the practice followed after the adoption of the Constitution.

For many years after the adoption of the Constitution it was the unvarying practice not to include the Constitution in the publication of the laws of one or more sessions. The inclusion of the Constitution in such books as purported to comprise all the then existing laws forms no exception. (See Laws, Oct., 1780, to Jan., 1783; Perpetual Laws of the Commonwealth, 1780–1789; General Laws to 1822; Revised Statutes, 1836.)

Apparently the first Blue Book in which the Constitution was printed was for the year 1855. The Constitution was printed at the end of the Blue Books for the years 1855, 1856 and 1857. It was not included in the Blue Book for 1858. It was prefixed to the Blue Book for 1859.

The various resolves under which the acts were published prior to the General Statutes (1860) made no provision for printing the Constitution. (See Res. Jan. 20, 1808; Res. Jan. 16, 1812; Res. 1839, c. 83.)

G. S. (1860), c. 3, § 1, provided for the printing of the Constitution and other matter with the acts and resolves of each session. In the report of the commissioners on revision of the statutes, published in 1858, the commissioners state in a note to chapter 3, section 1, that they have therein provided for the publication of the acts and resolves of each session, “ with such other matter as it has been the custom to publish with them.” The custom of publishing the Constitution seems not to have been of long standing.

The statutory requirement for printing the Constitution as part of the Blue Book, which has existed since the General Statutes of 1860 (see G. L., c. 5, § 2), has been repealed by St. 1924, c. 462; and there seems to be no other provision making this requirement.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Animal Industry — Quarantine Stations — Tuberculin — Disposition of Diseased Animals.

Department Order No. 35 of the Department of Conservation, Division of Animal Industry, created a valid quarantine of the premises of the Brighton Stock Yards Company in Brighton.

Quarantine is a proper means of enforcing the power of inspection and examination.

The tuberculin test may be applied without the owner's consent to imported cattle and to domestic cattle reported tuberculous on physical examination by a veterinary.

Quarantine stations established under G. L., c. 129, § 8, are experimental stations for the study of animal diseases.

Quarantine stations in Brighton, Watertown and Somerville, G. L., c. 129, § 32, are general quarantines to facilitate inspection, and the tuberculin test may be used upon cattle in such stations without the owner's consent.

Prior to St. 1924, c. 156, the sale of tuberculous animals was unrestrained, except that the owner must provide the buyer with certain information; after St. 1924, c. 156, sale or other disposition by the owner, except for immediate slaughter, is forbidden.

JUNE 25, 1924.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR:—The questions which you have referred to me, relative to the quarantining of the Brighton Stock Yards and to the use of tuberculin in testing cattle on those premises, are predicated on the following facts:—

That there is maintained at the Brighton Stock Yards a large distributing centre for cattle, at which a weekly market is held for trading in dairy animals; that some of these cattle are brought from without the State, and that others of them are in the course of a purely intrastate movement; that an important part of the work of your department in controlling the spread of disease consists of determining whether all such cattle, or such of them as to which it may legally be done, are affected with tuberculosis; and that the only certain method of determining the presence or absence of tuberculosis is the use of the tuberculin test.

1. You ask whether the Brighton Stock Yards, as a "premises," are legally under quarantine by Department Order No. 35, approved in Council April 3, 1918. This order provides, in section 2, that "the premises of the Brighton Stock Yards Company in Brighton, within the city of Boston, . . . are hereby declared to be quarantine stations, and no animals are to be released therefrom except by permission of the Director of Animal Industry or an agent of the division."

Under G. L., c. 129, § 2, the Director of Animal Industry is authorized to—
"make and enforce reasonable orders, rules and regulations relative to . . . prevention, suppression and extirpation of contagious diseases of domestic animals; the inspection, examination, quarantine, care and treatment or destruction of domestic animals affected with or which have been exposed to contagious disease, . . . No rules or regulations shall take effect until approved by the governor and council."

Under G. L., c. 129, § 7, plenary power is given to the director or his agents or an inspector to make examinations or to inspect animals or the places where they are kept. Under section 11, as amended by St. 1922, c. 353, the director or one of his agents, upon determination that a domestic animal is affected with a contagious disease, may, if he is of opinion that the public good so requires, cause the diseased animal to be isolated or killed.

I am of the opinion that a rule establishing a quarantine about such a place as the Brighton Stock Yards, where the director and his aids have an unquestioned right to exercise their power of inspection and examination on the premises, is not an unreasonable method of facilitating such examination or inspection, and is therefore warranted under G. L., c. 129, § 2. The same view would apply to the provision requiring that no animals be released from the quarantined premises except by permission of the director or of one of his agents. I am not, of course, dealing with any case of possible arbitrary action under such a ruling. The Brighton Stock Yards, therefore, can be said to be legally under quarantine by Department Order No. 35. It should be pointed out, however, that this consequence is deduced from the department

order by assuming that the words "quarantine stations" were not used by the director in the narrow sense in which they are used in G. L., c. 129, § 8, which section is further discussed below.

2. You ask whether, if the Brighton Stock Yards are legally under quarantine, the Director of Animal Industry has authority, under G. L., c. 129, § 32, to order that any and all cattle thereon be tested with tuberculin for the purpose of determining whether or not they are affected with tuberculosis. Section 32 prohibits the use of tuberculin as a diagnostic agent for the detection of tuberculosis in domestic animals except upon cattle brought into the Commonwealth, upon cattle "in quarantine stations at Brighton, Watertown and Somerville," upon any animal in any other part of the Commonwealth where the written consent of the owner or person in possession is obtained, and upon animals which have been reported as tuberculous upon physical examination by a competent veterinary surgeon. Clearly, this statute gives the right to use the tuberculin test without the owner's consent upon all foreign cattle coming into the Commonwealth and upon any domestic cattle which have been reported tuberculous upon physical examination by a veterinary. There is more difficulty as to the meaning of the words "in quarantine stations at Brighton, Watertown and Somerville."

G. L., c. 129, § 8, provides that the director may establish "hospitals or quarantine stations, with proper accommodations, wherein, under prescribed regulations, animals selected by him may be confined and treated for the purpose of determining the characteristics of a specific contagion and the methods by which it may be disseminated or destroyed."

In this section the words "quarantine stations" appear for the only time in G. L., c. 129, except as in section 32 quoted above. They are clearly used in section 8 with a narrow significance, as experimental stations where selected animals may be kept under observation and treatment in order to enable the department to acquire additional knowledge about the problems with which it has to deal. It is a natural construction to assume that the words "quarantine stations" in section 32 were used with the same significance which they plainly have in the only other place where they appear in the chapter. Such a construction would have a rational background, for the Legislature might well have intended to except cattle in such stations from the operation of section 32, so that the experimental work might not be hampered by inability to use tuberculin. The effect of this construction would be that tuberculin could not be used upon Massachusetts cattle brought to the Brighton Stock Yards unless with the owner's consent, or except after they are reported as tuberculous by a veterinary; unless in some portion of the Brighton Stock Yards which may have been properly established as a hospital or quarantine station, as those terms are narrowly used in section 8.

The foregoing would seem a proper interpretation if G. L., c. 129, be divorced from its historical background. It seems to me, however, although it is not free from doubt, that the way in which these statutes have grown indicates that the Legislature intended to use the words "quarantine stations" with a different significance in section 32 from that with which those words are used in section 8. The discussion in the following two paragraphs will show the grounds for this conclusion.

By St. 1860, c. 221, § 3, the power was originally created to "provide for the establishment of a hospital or quarantine in some suitable place or places, with proper accommodations of buildings, land, etc., wherein may be detained any cattle by them selected, so that said cattle so infected or exposed may be there treated by such scientific practitioners of the healing art as may be appointed to treat the same." The substance of this provision, although altered somewhat in the numerous acts which intervene between St. 1860 and G. L., c. 129, § 8, has not varied materially for our present purposes. In P. S., c. 90, § 14, the words "a hospital or quarantine" are still found. In St. 1887, c. 252, § 11, the words are "hospitals or quarantines." These words are also in St. 1894, c. 491, § 41. In St. 1899, c. 408, § 6, are found for the first time the words "hospitals or quarantine stations." These words remain unchanged in G. L., c. 129, § 8. There seems no reason to believe that any substantial meaning

is to be attached to the change from the term "quarantines" to the term "quarantine stations," or that the term "quarantine stations," as first used in the statute of 1899 or as now found in section 8, was intended to have any very technical significance.

The history of G. L., c. 129, § 32, followed a somewhat similar course. In the original statute of 1895, chapter 496, section 14, the use of tuberculin is prohibited except (among other exceptions) as to "all cattle held in quarantine at Brighton, Watertown and Somerville." In St. 1896, c. 276, the same words are found. In St. 1897, c. 165, the words are "to all cattle at Brighton, Watertown and Somerville," the words "held in quarantine" being deliberately stricken out. St. 1899, c. 408, § 42, uses words similar to those in the preceding statute. Similarly, in R. L., c. 90, § 31, and in St. 1903, c. 322. The present change was made in the report of the commissioners consolidating and revising the General Laws, and there are no annotations in the report to explain the change.

I am therefore of the opinion that G. L., c. 129, § 32, authorizes the use of tuberculin in tests made upon Massachusetts cattle brought upon the premises at Brighton, which are designated as "quarantine stations," in the sense in which those words are used in that section and in which I have assumed them to be used in Department Order No. 35.

3. You ask whether, if the test shows animals to be diseased, the director can prohibit their sale at these premises. G. L., c. 129, § 33A. If the director does not see fit to take advantage of the provisions of G. L., c. 129, § 11, authorizing the killing of animals found upon examination to be affected with contagious disease, the only alternative regulation is found in section 33A (St. 1922, c. 137). This latter section provides, in substance, for the marking of the animal for identification, by a metal tag, and that any person who sells, exchanges or otherwise disposes of an animal which to his knowledge has reacted to a tuberculin test shall furnish the person to whom he disposes of the animal with a true copy of the record of the test or a written statement of the fact of such reaction.

St. 1924, c. 156, strikes out section 33A of G. L., c. 129, as amended, and substitutes a provision that the reacting animal shall be tagged for identification, and that no person shall dispose of an animal which has reacted to a tuberculin test except for the purpose of immediate slaughter. This latter statute, however, which was approved March 28, 1924, is not yet in effect. It would seem that while section 33A remains in effect the only alternatives which the director has are to have the animal killed under his own authority or to permit its owner to dispose of it in any way that he pleases, subject to the duty to inform any transferee of the condition of the animal. The director cannot in any direct fashion prohibit the sale at the premises of such animals. When St. 1924, c. 156, shall be in effect the director will still have the former option of having the animal killed, under section 11, or he may permit the owner or possessor to return it to his own premises; but any sale or other disposition by the owner or possessor, except for the purpose of immediate slaughter, will be prohibited.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Retail Drug Store — Registration and Permit — Peddling Patent Medicines and Drug Sundries.

A registered pharmacist who maintains no fixed place of business but travels about selling patent medicines and drug sundries from an automobile truck, on the side of which is a sign containing his name and the words, "Registered Pharmacist. Everything in the Drug Line," is not conducting a "store" within the meaning of G. L., c. 112, § 38, as amended by St. 1921, c. 318, and accordingly is not required to obtain a permit as therein provided.

It seems that such a person would require a license for hawkers and pedlers under G. L., c. 101.

JUNE 25, 1924.

Board of Registration in Pharmacy.

GENTLEMEN:— You ask my opinion as to whether G. L., c. 112, § 38, as amended, is violated by a registered pharmacist who maintains no fixed place of business, but who, without a permit under said section, travels about selling patent medicines and drug sundries from an automobile truck owned by him, on the side of which is a sign containing his name and the words "Registered Pharmacist. Everything in the Drug Line."

G. L., c. 112, § 38, as amended by St. 1921, c. 318, reads as follows:—

"No store shall be kept open for the transaction of the retail drug business, or be advertised or represented, by means of any sign, or otherwise, as transacting such business, unless it is registered with, and a permit therefor has been issued by, the board, as provided in the following section. The permit shall be exposed in a conspicuous place in the store for which it is issued."

If it be assumed, as a matter of fact, that the articles sold are of a kind which makes their sale "drug business" within the definition of G. L., c. 112, §§ 35 and 37, still section 38, above quoted, by its terms requires a permit only for a "store"; and, in my opinion, a court would not construe said section 38 as covering the transaction in question. See *Commonwealth v. McMonagle*, 1 Mass. 517; *Hittinger v. Westford*, 135 Mass. 258; *Barron v. Boston*, 187 Mass. 168.

I might suggest that the man to whom you refer would seem to require a license for hawkers and peddlers under G. L., c. 101.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Public Schools—Department of Education—State Reimbursement—School Buildings and Equipment.

The Department of Education is empowered to withhold State reimbursement due to a town under G. L., c. 70, pt. II, when such town neglects to furnish its school buildings with all or any of the forms of equipment required by law.

JULY 18, 1924.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You ask my opinion in the following language:—

"I desire your opinion as to whether, under the statutes quoted above, the department is directed to withhold the State reimbursement due any town under G. L., c. 70, pt. II, in case the town neglects to furnish its school buildings with such heating, lighting, ventilating, seating and sanitary facilities as in the opinion of the department are necessary for the comfort and health of the pupils."

The provisions of the statutes to which you refer in the earlier part of your communication are G. L., c. 71, § 68, and G. L., c. 70, § 17.

I am of the opinion that the provisions of these two statutes give your department the power to withhold State reimbursement due to a town under G. L., c. 70, pt. II, when such town neglects to furnish its school buildings with all or any of the forms of equipment specifically mentioned in your letter. Such forms of equipment in proper quantities or amount are necessary to the reasonable comfort of pupils; the laws relating to public schools already referred to make it incumbent upon towns or school committees to provide them. Failure to provide them is a failure to comply with a part of the laws relating to public schools. Your department is charged with the duty of withholding the said funds when all the laws relating to public schools have not been complied with. Compliance must be of such a character as to satisfy your department, in the exercise of its reasonable judgment, that the provisions of the public school laws have been fulfilled.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Lease — Sublease — Fish Pier.

A lease by the Board of Harbor and Land Commissioners to the Boston Fish Market Corporation of parts of the Commonwealth flats, under R. L., c. 96, § 3, gives to the lessee every right which it would have had if the lessor had been a person or private corporation.

A covenant in a lease that the lessee will not, without the consent of the lessor first obtained in writing, assign the lease is not a covenant against underletting, and will not be violated by the making of a sublease of a portion of the premises.

Under the lease referred to, the lessee has the right to sublet a portion of the premises for the storage of fuel oil and gasoline.

JULY 24, 1924.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR:— You have asked me to advise you whether the Boston Fish Market Corporation, being the lessee of the property known as the Fish Pier in South Boston, has a right under the lease to sublease any portion of the premises to another corporation for the establishment and operation of fuel oil and gasoline storage.

The lease was executed September 24, 1910, between the Commonwealth of Massachusetts, acting by its Board of Harbor and Land Commissioners, as lessor, and the Boston Fish Market Corporation, as lessee. By it certain parts of the Commonwealth flats at South Boston, as therein bounded and described, were demised and leased to the corporation. The lease contains, among other covenants, the following covenant by the lessee:

“ And the said lessee further covenants and promises with and to the said lessor that it or others having its estate in the premises will not, without the consent of the lessor first obtained in writing, assign this lease, nor make nor allow to be made any unlawful or improper use of the leased premises.”

This lease was executed by the Harbor and Land Commissioners under the authority of R. L., c. 96, § 3, which contains the provision that—

“ . . . It (the Board of Harbor and Land Commissioners) may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth flats, may lease any portion thereof with or without improvements thereon, for such periods and upon such terms as it shall deem best . . . ”

In *Boston Fish Market Corp. v. Boston*, 224 Mass. 31, this very lease was under consideration, and the court said:—

“ The plaintiff is the lessee of the land for which it has been taxed within the meaning of the statute. It is described as ‘lessee’ throughout the indenture under which it holds possession. That indenture is in the form of a lease. It is aptly phrased to create the relation of lessor and lessee. The harbor and land commission had the power to execute a lease. R. L., c. 96, § 3.”

In *Cotting v. Commonwealth*, 205 Mass. 523, it was held that under R. L., c. 96, § 3, the Board of Harbor and Land Commissioners had the power to make a deed of a parcel of land included in the Commonwealth flats with covenants of seisin, against incumbrances, of right to convey and of warranty.

It is my opinion that the lessee under this lease acquired every right which it would have had if the lessor had been a person or private corporation and not the State.

There is no express restriction in the lease limiting the purposes for which the leased property may be used, unless such restriction is found in the part already quoted. The covenant that the lessee will not make nor allow to be made any unlawful or improper use of the leased premises I regard as intended to describe such use as offends against some law, regulation or ordinance. In my opinion, it does not cover the use mentioned in your letter.

The covenant that the lessee will not, without the consent of the lessor first

obtained in writing, assign the lease is not a covenant against underletting and will not be violated by the making of a sublease of a portion of the premises. The authority for this proposition seems clear. *Crusoe v. Bugby*, 3 Wils. 234; *Jackson v. Silvernail*, 15 Johns. (N. Y.) 278; *Jackson v. Harrison*, 17 Johns. (N. Y.) 66; *Den v. Post*, 25 N. J. L. 285; *Hargrave v. King*, 40 N. C. 430; *Cross v. Bouck*, 175 Cal. 253; Taylor, Landlord and Tenant, § 403; 24 Cyc. 974. On the question whether a covenant not to underlet forbids an assignment the authority is divided. See *Greenway v. Adams*, 12 Ves. Jr. 395, and *Den v. Post*, *supra*, in the affirmative, and *Field v. Mills*, 33 N. J. L. 254, in the negative. It seems to have been assumed in some Massachusetts cases that a covenant not to underlet forbids an assignment. *Blake v. Sanderson*, 1 Gray, 332; *Shattuck v. Lovejoy*, 8 Gray, 204; *Bemis v. Wilder*, 100 Mass. 446; see Hall, Massachusetts Landlord and Tenant, § 26. But whatever may be the scope of a covenant not to underlet, the rule that a covenant not to assign is not broken by a sublease seems to be clearly established.

I must advise you, therefore, that there seems to be no legal objection to the making of a lease by the Boston Fish Market Corporation of a portion of the Fish Pier to another corporation for the establishment and operation of fuel oil and gasoline storage.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Domicil — Change of Domicil of Minor Child.

The domicil of an infant whose father has died and whose mother has married again does not change with the mother's change of domicil, even though he accompany his mother to the new place of abode.

A widowed mother who has remarried cannot change the domicil of her minor child to another State, although she is also guardian by court appointment.

If such a mother were also testamentary guardian, it seems that she would have power to change the domicil of her minor child.

JULY 28, 1924.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:—You request my opinion upon the following questions of domicil:—

“Has a widowed mother who, with her minor child, has been domiciled in one State, and who remarries and takes the child to live with her in the home of her second husband, located in another State, the power to change the domicil of such minor child in each of the following cases, assuming that she intends to keep the child with her in her new home?

1. When she is acting as a natural guardian only, not having received a court appointment as guardian?

2. When she is acting as a guardian with custody of the child by appointment of a court but not in accordance with the terms of a will?

3. When she is acting as a guardian of the child having been appointed by a court under the terms of the will of its deceased father?”

Generally speaking, an infant, unless emancipated, has a derivative domicil. His domicil at birth is that of his father, and changes with his father's change of domicil, whether father and child dwell together or apart. This rule results from the relation of the father as the head of the family, whose domicil draws after it that of his wife and minor children. Upon the death of the father the mother usually becomes the head of the family, and therefore it would seem that the domicil of her minor children should follow hers, at least so long as she remains a widow. The rule has frequently been stated without qualification that under such circumstances the domicil of an infant follows that of his mother. *Pottinger v. Wightman*, 3 Meriv. 67; *Dedham v. Natick*, 16 Mass. 135; *Lamar v. Micou*, 112 U. S. 452, 470. In other cases, however, the view has been held that the domicil of an infant under such circumstances does not necessarily follow that of the mother but depends upon her intention as shown by the facts

of the case, and particularly the fact of the infant's actual residence with or apart from his mother. *Brown v. Lynch*, 2 Bradf. (N. Y.) 214; *In re Beaumont*, (1893) 3 Ch. 190, 195; Dicey on Domicil, pp. 98, 99.

Whatever may be the law in this State upon that question, it seems clearly enough settled that the domicil of an infant does not follow that of his mother upon her second marriage and consequent change of domicil, but that the infant retains his previous domicil even though he accompany his mother to the new place of abode. *Freetown v. Taunton*, 16 Mass. 52; *Lamar v. Micou*, 112 U. S. 452, 470, 471; *School Directors v. James*, 2 Watts. & S. 568; *Johnson v. Cope-land*, 35 Ala. 521; *Mears v. Sinclair*, 1 W. Va. 185; Jacobs, Law of Domicil, § 244. There is some authority to the contrary. *Wheeler v. Hollis*, 19 Tex. 522; *In re Beaumont*, (1893) 3 Ch. 490, 497. I do not, however, regard these cases as controlling in view of the decisions expressly to the contrary in cases cited above. I therefore answer your first question in the negative.

The question to what extent a guardian has the power to change the domicil of his minor ward is a complicated one, involving distinctions which must be borne in mind and considerable conflict of authority. It is clear that a minor ward does not take the domicil of his guardian as a matter of law. *School Directors v. James*, 2 Watts. & S. 568; Jacobs, Law of Domicil, § 256. It is clear, also, that a guardian having the custody of a minor ward by appointment of a court has the power to change the ward's domicil from one county to another within the State—his municipal domicil as it is called. *Holyoke v. Haskins*, 5 Pick. 20; *Kirkland v. Whately*, 4 Allen, 462; *Lamar v. Micou*, 112 U. S. 452, 472; *Ex parte Bartlett*, 4 Bradf. (N. Y.) 221; Jacobs, Law of Domicil, §§ 257, 260. On the other hand, it has been said to be very doubtful whether a guardian not the natural or testamentary guardian of a minor ward can change the ward's domicil to another State. *Lamar v. Micou*, 112 U. S. 452, 472; *Daniel v. Hill*, 52 Ala. 430, 435; Jacobs, Law of Domicil, §§ 260, 263. *Pedan v. Robb's Adm'r*, 8 Ohio, 227, and *Townsend v. Kendall*, 4 Minn. 412, holding the contrary, seem not to be well considered. If a guardian not a natural guardian cannot change the domicil of his ward under those circumstances, and if a widowed mother upon her remarriage cannot change the domicil of her minor child, it is my opinion that such a mother, although she is also guardian by court appointment, cannot affect her child's domicil. I therefore answer your second question in the negative.

A testamentary guardian of a minor ward, appointed by the will of the ward's father, seems to be accorded greater power over his ward's domicil. In that respect such a guardian seems to be regarded as standing to a considerable extent in the shoes of the father himself, although still the domicil of the ward does not follow that of the guardian as a derivative domicil. In *White v. Howard*, 52 Barb. 294, 318, the domicil of an infant was held to have been changed by the appointment by his father of a testamentary guardian residing in another State, and a direction in the will that the infant should reside in that State under the care of the guardian during minority. The suggestion is made in *Lamar v. Micou*, 112 U. S. 452, 471, that "a testamentary guardian nominated by the father may have the same control of the ward's domicil that the father had." It was held in *Delaware, L. & W. R. Co. v. Petrowsky*, 250 Fed. 554, 563 (C. C. A., 2nd Cir.), that "a testamentary guardian nominated by the father has the same control over the ward's domicil that the father had, and may in good faith change it either from one State to another State or from one county to another county in the same State." On the other hand, in *Mears v. Sinclair*, 1 W. Va. 185, the mother, whose change of domicil upon her second marriage was held not to change the domicil of her infant, was also his testamentary guardian. See Jacobs, Law of Domicil, §§ 260, 263.

It is impossible to answer your third question with any degree of certainty. My advice upon that point is that it seems slightly more probable that under the circumstances assumed by you the mother has the power to change the domicil of her minor child.

Very truly yours,

JAY R. BENTON, Attorney General.

Burial Expenses for Persons dying from Certain Contagious Diseases — Overseers of the Poor — Local Boards of Health.

Where a local board of health has acted in a case involving a contagious disease deemed to be dangerous to the public health and reportable under G. L., c. 111, such board shall retain exclusive control of each such case until it is fully terminated. The responsibility of the board of health is not terminated by the death of a patient suffering from such disease, but necessarily includes the duty of supervising and providing for the proper burial of the patient.

JULY 28, 1924.

EUGENE R. KELLEY, M.D., *Commissioner of Public Health.*

DEAR SIR:— You request my opinion as to whether local overseers of the poor or local boards of health are charged with the duty of payment of burial expenses for persons dying from the following contagious diseases: Actinomycosis, measles, tetanus, trichinosis, tuberculosis, typhoid fever, varicella and whooping cough.

You state that a local board of health has voted that it does not consider these diseases "contagious after death," and that the overseers of the poor are, accordingly, the ones to whom to apply for burial if the family is without means to provide therefor.

G. L., c. 111, provides that the Department of Public Health shall define what diseases shall be deemed to be dangerous to the public health, and outlines the duties of local boards of health with respect to such diseases. Section 32 of said chapter provides:—

"A board of health shall retain charge, to the exclusion of the overseers of the poor, of any case arising under this chapter in which it has acted."

This department has, accordingly, ruled in an opinion of my predecessor Hon. J. Weston Allen, dated March 23, 1922, that in any case involving a disease which the Department of Public Health has declared to be dangerous to the public health and which, accordingly, is to be reported under G. L., c. 111, § 112, and a local board of health has acted in the matter, such local board of health shall retain charge thereof, including whatever support may be necessary, to the exclusion of the overseers of the poor.

While it is true that in general the duty of providing for the decent burial of deceased persons without means is imposed upon the overseers of the poor (see G. L., c. 117, §§ 14 and 17), nevertheless, the legislative intent appears to be clear that where a local board of health has acted in a case involving a contagious disease deemed to be dangerous to the public health and reportable under the provisions of G. L., c. 111, such board of health shall retain exclusive control of each such case until it is fully terminated. Having in mind the purpose of the statute and the dangers to be safeguarded in the interest of the public health, I am of the opinion that the responsibility of the board of health is not terminated by the death of such a patient while suffering from such disease, but that such responsibility necessarily includes the duty of supervising and providing for the proper burial of the patient, and I so answer your inquiry.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Metropolitan District Commission — Repair of Bridge — Care and Control — Harvard Bridge.

Under St. 1924, c. 442, providing for the repair of the Harvard Bridge, the Metropolitan District Commission was constituted a public agency for the specific purpose of repairing the bridge, and the bridge was placed under the care and control of the Commission from and after the time of the completion of the work.

While the work of repairing said bridge is proceeding, the board of commissioners appointed under St. 1898, c. 467, and not the Commission, is

responsible for the policing, control and maintenance of portions of the bridge kept open for public travel, and the cities of Boston and Cambridge, and not the Commonwealth, are liable under that statute for damages to persons traveling on the bridge, arising out of any defect or want of repair.

AUG. 4, 1924.

Metropolitan District Commission.

GENTLEMEN:— You ask my opinion upon certain questions arising under St. 1924, c. 442, providing for the repair of the bridge in Massachusetts Avenue across Charles River Basin, known as the Harvard Bridge. By section 1 of this statute the Metropolitan District Commission is authorized and directed to strengthen, repave and repair the bridge and to alter the draw span therein, for which purposes it is authorized to expend not exceeding \$600,000. Sections 2, 3 and 4 provide for the payment and assessment of expenses. Section 5 is as follows:—

“When the work herein authorized shall have been completed, said bridge shall be maintained as a public highway and, so far as consistent with such purpose, the metropolitan district commission shall have over the same all the powers and authority and be subject to the liability now conferred and imposed upon said commission in respect to the care, control and maintenance of roadways and boulevards under its care and control, and the cost of maintenance of said bridge and approaches shall be paid as a part of the cost of maintenance of boulevards by said commission.”

You state that the Metropolitan District Commission proposes to repair a part of the bridge at a time, allowing public travel to continue on the rest of the bridge not under repair, and that when the statute was passed the bridge was policed and maintained under St. 1898, c. 467, by a board of two commissioners, one appointed by the mayor of Boston and one by the mayor of Cambridge, and all damages recovered by reason of any defect or want of repair therein were paid by said cities equally.

You ask my opinion on the following questions:—

“First, whether the board of commissioners of the Boston and Cambridge bridges, appointed by the cities of Boston and Cambridge under the act of 1898, or the Metropolitan District Commission is responsible for the policing, control and maintenance of the portions of the bridge kept open for public travel during the prosecution of the work required by the act of 1924, and whether liability for damages to persons traveling on the bridge, arising out of any defect or want of repair in such traveled portions, would rest upon the cities of Boston and Cambridge or upon the Commonwealth; second, if the obligation of policing, maintenance and repair of the traveled portions during the progress of the work rests upon the Metropolitan District Commission, whether the Commission may spend money out of the appropriation made by the act of 1924 for the purpose of policing, lighting and temporary repairs of the traveled portions of the bridge; third, whether the Commission, prior to the completion of the work, has authority to grant the petition of the Boston Elevated Railway Company for a double-track street railway location on the bridge, as an alteration of and in addition to its existing location granted originally by the cities of Boston and Cambridge; fourth, if the Commonwealth is liable for maintenance of the part of the bridge used for public travel during the progress of the work, whether, under authority of St. 1923, c. 358, it may require the Boston Elevated Railway Company to pay the cost of paving and other surface material on the portions of the bridge occupied by its tracks; and, fifth, if there is liability on the part of the Commonwealth for damages due to defects in the surface of parts of the bridge left open to public travel, what action the Commission may take to safeguard the interests of the Commonwealth.”

In my opinion, section 5 deals exclusively with the period subsequent to the completion of the work of repair. Apparently the purpose of the Legislature was, first, to constitute the Metropolitan District Commission merely a public

agency for the specific purpose of repairing the bridge during that period, imposing upon it no responsibility for the control and maintenance of the bridge until the repairs were finished, and secondly, to place the bridge under the care and control of the Commission from and after the time when the work was completed. At any rate, this seems to be the plain meaning of the statute. I must advise you, therefore, in answer to your first question, that the board of commissioners appointed under St. 1898, c. 467, is responsible for the policing, control and maintenance of the portions of the bridge kept open for public travel while the work of repair is proceeding, and that the cities of Boston and Cambridge, and not the Commonwealth, are liable under that statute for damages to persons traveling on the bridge, arising out of any defect or want of repair in such traveled portions. This constitutes a sufficient answer to your second, fourth and fifth questions.

As to your third question, it is my opinion that the Commission cannot grant a location to take effect prior to the completion of the work, but I see no objection to action on the petition before that time.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Insurance — Furnishing of Bail Bonds by Surety Company — Sale of Powers of Attorney-in-fact for the Execution of Bail Bonds.

A power of attorney-in-fact to execute a bail bond upon behalf of a surety company for the benefit of the holder of the power is not itself a contract of insurance or suretyship, but its exercise will result in the formation of a contract of suretyship. The seller of such a power must be a licensed resident agent of the surety company who issues it, under G. L., c. 175, § 157.

A bond executed by the holder of the power requires the seal of the surety company.

The propriety of the acceptance of a bail bond so executed by the holder of the power, for his own benefit, is a subject for judicial determination.

AUG. 4, 1924.

MR. ARTHUR E. LINNELL, *First Deputy and Acting Commissioner of Insurance*.

DEAR SIR: — You have directed my attention to a "power of attorney-in-fact for the execution of bail bonds," which you state is being sold in this State by a foreign insurance company. I assume from the tenor of your letter that the company is authorized to do the kinds of business referred to in G. L., c. 175, § 105, more particularly the business of acting as surety on bail bonds required in criminal proceedings, and I assume that the actual sales of these powers of attorney are made by individual persons not officers of the company.

The questions upon which you ask my opinion are as follows: —

"1. Does a person who, for compensation, sells these powers of attorney on behalf of this surety company need to be licensed, either as an agent of the company, as provided in section 163 of G. L., c. 175, or as an insurance broker, as provided in section 166 of said chapter?"

2. If a person named as attorney-in-fact in such power of attorney executes a bond in a criminal case by himself as principal and on behalf of the surety company as surety, and, as I am informed is the fact, the corporate seal of the company is not affixed thereto: — (a) Does the lack of the seal invalidate the bond? (b) Does failure to affix the seal constitute a criminal offence?

3. Does section 157 of said chapter apply to bonds executed by corporate surety companies as surety in favor of the Commonwealth or an obligee resident therein?

4. If the preceding question is answered in the affirmative, is a bond executed in this Commonwealth on behalf of the said company as surety, by a person resident in another State, pursuant to such a power of attorney, issued in violation of said section 157, such person not being a licensed resident agent of the company?

5. Does the fact that the person named in the power of attorney executes the bond as principal and as agent, on behalf of the surety company as surety, impair the obligation?

6. Is it discretionary, under section 105 of said chapter, for a magistrate authorized to take bail in a criminal case; (a) To decline to approve a bond executed by such a company; and (b) To decline to recognize such a power of attorney?"

The document which you submit with your letter is a power of attorney the terms of which, in brief, authorize the holder (who, as you inform me, is a purchaser of the document) to act as an attorney-in-fact for the company, to execute and deliver, in its behalf as surety, any bail bond not exceeding five thousand dollars, which may be required by any magistrate as bail or security for the purchaser's own personal appearance before a court, in the event of his having been arrested for any offence committed against the laws relative to the operation of motor vehicles of any of the States of the Union, including offences which may have resulted in injury to persons or damage to property, both as regards misdemeanors and felonies. A copy of a by-law of the company, which is printed on the back of the power of attorney and made a part thereof by reference, provides for the appointment of attorneys-in-fact with the power already referred to herein, namely, the power to execute bail bonds, insuring to their own benefit, on behalf of the company as surety, and provides that when so executed by the attorneys-in-fact such bonds shall be binding upon the company "as if signed by the president and sealed and attested by the secretary."

This document which you have submitted to me is not itself, when delivered, a contract of suretyship, but constitutes in effect a contract to enter into such a contract of suretyship upon the occurrence of certain designated circumstances and the exercise of the power of attorney by the purchaser of the document, who has by his purchase a power coupled with an interest. The sale of the document or power of attorney is the first step in a transaction which brings the company and its customer together into a contractual relationship which, upon the occurrence of a certain hazard, will result at the will of the purchaser in the formation of a contract of suretyship and the execution of a bail bond by the purchaser and the company for the benefit of the former. The sale of the document by some person who acts for the company has no other purpose, aside from the immediate receipt of money by the company from the purchaser, than the formation of the contract of suretyship concurrent with the making of the bond upon the happening of the designated event which is the hazard to be guarded against.

1. The document under consideration is not a contract of insurance. In relation to the making of bonds upon which this company becomes liable as a surety, under G. L., c. 175, § 107, it is, as a foreign company, subject to the other provisions of chapter 175 so far as such provisions are applicable, and agents and brokers are likewise subject to such provisions so far as applicable in connection with bonds upon which the company becomes surety. Of such provisions are those in sections 162 to 166 of chapter 175 which require licenses for agents and brokers who solicit business in, or act in the negotiation of, contracts such as are made by this company, including the negotiation of bonds on which the company is to act as surety.

Although the actual document under consideration which is sold by persons on behalf of the company is not, as has been pointed out, a contract of insurance or of suretyship nor a bond, nevertheless it may lead, and is intended to lead, directly, in the event of the happening of certain occurrences, to the making of a bond upon which the company will act as surety for the benefit of the purchaser. The company receives from the purchaser of the power of attorney a valuable consideration in money for giving him the right to make the company a surety on a bail bond which he may elect to execute for his own benefit upon the happening of a certain contingency. The sale of the power of attorney and the subsequent making of the bond are in effect both parts of a single transaction — the negotiating and making of a bond by the company as surety. The person who actually sells the document or power of attorney is the one

who brings the purchaser to the company and the one who brings him to the formation of a contract of suretyship with the company upon the happening of certain contemplated conditions outside the sphere of control of the one who sells the power. The negotiations which lead to the sale of the power of attorney are presumably made upon the suggestion and solicitation of the person who is the actual seller of the document. He is the one who comes in contact with the purchaser and produces for the benefit of the company an actual buyer of its power of attorney, for whom the company may eventually, and as the result of the sale of the power, make a bond. Bringing the parties together with a view to their making a contract is of the essence of the service performed by an agent or broker. See *I Op. Atty. Gen. 74; Pratt v. Burdon*, 168 Mass. 596.

The act of the person who sells the document is always, in anticipation of the parties and sometimes in reality, the act of one who is a cause of the company's making a bond. If such bond is made it is, from the viewpoint of one who deals in the company's documents, made by means of the act of the seller of the power of attorney. Even if the bond is not subsequently made, through failure of the purchaser to exercise his power, yet the person who sold the power of attorney has brought the company and the purchaser together in a contract which obligates the company, under certain conditions, to make a bond. Such a seller should, in my opinion, be held to come within the terms of G. L., c. 175, § 157, and should therefore be a licensed resident agent of the company.

I accordingly answer your first question to the effect that "a person who, for compensation, sells these powers of attorney" should be licensed as an agent of the company, under the provisions of G. L., c. 175, § 163, and should be a resident of the Commonwealth. I am of the opinion that section 166 of said chapter, concerning brokers, is not applicable under the terms of section 107 to a person who himself sells these powers of attorney for the benefit of the company, which powers, as I have said, form a part of a transaction calculated to result in the making of a bond by the insurance company.

2. G. L., c. 155, § 6, provides that a corporation may have a corporate seal, which it may alter at pleasure. G. L., c. 175, § 105, in relation to the execution of bail bonds by a company of the character of the one issuing the power of attorney under consideration, requires that the bond executed by the company shall be "sealed with its corporate seal." G. L., c. 4, § 7, cl. 29th, provides:—

"If the seal of a court . . . or corporation is required by law to be affixed to a paper, the word 'seal' shall mean either an impression of the official seal upon the paper or an impression on a wafer or wax affixed thereto."

"Official seal," as used in the foregoing section, as applied to a corporation, means a corporate seal adopted by a corporation. The manner of adopting or altering a corporate seal by a foreign insurance corporation, such as the one issuing this power of attorney, is governed by the law of the place of incorporation, but it is evident from the by-law of this corporation, made a part of the power of attorney by reference and printed on the back thereof, that this corporation has a corporate seal and that the effect of the by-law is not to alter the seal but at most to waive the requirement of the fixation of such seal to bail bonds executed by its attorneys-in-fact, and to adopt in place thereof any seal placed upon the bond by its attorneys-in-fact as and for the seal of the corporation. In the absence of the statutory provisions above noted, it might be that the affixing of any seal to the bond by the attorney-in-fact on behalf of the corporation would be a sufficient sealing of the bond. The terms of our statutes, however, cannot be controlled by the by-law of the company, and these statutes require the affixing to the bond of the corporate seal of the company, either in the form of an impression of the seal upon the paper or in the form of an affixation to the document of a wafer or wax bearing an impression of the company's seal.

I answer your second question, in relation to division (a), in the affirmative. It is to be noted, however, that if such a bond had an ordinary seal affixed to it by the attorney-in-fact, though not a corporate seal, and was actually approved by a court, justice or other magistrate, despite the fact that the instru-

ment was not sealed in accordance with the statutory requirements, such approval, under the provisions of G. L., c. 175, § 105, would prevent the defeat of the bond, and the bond would be enforceable against the company acting as surety.

As to division (b) of the second question, upon the facts which you have set forth my answer is in the negative.

3. I answer your third question in the affirmative.

4. The authority given by the power of attorney under consideration to the purchaser is a limited power, not a general power, to transact business or to negotiate contracts or to issue bonds to the public on behalf of the company. The authority of the attorney-in-fact is limited, by the terms of the document sold to him, to the single act of executing bail bonds of a specified maximum amount, relative to certain enumerated offences under particular circumstances, for his own immediate benefit. It is true that an actual contract arises upon the execution of the bond, assuming that the same be properly executed and properly sealed, by an act done by the attorney-in-fact under authority given him by the company, but inasmuch as his authority is limited, as set forth, although he is an agent of the company for a certain definite cause of action, I am of the opinion that he is not such an agent or broker in respect to the bail bond or other matters as is intended to be subject to the provisions of G. L., c. 175, §§ 107 and 157. I am of the opinion that the sale of the power of attorney is an act so essentially a part of the entire contemplated transaction between the company and the purchaser that it, rather than the execution of the power, is to be regarded as the negotiation of the ultimate contract of suretyship and making of the bond. It is then immaterial whether or not the attorney-in-fact be a resident of this State, but it is required, under the provisions of chapter 175, last above mentioned, that the person who actually sells the power of attorney shall be a resident of this State, and, as I have said in an earlier portion of this opinion, a licensed agent of the foreign insurance company issuing the power of attorney.

5. I answer your fifth question in the negative.

6. In relation to your sixth question: The acceptance and approval of a bail bond by a person empowered to take bail in criminal cases is a judicial act. In the exercise of a sound judicial discretion such person has the power to inquire into the authority of whoever executes a bail bond on behalf of another, to pass upon the legality of the form in which the instrument is executed, and to withhold acceptance and approval of such bond for proper cause. Whether or not the contracts involved in the negotiation of the power of attorney and the exercise of the power in relation to bail bonds in criminal cases thereunder are invalid, as against public policy, is a matter of some doubt, and the subject is a proper one for judicial decision. In the absence of a specific case requiring the interposition of the Attorney General, an opinion from him upon this point, in anticipation of judicial determination, cannot at this time be given with propriety.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Insurance — Foreign Life Insurance Company — Participation in Surplus — Annual Dividends — Additional Option — Accelerative Endowment Plan — Commissioner of Insurance.

A participating policy of a foreign life insurance company containing the four options for distributing annual dividends, as provided for in G. L., c. 175, § 140, may also contain a fifth option, called the accelerative endowment plan.

The enumeration of four options in G. L., c. 175, § 140, does not, as matter of law, exclude the insertion of additional options in a life endowment or annuity policy relative to the application of the annual dividend.

It is for the Commissioner of Insurance to determine whether the provisions relative to annual participation in the surplus of the company are "more favorable to the insured or his beneficiary" than those defined by the statute.

Aug. 5, 1924.

Mr. WILLIAM O. RICHARDSON, *Second Deputy and Acting Commissioner of Insurance.*

DEAR SIR:— You inform me that there is pending in your department the matter of the approval or disapproval of forms of accelerative endowment policies issued by the Mutual Benefit Life Insurance Company of Newark, New Jersey. I therefore give consideration to the question as to whether or not that company is writing insurance contrary to the provisions of G. L., c. 175, § 140.

G. L., c. 175, § 132, provides, in part, as follows:—

“No policy of life or endowment insurance and no annuity or pure endowment policy shall be issued or delivered in the commonwealth until a copy of the form thereof has been on file for thirty days with the commissioner, unless before the expiration of said thirty days he shall have approved the form of the policy in writing, nor if the commissioner notifies the company in writing, within said thirty days, that in his opinion the form of the policy does not comply with the laws of the commonwealth, specifying his reasons therefor, provided that such action of the commissioner shall be subject to review by the supreme judicial court; nor shall such policy, except policies of industrial insurance, on which the premiums are payable monthly or oftener, and except annuity or pure endowment policies, whether or not they embody an agreement to refund to the estate of the holder upon his death or to a specified payee any sum not exceeding the premiums paid thereon, be so issued or delivered unless it contains in substance the following:

5. A provision that the policy shall participate in the surplus of the company annually, beginning not later than the end of the third policy year.

A policy shall be deemed to contain any such provision in substance when in the opinion of the commissioner the provision is stated in terms more favorable to the insured or his beneficiary than are herein set forth.”

G. L., c. 175, § 140, provides, in part, as follows:—

“... A foreign life company which does not provide in every participating policy hereafter issued or delivered in the commonwealth that the proportion of the surplus accruing upon said policy shall be ascertained and distributed annually and not otherwise, either by payment in cash of the amount apportioned to a policy, or by its application to the payment of premiums or to the purchase of paid up additions, or for the accumulation of the amounts from time to time apportioned, said accumulations to be subject to withdrawal by the policy holder, shall not be permitted to do new business within the commonwealth.”

The policy of the Mutual Benefit Life Insurance Company contains the following provision as to annual dividends:—

“Upon payment of the second year's Premium and at the end of the second and each subsequent Policy year, while this Policy is in force, and at the end of each complete year of Extended Insurance, this Policy or such Extended Insurance will be credited with such Dividends, including the portion of the divisible surplus accruing thereon, as may be apportioned by the Directors. Dividends thus credited, except in the case of Extended Insurance, may be applied in reduction of Premiums, or upon the Addition, Accumulation, or Accelerative Endowment plan. These options will be available each year, except that Dividends cannot be applied upon any one of said three plans while there is outstanding any credit arising from the application of Dividends upon either of the other two plans. If no other option be selected, Dividends will be paid in cash. The stipulated payments under Settlement Option A or B, or the Instalments certainly payable under Settlement Option C, will be

increased by such Annual Dividends as may be apportioned by the Directors, beginning one year after the maturity of the Policy, but such Dividends will be payable only in cash.

Under the Accelerative Endowment plan Dividends are applied at Net Single Premium Rates to the conversion of the Policy into a specified Endowment, the term of which will be gradually shortened. Upon evidence of insurability satisfactory to the Company this Policy may be restored to the original plan and the Reserve thus released withdrawn in cash, provided the security of any outstanding loan shall not be impaired."

Inspection of the policy discloses that it contains the four options defined in section 140, together with what purports to be a fifth option, which is called by the company the accelerative endowment plan.

This plan is, that instead of using dividends in reduction of the annual premiums the insured may, at his discretion, pay his premiums in full in cash, the annual dividends being applied to convert the policy into an endowment policy and to shorten the endowment term without increasing the annual premiums. The company then agrees to pay the sum insured when the policyholder shall have attained a certain age, or at his previous death, instead of at death only. As each dividend is ascertained and applied the company issues a definite agreement to pay the policy at a specified date.

The accelerative endowment agreement reads as follows:—

"The current dividend having been applied on the Accelerative Endowment plan, it is hereby agreed that:

If this policy be continued in force for its present amount until the Paid-up Option date shown on the face of this receipt and be then surrendered duly receipted, the Company will issue in exchange a Paid-up Participating Policy for the amount of this Policy and will also pay in cash the amount then payable. The Paid-up Policy will be subject to any outstanding indebtedness to the Company on this Policy and will be payable only at death.

Or, if the above option be not exercised and this Policy be continued in force for its present amount until the Maturity date shown on the face of this receipt and the Insured be then living and if the Policy be then surrendered duly receipted the Company will pay the amount stated as then payable less any outstanding indebtedness to the Company on this Policy."

The precise question is whether the addition of this so-called accelerative endowment option to the four options defined in section 140 is in violation of that section.

1. Pursuant to Resolves of 1906, c. 11, the Governor appointed a commission to recodify the insurance laws of this Commonwealth. As this commission was appointed shortly after the so-called Armstrong investigation of life insurance companies in the State of New York, it may be inferred that one reason for the passage of the aforesaid resolve was the evils disclosed by that investigation. One of these evils, which was the subject of investigation in New York, Massachusetts and Illinois, was a plan by which policy-holders were induced to defer payment of dividends upon their several policies for a series of years, in exchange for the promise of the company to divide such portion of the resulting fund as might be determined by the company to be applicable among the "persistent survivors" alive at the end of the deferred period. The Massachusetts commission, in its report made in June, 1906, outlined at length the evils of this deferred dividend, or tontine, plan, which was in essence a gamble rather than a plan of insurance.

By St. 1907, c. 576, the Legislature enacted a law entitled "An Act to recodify, revise and amend the laws relative to insurance, other than fraternal and assessment." It may be inferred that the Legislature availed itself of the information contained in the report of the committee appointed under Resolves of 1906, c. 11. G. L., c. 175, § 132, is a re-enactment of St. 1907, c. 576, § 75, and amendments thereof, while G. L., c. 175, § 140, is a re-enactment of St. 1907, c. 576, § 76, and amendments thereof.

It may be urged with considerable force that when the Legislature, by St. 1907, c. 576, § 76 (now G. L., c. 175, § 140), enumerated four methods by which the annual dividend may be annually applied, it excluded all other modes by implication. It is a familiar rule of statutory construction that an express provision excludes that which is not expressed or reasonably implied from that which is expressed. But all rules of statutory construction are simply guides designed to aid in ascertaining the legislative intent, which are not to be blindly applied or pressed to a dryly logical conclusion. No rule of construction can prevail against that intent if it can be ascertained. For the reasons hereafter set forth, I have reached the conclusion that the above rule of construction is inapplicable.

St. 1907, c. 576, § 75, now G. L., c. 175, § 132, enumerates ten provisions which must be included "in substance" in life, annuity and endowment policies. Clause 5 of that section provides:—

"A provision that the policy shall participate in the surplus of the company annually, beginning not later than the end of the third policy year."

It seems plain that St. 1907, c. 576, § 76, now G. L., c. 175, § 140, is intended to state in greater detail the obligation imposed by said clause 5. It is significant, however, that clause 5 simply requires that "the policy shall participate in the surplus of the company annually." The quoted clause of section 140 requires that the policy must provide that "the proportion of the surplus accruing upon said policy shall be ascertained and distributed annually and not otherwise, . . ." As a matter of grammar the words "and not otherwise" modify the word "annually" rather than the modes of distribution thereafter enumerated. If the Legislature intended that the enumeration should exclude all other methods not enumerated, it would have been easy to have so provided by express words. Under these circumstances, the fact that the words "and not otherwise" are so restrained as to modify the word "annually" acquires significance, especially when section 140 is read with section 132, clause 5.

In *Aetna Life Ins. Co. v. Hardison*, 199 Mass. 181, the insurance company brought a petition under St. 1907, c. 576, § 75, to review the action of the then insurance commissioner in rejecting certain proposed policies of insurance upon the ground that they did not comply with the requirements of that section, which is now G. L., c. 175, § 132. In the course of that opinion the court said, by Knowlton, C.J., at page 187:—

"Another question is whether the provisions which, in substance, must be inserted in the policy, must appear in a form substantially identical with that given in the statute, or whether it is enough if they contain everything, in meaning and legal effect, that the statute prescribes, and at the same time include other things relating to the same subject, no one of which impairs the force of that which is prescribed for the benefit of the insured. Inasmuch as the ten provisions referred to and the other prescribed parts of the policy were intended for the protection of the policy holder, we are of opinion that, if they are contained in substance in the policy, their form may be varied, and additional provisions beneficial to the insured may be inserted, provided the requirements of the statute are satisfied, and are left undiminished by that which is added."

In *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, which was a similar petition, the court said, by Knowlton, C.J., at page 194:—

"No departure from the exact provisions required by the statute should be permitted, unless it is too plain for doubt that the substitution is in every way as advantageous to the insured and as desirable as the prescribed provision."

Reading these cases together, it seems plain that sections 132 and 140 do not prescribe a standard form for life, annuity and endowment policies, even to the extent which was provided in the case of fire policies by section 99. On the contrary, they prescribe a minimum standard below which life, annuity and endowment policies must not fall, no matter in what words such policies may

be expressed. This view is confirmed by the following clause, which was added to section 132 at the time of the revision:—

“A policy shall be deemed to contain any such provision in substance when in the opinion of the commissioner the provision is stated in terms more favorable to the insured or his beneficiary than are herein set forth.”

I am therefore constrained to the opinion that the quoted enumeration in G. L., c. 175, § 140, does not, as matter of law, exclude the insertion of additional options in a life, endowment or annuity policy relative to the application of the annual dividend.

2. Assuming that additional options relative to the application of the annual dividend may be inserted in a life, annuity or endowment policy, the next question is as to how the validity of such additional options shall be determined. G. L., c. 175, § 132, requires that such policies shall be submitted to the Commissioner in order that he may determine whether in his opinion they comply with the law, but subject to review by the Supreme Judicial Court. *Aetna Life Ins. Co. v. Hardison, supra*; *New York Life Ins. Co. v. Hardison, supra*; *Metropolitan Life Ins. Co. v. Insurance Commissioner*, 208 Mass. 386; *Metropolitan Life Ins. Co. v. Insurance Commissioner*, 220 Mass. 52; see also *Curtis v. New York Life Ins. Co.*, 217 Mass. 47. While the authority so exercised by the Commissioner is administrative rather than judicial, the determination of the questions involved, both of law and fact, devolves upon him in the first instance. *New York Life Ins. Co. v. Hardison, supra*. That procedure should be followed in the instant case. The precise issue to be determined is whether the provisions of the instant policy, relative to annual participation in the surplus of the company, are “more favorable to the insured or his beneficiary” than those defined by the statute.

3. I understand that the policies issued in the past by the company have been submitted to and approved by your department. Even if, upon reconsideration of the same question upon a policy newly submitted under section 132, you should reach the conclusion that certain policies had been erroneously approved in the past, the issue of such policies, in the past, in reliance upon such approval, ought not, in my opinion, to exclude the company from doing “new business” within the meaning of section 140. If, however, the company should persist in issuing in the future a policy in a form disapproved by you, upon the ground that it did not comply with section 140, and such disapproval should be sustained upon review by the Supreme Judicial Court, the company should then be excluded from doing “new business” within the Commonwealth.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Insurance — Broker — Advance Payment of Premiums for Customers.

The extension of credit to customers by a broker for the amount of premium payments advanced by him is not a violation of G. L., c. 175, §§ 182–184.

AUG. 5, 1924.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:—You have asked my opinion as to the legality of a certain course of action which an insurance broker proposes to take in connection with placing or negotiating policies of insurance. I understand that the broker proposes to follow the course of action noted in your letter with all his customers, both those with whom he has been accustomed to deal and those with whom he may do business in the future, and intends to make it known among persons interested in obtaining policies of insurance that those who desire to place orders for insurance policies with him may avail themselves of the benefits of his proposed mode of transacting business. You state in your letter:—

“A certain broker proposes to agree with his clients to advance their premiums to the company issuing their policies, which he negotiates, and the clients agree to reimburse the broker for such advances in monthly instalments with an interest charge.

I respectfully request your opinion on the following questions:

1. On the facts premised, is there, as a matter of law, any violation of G. L., c. 175, §§ 182-184?

2. Does such agreement, as a matter of law, amount to allowing 'a valuable consideration or inducement not specified in the policy,' within the meaning of said sections, (a) if interest is charged and collected on the deferred payments, and (b) if interest is not so charged and collected?"

G. L., c. 175, §§ 182-184, are as follows:—

"SECTION 182. No company, no officer or agent thereof and no insurance broker shall pay or allow, or offer to pay or allow, in connection with placing or negotiating any policy of insurance or any annuity or pure endowment contract or the continuance or renewal thereof, any valuable consideration or inducement not specified in the policy or contract, or any special favor or advantage in the dividends or other benefits to accrue thereon; or shall give, sell or purchase, or offer to give, sell or purchase, anything of value whatsoever not specified in the policy; or shall give, sell, negotiate, deliver, issue, or authorize to issue or offer to give, sell, negotiate, deliver, issue, or authorize to issue any policy of workmen's compensation insurance at a rate less than that approved by the commissioner. No such company, officer, agent or broker shall at any time pay or allow, or offer to pay or allow, any rebate of any premium paid or payable on any policy of insurance or any annuity or pure endowment contract.

SECTION 183. No person shall receive or accept from any company or officer or agent thereof, or any insurance broker, or any other person, any such rebate of premium paid or payable on the policy or contract, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement not specified in the policy or contract or any policy of workmen's compensation insurance at a rate less than that approved by the commissioner. No person shall be excused from testifying, or from producing any books, papers, contracts, agreements or documents at the trial of any other person charged with violating any provision of this and the preceding section, on the ground that such testimony or evidence may tend to incriminate himself; but no person shall be prosecuted for any act concerning which he shall be compelled so to testify or produce evidence, documentary or otherwise, except for perjury committed in so testifying.

SECTION 184. The two preceding sections shall apply to all kinds of insurance, including contracts of corporate suretyship, except those specified in the second clause of section forty-seven, as to which they shall apply only to insurance against loss or damage to motor vehicles, their fittings and contents and against loss or damage caused by teams, automobiles or other vehicles, excepting rolling stock of railways, as provided in said second clause. The said sections shall not prohibit any company from paying a commission to another company or to any person who is duly licensed as an insurance agent of such company or as an insurance broker and who holds himself out and carries on business in good faith as such, or prohibit any such person or any company from receiving a commission in respect to any policy under which he or it is insured, or in respect to any annuity or pure endowment contract held by him; nor shall said sections apply to (1) a distribution, without special favor or advantage, by mutual companies to policy holders of savings, earnings or surplus without specification thereof in the policy, or (2) the furnishing to the insured of information or advice by any company, officer, agent or broker with regard to any risk for the purpose of reducing the liability of loss, or (3) the payment or allowance to the insured of a return premium or a cash surrender or other value upon cancellation, lapse or surrender of a policy."

These sections are penal in their nature, and render both the broker and the insured who violate their provisions liable to the punishment provided for in section 194, but under the terms of section 193 the contract of insurance is not made invalid by the violation of these sections by the broker and the insured.

The primary purpose of sections 182 to 184 is, as stated in opinions of former Attorneys General, to prevent discriminations between individuals of

the same class who may be applicants for insurance (IV Op. Atty. Gen. 503; V Op. Atty. Gen. 543), and to eliminate the evils of the practice of rebating, which is in itself a form of such discrimination. The performance of certain specific acts is also forbidden by the statute, and among its terms is a prohibition against paying or allowing, or offering to pay or allow, "any valuable consideration or inducement" not specified in the policy in connection with placing or negotiating any policy of insurance. In the earlier forms in which this enactment appeared brokers were not included in the list of those falling within the terms of the prohibitions of section 182, but they were added to the list by St. 1908, c. 511, and have been retained therein ever since.

The essential problem presented by the terms of your communication calls for a determination as to whether or not the extension of credit to customers by a broker who advances money to pay premiums is a "valuable consideration or inducement" within the meaning of the statute, when the policy contains no provision relative to extension of credit.

To allow credit to another in relation to the purchase of something desired might, in common parlance, be called a valuable consideration for the purchase of the desired thing. Escape from the necessity for immediate payment in cash is perhaps, in a popular sense, a desirable or valuable state. Forbearance to sue upon a debt due may even be a sufficient consideration for the formation of a contract; but the customer, upon the state of facts presented by your letter, is placed by the action of the broker in the position of a debtor,—he is bound to pay the sum advanced in a manner and at a time fixed by agreement. He is not discharged from the obligation to pay the premium on his policy. He may even, under certain arrangements, be bound to pay the amount with interest. The customer's fundamental financial position is in no way bettered by the extension of credit. He has not in reality received a consideration or inducement of value.

The broker's offer is open to all, the other policy-holders are not affected as the cash is paid into the treasury of the company, and other brokers may pursue the same course with their customers; so that the evil of discrimination among individuals of the same class, at which the statute is primarily aimed, is not induced by the broker's proposed course of action.

It is a matter of common knowledge that the business of selling insurance, like other businesses of similar magnitude and complexity, is carried on under a system whereby credits are extended to customers by agents and brokers. Immediate or advance payment of money to be applied upon premiums or renewal charges is not customarily required by agents or brokers from their regular customers, but by a system of bookkeeping the customers' payments are taken care of as they fall due and bills for such amounts sent to them and their accounts debited with corresponding sums on the books of the agents or brokers. The relation of debtor and creditor is then established between the agents or brokers and the respective customers. An entirely different situation would exist under such circumstances, and would exist under the facts outlined in your letter, if the agent or broker were to pay the amount of the premium without charging it to the customer and without creating the relation of debtor and creditor. The pursuance of the latter course would clearly fall within the prohibition of the statute; the customer would then receive virtually a gift of the amount involved in the payment of the first premium, his financial position would experience a gain with no corresponding obligation, and he would receive "a valuable consideration or inducement" in connection with negotiating the policy.

The acceptance of an interest-bearing note by the agent of an insurance company, who in turn became responsible, either by payment or by a debit in mutual accounts, to the company for the amount of the premium, has been treated by courts in other States as if it involved no breach of prohibitions in statutes not dissimilar to those in our own. *Ellis v. Anderson*, 49 Pa. Sup. Ct. 245; *Northern Assurance Co. v. Meyer*, 194 Mich. 371. The giving of credit for a premium on a temporary policy by agents has been treated by our Supreme Court as proper, and the fact that it was the general custom in regard to such policies to give credit was recognized by the court. *Baker v. Commercial Union*

Assurance Co., 162 Mass. 358. Unless the provisions of the sections of the statute under discussion forbid it, there is no impropriety in the broker paying the premium for the insured and making mutually agreeable arrangements with the latter for the repayment of the amount to him. *Wheeler v. Watertown Fire Ins. Co.*, 131 Mass. 1.

In view of the foregoing considerations, I am of the opinion that the payment or the promise of payment of a premium by the broker, upon the understanding that the amount thereof shall be repaid to him by the customer, upon terms mutually agreed upon, is not, as a matter of law, "a valuable consideration or inducement" within the meaning of the sections of the statute under consideration.

I accordingly answer your first question and your second question, in both its parts, in the negative.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Elevators — Inspection of Elevators in Private Residences.

The provisions of G. L., c. 143, §§ 62-71, apply to the inspection, installation and operation of elevators in private residences.

AUG. 5, 1924.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You have asked my opinion regarding the application of certain sections of the General Laws to elevators in private residences. Your request is as follows: —

"I would respectfully request your opinion as to whether the provisions of the law relative to the installation and operation of elevators, as contained in G. L., c. 143, §§ 62-71, inclusive, apply to such installation and operation in private residences."

The first provision of our statutes regarding protection of the public relative to elevators is contained in St. 1877, c. 214, § 2, and is specifically limited to manufacturing establishments. The statute is entitled "An Act relating to the inspection of factories and public buildings." This section is inserted in substance in P. S., c. 104, § 14, in a statute entitled "Of the inspection of buildings." By St. 1882, c. 208, P. S., c. 104, was amended in an act entitled "An Act relating to the inspection of buildings," by adding after the word "factory" the words "mercantile or public buildings," and by adding a clause relative to a safety device for elevators, so as to enlarge to that extent the terms of the earlier statutes. The building laws were codified in St. 1894, c. 481, and the provisions of P. S., c. 104, § 14, as enlarged by St. 1882, c. 208, were placed in sections 41 and 42, but there the extent of the provisions relating to the protection of the public in relation to elevators was still distinctly limited to elevators in factories and mercantile or public buildings. St. 1901, c. 439, enlarged the number of protective appliances required by law on elevators but, properly construed, did not increase the previously enumerated classes of elevators to which these provisions were applicable. St. 1894, c. 481, §§ 41 and 42, as enlarged, were embodied in R. L., c. 104, §§ 27 and 28, in a chapter entitled "Of the inspection of buildings." As therein set forth neither section contains in words the specific limitation to "factory, mercantile or public building," but there is nothing in the language used in these provisions which, read in the light of the history of the legislation on the subject, can be said to have enlarged the classes of buildings to the elevators of which they were applicable. See *Rippucci v. Commonwealth Construction Co.*, 190 Mass. 518.

In 1913 the Legislature passed an act, chapter 806, entitled "An Act relative to the installation, alteration and inspection of elevators and to the appointment of a board of elevator regulations." This act provides a mode for the supervision of the construction of elevators, with authority for such supervision in various officials designated with relation to the geographical location of such elevators, and by its phraseology, repeatedly used, appears to be applicable to "all" elevators, irrespective of the character of the buildings in which

they may be respectively placed. It provides for the appointment of a board of elevator regulations, with power to frame regulations of a wide variety relative to "all elevators," and provides penalties for breach of such regulations. The sections of the Revised Laws previously referred to as embodying substantially the terms and the implied limitations are specifically repealed, together with other sections relative to the operation of elevators, contained in various statutes. The act of 1913 is now contained, virtually in its entirety, in G. L., c. 143, §§ 62-71. Said chapter 143 is entitled "Inspection and regulation of, and licenses for, buildings, elevators and cinematographs."

I am of the opinion that St. 1913, c. 806, was applicable to all elevators, and that its provisions show that it was the intention of the Legislature to enlarge the classes of elevators subject to regulation beyond the classes in specified kinds of buildings, to which the restrictions had been limited by previous statutes; and that the provisions of St. 1913, c. 806, as now embodied in G. L., c. 143, §§ 62-71, apply to elevators in private residences as well as to those of other kinds of buildings. An elevator, as a matter of common knowledge, is a machine of such a character that unless properly constructed, installed and maintained it may be a source of great danger to persons using it, and it is of such a character as to make regulations looking to its safety in private residences within the power of the Legislature to enact.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Education — Pecuniary Interest in School Books — Principal of State Normal School.

G. L., c. 15, § 5, providing that certain "agents, clerks and other assistants" appointed by the Commissioner of Education shall have no pecuniary interest in any school book used in public schools, does not apply to a principal of a State normal school.

AUG. 5, 1924.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You request my opinion as to whether the provision contained in G. L., c. 15, § 5, in regard to certain appointees of the board having a pecuniary interest in the publication or sale of textbooks, applies to a principal of a State normal school.

That part of G. L., c. 15, § 5, to which you refer reads as follows:—

"... Except in the case of the teachers' retirement board, the division of public libraries, the division of the blind and institutions under the department, the commissioner may appoint such agents, clerks and other assistants as the work of the department may require, may assign them to divisions, transfer and remove them and fix their compensation, but none of such employees shall have any direct or indirect pecuniary interest in the publication or sale of any textbook or school book, or article of school supply used in the public schools of the commonwealth. . . ."

The provision contained in this section in regard to pecuniary interest in textbooks applies solely to appointees under that section. The provision originated in St. 1896, c. 429, and applied to "agents," such as might be appointed by the board "to visit the several cities and towns," within P. S. c. 41, § 9. See R. L., c. 39, § 9. The provision as it appears in G. L., c. 15, § 5, applies to such "agents, clerks and other assistants" as may be appointed by the board under said section 5. The principal of a State normal school is not properly described by the words above quoted, nor is he appointed under said section 5, but rather under G. L., c. 73.

I am therefore of the opinion that the provisions of G. L., c. 15, § 5, to which you refer, do not apply to a principal of a State normal school.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Taxation — Income Tax — Gain received by Appointee under General Power.

No estate is vested in the person appointed by the donee of a general power until the appointment is made.

A gain from the sale of securities received by trustees to whom property was appointed under a general power must be determined on the basis of its value at the time the property passed to them.

AUG. 5, 1924.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You ask my opinion as to the proper interpretation of G. L., c. 62, § 5 (c), in its application to certain facts stated by you as follows: —

“Under the will of A, who died in 1889, a resident of Boston, the residue of his property is divided into shares, one of which shares was left to trustees to hold and pay the income therefrom to B for life and upon B's death to pay over the principal of the trust to such persons as B should appoint by his will. B died in June, 1921, a resident of Massachusetts, and by his will appointed the property to the trustees to hold for the benefit of two persons, C and D, one of whom was a resident of Massachusetts and the other a non-resident of Massachusetts.

During the year 1923 the trustees sold certain securities constituting a part of the principal of the trust, and the question is, upon what ‘cost’ the gain or loss from the sale is to be determined.”

G. L., c. 62, § 5, cl. (c), as amended by St. 1921, c. 376, and by St. 1922, c. 449, and § 7, in part, are as follows: —

“SECTION 5. Income of the following classes received by any inhabitant of the commonwealth during the preceding calendar year shall be taxed as follows:

(c) The excess of the gains over the losses received by the taxpayer from purchases or sales of intangible personal property, whether or not said taxpayer is engaged in the business of dealing in such property, shall be taxed at the rate of three per cent per annum. Any trustee or other fiduciary may charge any taxes paid under this paragraph against principal in any accounting which he makes as such trustee. If, in any exchange of shares upon the reorganization of one or more corporations or of one or more partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, the new shares received in exchange for the shares surrendered represent the same interest in the same assets, no gain or loss shall be deemed to accrue from the transaction until a sale or further exchange of such new shares is made.

SECTION 7. . . . In determining gains or losses realized from sale of capital assets, the basis of determination, in case of property owned on January first, nineteen hundred and sixteen, shall be the value on that date, and in case of property acquired thereafter, the value on the date when it is acquired.”

In *Bingham v. Commissioner of Corporations and Taxation*, 249 Mass. 79, the complainants, as executors, had sold securities in the estate at a price greater than their cost to the testator but less than their value at the time of his death, and a tax had been levied on the gain over the cost to the testator, which the court held was invalid and should be abated. That case is essentially different from the case which you state. The court there held that the passing of the testator's property to the executors was a new acquisition by them, and that therefore any increase in value prior to that time was not a gain realized by them when the securities were sold. The case you put raises the different question whether gains received from purchases and sales of intangible personal property by an appointee under a general power are to be measured by the difference between the sale price and the value at the time the power was granted, or by the difference between the sale price and the value at the time the power was exercised.

But while the decision in *Bingham v. Commissioner of Corporations and Taxation* is not an authority which is decisive of the question under discussion, the opinion contains an expression of views as to the nature of income which throws considerable light on that question. Concerning the meaning of the word "income," as used in the income tax law, Chief Justice Rugg says as follows:

"The word 'income' as used in these sections may be said to include the true increase in amount of wealth which comes to a person during a stated period of time. It imports an actual gain. It is based on the practical conception that additional property has come to the taxpayer out of which some contribution is exacted and can be paid for the support of government. Income indicates increase of wealth in hand out of which money may be taken to satisfy the enforced pecuniary contributions levied to help bear the public expenses. It does not comprehend increase in the value of capital investment discernible only by estimation and not otherwise. It refers simply to an increase in value realized by sales or conversion of capital assets."

It is a general principal that appointed property passes to the appointee under a power of appointment not from the donee of the power but from the donor. As the court said in *Walker v. Treasurer and Receiver General*, 221 Mass. 600, 602:—

"The power is a deputation of the donee to act for the donor in disposing of the donor's property. Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power."

So it was held that under the succession tax law the decedent whose estate was liable to taxation was the donor of a power of appointment rather than the donee. *Emmons v. Shaw*, 171 Mass. 410. See, also, *Walker v. Treasurer and Receiver General*, 221 Mass. 600; *Hill v. Treasurer and Receiver General*, 229 Mass. 474; *Minot v. Paine*, 230 Mass. 514. But after the passage of St. 1909, c. 527, § 8 (G. L., c. 65, § 2), providing for the taxation under the succession tax law of property passing by the exercise of a power of appointment, in certain cases, as property belonging to the donee of the power and disposed of by him, it was held in *Minot v. Treasurer and Receiver General*, 207 Mass. 588, that such a provision was within the constitutional power of the Legislature. In the opinion in that case the court said on the subject, pages 590 to 592, as follows:—

"It generally has been held that a title derived through a power of appointment in a will or deed is to be taken as coming from the donor of the power, rather than from the donee. But in many particulars the donee is often more directly responsible for the possession and enjoyment of the beneficiary than the donor.

The condition of property which is subject to a general power of appointment contained in a will or deed, and which, in default of appointment, is to be given over to persons named, is peculiar. The donee of the power has no title to it, but he has an absolute right to dispose of it by the exercise of the power. . . . After a will or deed containing such a power has taken effect and before the donee of the power has acted under it, have all rights of succession in possession and enjoyment so vested that there is no possibility of a succession that will come into existence later, when the final disposition of the property is determined by an exercise of the power or by a failure to exercise it? It is held, and so far as we know without dissent, that, through the exercise of the power, a right of succession to property may come into existence afterwards, which properly may be a subject for the imposition of a tax. . . . The tax is imposed as of the time when the succession in possession and enjoyment occurs through the happening of the event that determines it."

Clearly, no estate is vested in the person appointed by the donee of a general power until the appointment is made. Applying to this situation the words of Chief Justice Rugg quoted above, there can be no true increase in the amount

of wealth which comes to an appointee under a general power, by a sale of the appointed property, from any increase in value of the property before his appointment. Prior to the time of his appointment the property has not passed to him in possession or enjoyment. Prior to that time there was nothing from which he could derive any actual gain.

The fact that in the case you state the trustees to whom the property was appointed happened to be the same persons who previously held it makes no difference. After the appointment they held it by a different title. It is my opinion that the trustees have derived no gain from any increase in value of the securities subsequently sold by them prior to the time of their appointment, and that any gain received by them must be determined on the basis of its value when it passed to them by virtue of the appointment.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — "Anti-aid" Amendment — Reimbursement of Towns for Teachers' Salaries.

A school cannot be partly private and be the object of an expenditure of public funds.

The Punchard Free School in Andover is, on the facts, a public school.

A school may be in receipt of private aid without losing its public character. Under G. L., c. 70, pt. I, a town may be reimbursed with respect of only those teachers' salaries which are in fact paid by the town.

AUG. 6, 1924.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— In connection with the duties of your department in carrying out the provisions of G. L., c. 70, pt. I, you have asked my opinion about the status of the Punchard Free School in Andover, and whether or not the Commonwealth may under that chapter allow reimbursement to the town of Andover on salaries paid to teachers in this school.

By will proved in 1850 Benjamin H. Punchard gave fifty thousand dollars to the town of Andover "for the purpose of founding a free school." The will provided for the expenditure of some of the fund in the purchase of buildings and for the maintenance of the school out of the income of the balance. There were detailed provisions for the selection of trustees, who were to manage the school. There were certain restrictions upon the way in which the school should be conducted. The trustees of the school were made a corporation by St. 1851, c. 7, with powers and duties appropriate for the administration of the trust created by the Punchard will. In 1868 the schoolhouse which was built by the trustees was destroyed by fire, and a statute of 1869, chapter 396, authorizing the town to appropriate funds to aid the trustees in erecting a new schoolhouse and to raise annually a further sum to aid in defraying the school expenses, gave rise to the decision in *Jenkins v. Andover*, 103 Mass. 94. The court held the statute unconstitutional, as violating what was then the eighteenth article of amendment of the Massachusetts Constitution. The court pointed out that the appropriation was clearly an appropriation intended for the support of public and common schools; that equally clearly the Punchard School, being under the control of the trustees, was not a school "conducted according to law, under the order and superintendence of the authorities of the town." "It would be inconsistent with the terms of the will to give them any such control." *Ibid.*, p. 102. Between the time of *Jenkins v. Andover* and the present there has intervened a period of transition in which the power of control and the responsibility of maintenance have gradually shifted away from the trustees and toward the town. Whether or not the respective courses of the town and of the trustees during this period were valid is not now a necessary inquiry.

Your letters, and those which you have presented to me as embodying the present state of facts, disclose a situation wholly different from that of 1869. You state that today the town owns the grounds and the buildings and equipment, furnishes all the text books and supplies, pays the janitor's salary, pays

the salary of nine teachers and of all special teachers connected with the school, and pays twelve-seventeenths of the salary of the principal; that it appropriates for the school nearly thirty-one thousand dollars a year; and that the trustees of the Punchard Fund now contribute some thirty-four hundred dollars a year, paying five-seventeenths of the principal's salary and the whole of the salary of one teacher. In one place you state that technically the trustees have the power to reject or retain this teacher, but that it has been the custom for many years to act upon the recommendation of the principal and the superintendent of schools. You state nothing indicating any present power of control by the trustees of the Punchard fund except this "technical power."

In the letter presented by your department as a résumé of the facts concerning control as they now pertain, it is said that "all supervision, organization, and administration of the school are entirely in the hands of the superintendent and principal"; and further, that if the trustees should "take any action not in accordance with the will of the school committee, all responsibilities of administration would probably be assumed by the committee." Summarizing, you have described a condition of complete public ownership and public control.

1. You ask: "Under our present Constitution is it possible for a school to be part private and part public?" Without overlooking the fact that the standing of a public school, as such, is not impaired by the mere receipt of contributions to support from private quarters (see *Jenkins v. Andover*, *supra*, at page 99), or the fact that, conceivably, a public school can be operated in conjunction with a private school in such fashion as together to perform the practical function of a single educational unit (see *Dickey v. Trustees of Putnam Free School*, 197 Mass. 468; Attorney General's Report, 1922, p. 75, at 77), it is possible, nevertheless, to answer your question with a categorical negative so far as pertains to the administration of G. L., c. 70, pt. I. The relevant language of Mass. Const. Amend. XLVI is as follows:—

"All moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding . . . any . . . school . . . which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both . . ."

It is perfectly clear that a school cannot be partly under private management and at the same time participate in public character to a sufficient extent to be the object of the expenditure of public funds.

2. You ask whether the Punchard School can "be considered under the law a public high school." In respect of the meaning which these words have in connection with your third question it is my opinion that the town of Andover is maintaining in fact a public high school. On the facts stated; the town is maintaining for the purpose of secondary education a complete plant and equipment and a substantial staff of teachers, all at the town's expense and under the town's control and management. If the relation of the trustees to the town be simply that of a contributor to the support of the school, whether by the furnishing of money which may be used in paying the salary of a teacher and part of the salary of the principal, or by the furnishing, as it were, of a prepaid teacher and prepaid five-seventeenths of a principal, the school, as maintained by the town, is none the less a public school, therefore. *Jenkins v. Andover*, *supra*, at p. 99. It is apparently not a fact that (*cf. Dickey v. Trustees of Putnam Free School*, *supra*) the trustees are maintaining a separate school with a teaching staff as above, which is, however, co-operating with the public school. The circumstance that the Department of Education, under G. L., c. 71, § 4, has exempted the town of Andover from maintaining a high school is not inconsistent with the fact that the town seems, nevertheless,

to be in substance maintaining such an institution. Only the existence of some power of control in the trustees could challenge the validity of these conclusions.

3. You ask whether the Commonwealth, under G. L., c. 70, pt. I, can allow reimbursement to the town of Andover on salaries paid any teacher employed to teach in the Punchard School. The answer to this question is governed by the constitutional provision already quoted. So far as ownership of the school is thereby made a prerequisite to the allowing of such reimbursement, the condition is fulfilled upon the facts stated. The prerequisite of the fact of complete public control by the appropriate local officers seems also to be satisfied by the circumstances upon which this opinion is predicated. Upon the face of your letter there seems to remain no power of control in the trustees over what probably constitutes a complete educational unit. If so, the facts of this case are as strong as those upon which was based I Op. Atty. Gen. 427. They are quite distinguishable, on the other hand, from the facts upon which was found II Op. Atty. Gen. 75, where the school in question was an incorporated academy under the ultimate direction of a supervising board of three persons, of whom only one was appointed by the school committee of the town, one by the trustees of the academy, who were wholly independent of the town's authority, and one by the two other members just mentioned. The reimbursement authorized by G. L., c. 70, pt. I, and acts in amendment thereof, may, therefore, be paid, so far as its terms permit, with respect of the nine teachers who are paid wholly by the town, and with respect of the principal also in so far as the salary paid him by the town corresponds to the provisions of G. L., c. 70, § 2, as amended by St. 1921, c. 420, § 1, relating to the minimum salaries against which reimbursement shall be allowed. No reimbursement is permissible on account of the teacher who is wholly paid by the trustees. This latter conclusion is reached without necessarily deciding the correct legal interpretation to be placed upon the arrangement by which this teacher is furnished, for the short reason that G. L., c. 70, pt. I, contemplates part reimbursement for only such salaries as are paid by the town.

Very truly yours,

JAY R. BENTON, *Attorney General*.

State Prison — Concurrent Sentences — Aggregate of the Minimum Terms.

The court, in imposing several sentences to the State Prison, may order that they be served concurrently.

The aggregate of the minimum terms of several concurrent sentences is the largest minimum term.

AUG. 14, 1924.

HON. SANFORD BATES, *Commissioner of Correction*.

DEAR SIR: — You request my opinion as to the effect of a provision in a sentence to the State Prison that it "run concurrently" with another sentence referred to.

"In the absence of a statute to the contrary, if it is not stated in either of two or more sentences imposed at the same time that the imprisonment under any one of them shall take effect at the expiration of the others, the periods of time named will run concurrently and the punishments will be executed simultaneously." 16 C. J., p. 1374. See also *Kirkman v. McLaughry*, 152 Fed. 255; *Kite v. Commonwealth*, 11 Met. 581.

St. 1884, c. 265 (G. L., c. 279, § 8), provided that commitment may be made on two or more sentences at the same time, and that "such sentences shall be served in the order named in the mittimuses."

St. 1897, c. 294, § 1 (last part of G. L., c. 279, § 24), provided that an additional sentence imposed under St. 1895, c. 504, providing for the imposition of maximum and minimum sentences (first part of G. L., c. 279, § 24), "shall take effect upon the expiration of the minimum term of the preceding sentence."

The purpose of these two acts (St. 1884, c. 265, and St. 1897, c. 294, § 1) was to change the common law that where there was no direction to the contrary sentences should run concurrently. These acts were not intended to

restrict the power of the courts to impose a sentence to run concurrently with another sentence. The provision contained in St. 1897, c. 294, § 1 (last part of G. L., c. 279, § 24), has been repealed by St. 1924, c. 152, and St. 1924, c. 165, was enacted, to the effect that when a sentence is ordered to take effect "from and after the expiration" of a previous sentence such previous sentence shall be deemed to have expired when the prisoner is released therefrom by parole or otherwise. Even if it were thought that the statutes did restrict the power of the courts to order a sentence to run concurrently, yet if the court should insert such a provision in a sentence it is difficult to see how the sentence can be enforced as an unqualified one.

If the court imposes several sentences and orders that they be served concurrently, "the aggregate of the minimum terms of the several sentences," under G. L., c. 127, §§ 131 and 133, is the longest minimum term. Thus, if two sentences, one three to five years and another six to eight years, were imposed to run concurrently, the aggregate of the minimum terms of the two sentences would be six years.

I am therefore of the opinion that the court, in imposing several sentences to State Prison, may, in its discretion, order that they be served concurrently and that the aggregate of the minimum terms of several concurrent sentences is the longest minimum term.

Very truly yours,

JAY R. BENTON, *Attorney General*.

State Police — Power under Volstead Act — Power conferred on State Officers by Congress.

State police officers, as such, have no authority or power to act under the National Prohibition Act.

The police, however, as private citizens may exercise such powers in apprehending violators of the Federal law as are shared by them in common with all other citizens.

While Congress may confer power upon State officers which the latter may, in their discretion, exercise, unless prohibited by State legislation, Congress cannot compel them to act.

AUG. 14, 1924.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You request my opinion whether under section 26 of the Volstead Act, so called, members of the State Police are given authority to seize vehicles in which intoxicating liquors are being transported and to arrest the person in charge thereof.

The Act of October 28, 1919, c. 85, title II, § 26, called the "National Prohibition Act," provides, in part, as follows: —

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. . . ."

The act is a Federal statute, relates to a violation of Federal law and confers drastic power of seizure of private property and arrest of persons without warrant. State officers of the law, as such, have no power under the act unless section 26, by the use of the words "any officer of the law," confers such power upon them. It is not to be lightly presumed that Congress has conferred such extensive powers upon the innumerable thousands of officers of the law of all the States of the Union, over whose appointment it has no control and whose actions it cannot govern. In my opinion, the statute should not be construed as conferring these powers upon the officers of the independent sovereign States unless the context of the act clearly warrants such interpretation.

Section 2 of the act confers powers and imposes duties upon certain Federal officers, and authorizes the officers enumerated in U. S. Rev. Stat., § 1014, to issue search warrants. The officers there enumerated, among others, are certain magistrates "of any State." Section 22 of the act specifically confers power to bring action to enjoin a liquor nuisance, as defined in the act, upon the "prosecuting attorney of any State or any subdivision thereof." It thus appears that when Congress intended to confer power under the act upon State officers it specifically referred to officers of a State.

Section 26, which refers to "any officer of the law," in the very next line refers to a "violation of the law." The latter, without question, refers exclusively to a violation of the Federal law. It would be a strain upon language to interpret the words "the law" as State or Federal law, when used in connection with the words "officer of the law," and in the next line of the section to interpret "the law" merely as Federal law.

Moreover, the section imposes a duty upon the officers of the law to seize and arrest. It is well established that while Congress may confer power upon State officers, which the latter may exercise or not in their discretion, unless prohibited by State legislation, Congress cannot lawfully compel them to act. *Goulis v. Judge of District Court*, 246 Mass. 1; *United States v. Jones*, 109 U. S. 513, 519; *Robertson v. Baldwin*, 165 U. S. 275; *Dallemagne v. Moisan*, 197 U. S. 169. Even if the statute specifically empowered members of the State police to act, they could refrain from exercising the powers so granted if they so desired.

Section 28 of the act provides:—

"The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States."

This section grants protection only to officers of the United States. It is difficult to suppose that Congress, by section 26, conferred power upon State officers of the law and deliberately excluded them by section 28 from the protection afforded to officers of the United States. It therefore seems to me that Congress, by the use of the words "any officer of the law," in section 26 of the act, conferred power only on Federal officers and did not authorize State officers to act thereunder. See to the same effect an opinion of the Attorney General of Maryland to the Police Commissioner of Baltimore, dated August 5, 1920.

I am accordingly of the opinion that members of the State police, as such, have no authority or power to act under the National Prohibition Act. The police, however, are private citizens also, and, as such, may exercise such powers in apprehending violators of the Federal law as are shared by them in common with all other citizens.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Metropolitan Police — Civil Service — Promotion.

The power temporarily to assign officers of the police force to duties of a higher rank is necessarily included in the power of the Metropolitan District Commission to organize its police force.

A temporary assignment of such officer to duties commonly pertaining to an office of a higher grade does not constitute a promotion, within the purview of the civil service laws.

Metropolitan District Commission.

AUG. 27, 1924.

GENTLEMEN:— You request my opinion as to whether the vote of the Commission that "until further orders Captain Spencer G. Hawkins be in charge and command of police matters in all divisions" constitutes a promotion within

the meaning of G. L., c. 31. You state that the Commission has not made Captain Hawkins acting superintendent, has given him no additional salary and still designates him as captain.

Under St. 1922, c. 406, the Commission was specifically authorized to appoint, and did appoint, Herbert W. West as superintendent of police. Mr. West recently died, and the above vote was presumably passed to meet the emergency. The vote, by its very terms, assigns Captain Hawkins to certain duties only "until further orders." The case, therefore, is merely one where a captain of police has been temporarily assigned to other duties involving greater powers.

The power temporarily to assign officers of the police force to duties of a higher rank is necessarily included in the power of the Commission to organize its police force. G. L., c. 28. A temporary assignment of such officer to duties commonly pertaining to an office of a higher grade does not constitute a promotion within the purview of the civil service laws. On the assumption, therefore, that the assignment is merely temporary, I am of the opinion that the vote passed by the Commission does not constitute such promotion. I do not pass upon the question which would arise if a permanent assignment were to be made.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Back Bay Lands — Equitable Restrictions.

The restrictions in deeds from the Commonwealth against use for "any mechanical or manufacturing purposes" do not forbid the use of premises for offices or stores.

AUG. 27, 1924.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You have asked my opinion whether the use of a building to be erected at 7 and 9 Newbury Street, Boston, for offices and a store would violate the following restriction found in the original deed from the Commonwealth to the early predecessors in title of the present owner:—

"This conveyance is made upon the following stipulations and agreement: That any building erected on the premises shall be at least three stories high for the main part thereof, and shall not, in any event, be used for a stable, or for any mechanical or manufacturing purposes."

Some of the history of the transactions by which the Commonwealth became the proprietor, and later the grantor to numerous grantees of parcels, of a large tract of land in what is commonly called the Back Bay, is found in *Wilson v. Massachusetts Institute of Technology*, 188 Mass. 565, 568 *et seq.*; see also *Allen v. Mass. Bonding & Insurance Co.*, 248 Mass. 378. It discloses a general and, at the time, well understood intent that this section of Boston should be given over in general to a residential district of a high standard. To that end the restriction in question, together with other restrictions, was inserted in the deeds of all the lots on the northerly side of Newbury Street from Arlington Street to Berkeley Street. The effect of this restriction is to be measured, however, by the language actually and deliberately used, under the usual rules of construction of deeds, including specifically the rule that "in case of doubt a clause creating an equitable restriction is to be construed against the grantor and in favor of the grantee's right not to have his land restricted." *American Unitarian Assn. v. Minot*, 185 Mass. 589, 595.

Had the Commonwealth seen fit to do so, it might have given only deeds which restricted the grantees to the building of dwelling houses and the usual out-buildings, and to the use of the premises only for the purposes of private dwellings. Such restrictions are common and well known. Had it seen fit to do so, it might have given only deeds which confined the grantees to uses not "detrimental to the use of the surrounding locality for dwelling houses." See, for example, *Noyes v. Cushing*, 209 Mass. 123, 125. Numerous other types of restrictions might be mentioned, and it must be assumed that the Common-

wealth, through its representatives, deliberately selected that variety which it deemed best suited to its purposes. It chose, in fact, to govern the type of buildings by imposing certain architectural limitations, and to govern the use of them by stating two categories of forbidden uses, — “mechanical or manufacturing.” The language of *Noyes v. Cushing*, *supra*, at p. 125, seems apt and conclusive, —

“ . . . in the absence of anything . . . limiting the buildings to be erected to dwelling houses we do not see how the restrictions can be so construed.”

See, also, *Carr v. Riley*, 198 Mass. 70. *Cf.*, further, the guarded language of the court in *Allen v. Mass. Bonding & Insurance Co.*, *supra*, at p. 383: —

“ It is plain that there was on the part of the Commonwealth a general scheme of real estate development of considerable magnitude as to the Back Bay district. It covered a large area. It was designed to create an attractive neighborhood given over *in general* to residential uses. . . .”

In the ordinary understanding of language these two words, “mechanical” and “manufacturing,” do not describe the activities of a store or of business offices. No Massachusetts decision has been found which, upon any context or state of affairs, has undertaken to stretch them to such a length. The use for offices or a store might well come within the designation of “mercantile,” a term plainly understood by the court in *Carr v. Riley*, *supra*, at p. 75, to be of different scope from the words “manufacturing” or “mechanical.” But that term, although used in certain other deeds from the Commonwealth of Back Bay land, was omitted from the deeds of land upon the north side of Newbury Street. This fact is noted by the court in *Allen v. Mass. Bonding & Insurance Co.*, *supra*, at p. 381. The decision in *Bacon v. Sandberg*, 179 Mass. 396, is that the fact that some of the deeds there in question contained the words “trade or manufacture,” while others contained the words “manufacturing or mechanical,” did not preclude the various restrictions inuring to the benefit of the several grantees as part of a general scheme; it is not to be understood as a decision that the two groups of words were identical in scope.

I must therefore say to you that the use of the premises at 7 and 9 Newbury Street for offices or a store is not, upon the facts stated, forbidden by the quoted restriction. I am not, of course, purporting to pass upon whether every conceivable use to which the tenant of a store or of an office could put his premises would be valid. It is enough at the present time to say that the proposed general uses for offices or a store are not prohibited. The validity of particular uses would have to be considered when they actually arise.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Registrar of Motor Vehicles — Revocation of License — New License — Appeal to Division of Highways — “Conviction.”

The power of the Registrar of Motor Vehicles to issue and revoke licenses to operate motor vehicles is statutory, and can be exercised only in accordance with the statute.

After the license of a person, convicted of operating a motor vehicle while under the influence of intoxicating liquor, has been revoked, the registrar has no power to issue a new license prior to the expiration of the time fixed by statute.

The power of the Division of Highways to entertain appeals from the registrar’s decisions is confined to cases where the registrar may exercise his discretion.

No appeal lies from the refusal of the registrar to issue a new license after a revocation and prior to the expiration of the statutory period.

The placing of a case on file, upon the payment of costs, after a plea of “not guilty” does not constitute a “conviction.”

Such action constitutes an “acquittal” within the purview of G. L., c. 90, § 24.

AUG. 28, 1924.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR: — You request my opinion upon the following questions: —

"1. Under the provisions of G. L., c. 90, § 24, when a person is convicted of operating a motor vehicle while under the influence of liquor, and the court record of such conviction is sent to the Registrar of Motor Vehicles without a recommendation, and the license is then revoked in accordance with the section, has the registrar the right to rescind action and restore the license at any time before the expiration of said license, if the court submits a recommendation after the revocation?"

G. L., c. 90, § 24, contains the following provision: —

"... A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event and shall, unless the court or magistrate recommends otherwise, revoke immediately the license of the person so convicted, and no appeal from the judgment shall operate to stay the revocation of the license. . . . The registrar in his discretion may issue a new license to any person acquitted in the appellate court, or after an investigation or upon hearing may issue a new license to a person convicted in any court; provided, that no new license shall be issued by the registrar to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence, or five years after any subsequent conviction. . . ."

The power of the Registrar of Motor Vehicles to issue and revoke licenses to operate motor vehicles is purely statutory, and can be exercised only in accordance with the statute. He cannot in any respect transcend the authority thus given. *Commonwealth v. Maletsky*, 203 Mass. 241; *Goldstein v. Conner*, 212 Mass. 57; *Kilgour v. Gratto*, 224 Mass. 78; *Wright v. Lyons*, 224 Mass. 167, 168; *Commonwealth v. McCarthy*, 225 Mass. 192, 195; *Commonwealth v. Atlas*, 244 Mass. 78; *Connors v. Lowell*, 246 Mass. 279. The statute specifically prescribes the conditions under which a new license may be issued after a revocation. Once revoked, a license may be issued only in the manner thus prescribed. I am accordingly of the opinion that your first question should be answered in the negative.

2. Your second question is as follows: —

"If the court, in the case above mentioned, submitted a recommendation that the license be not revoked as provided for in the statute, and the registrar refused at the time to accept such recommendation and revoked the license, would the registrar have the right to rescind his action at a later date and accept the recommendation and then restore the license?"

I assume that your question refers to the restoration of a license prior to the expiration of the time prescribed by the statute. It follows from what I have said in answer to your first question that the answer to your second question is "No."

3. Your third question reads: —

"Should the registrar decline to issue a license to a person convicted of operating a motor vehicle while under the influence of liquor, under either of the situations covered by questions 1 and 2, can the Division of Highways, under section 28, upon an appeal by a person aggrieved by such ruling or decision of the registrar, order said ruling or decision to be affirmed, modified or annulled?"

The power of the Division of Highways to entertain appeals from the rulings or decisions of the registrar is entirely statutory. It is plain that this power is confined to consideration, upon proper appeal, of rulings and decisions of the registrar only in cases where the registrar may exercise his discretion. No appeal may be made in cases where the registrar has no discretion as to his action. Since the registrar has no discretion as to his action in the situations

covered by the first and second questions, no appeal from his refusal to issue a new license in such cases will lie. The third question should, therefore, be answered in the negative.

4. Your fourth question is as follows:—

“On May 31, 1921, A was convicted of operating a motor vehicle while under the influence of liquor and was fined \$100. On August 19th he was again convicted of operating a motor vehicle while under the influence of liquor and sentenced to six months in the house of correction, from which sentence he appealed. After numerous continuances, on April 29, 1924, he was tried in the Superior Court and the jury disagreed. On that same day the district attorney and the counsel for A agreed that the case should be placed on file upon the payment of \$100 as expenses. Under the statute, of course, the registrar has no power to restore the license until five years from the date of the final conviction. Was the latest action of placing on file, after a plea of not guilty and the payment of \$100 as expenses, a conviction, from which the five years should date, or was it an acquittal, which would enable the registrar to restore the license?”

G. L., c. 90, § 24, contains the provision that,—

“no new license shall be issued by the registrar to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence, or five years after any subsequent conviction.”

The effect of an entry that a case be “placed on file” is that it is indefinitely continued. *Commonwealth v. Maloney*, 145 Mass. 205, 210. Such disposition can be made only by order of the court. *Attorney General v. Tufts*, 239 Mass. 458, 537. Formerly it was perhaps the practice to make such order only after conviction by trial or on plea of guilty. *Marks v. Wentworth*, 199 Mass. 44, 45. In that event, the defendant remained liable for sentence at any time. *Marks v. Wentworth*, 199 Mass. 44, 45. Apparently it has become the practice, if justice seems to require it, to enter such order without a verdict and although the plea is not guilty. *Attorney General v. Tufts*, 239 Mass. 458, 537. It appears that the plea of not guilty was not withdrawn in the case referred to in your question. Clearly, the accused has not been “convicted” in the Superior Court.

The question remains whether the accused has been “acquitted,” within the meaning of that word as used in G. L., c. 90, § 24. If the word “acquitted” is construed technically, it may be urged that it is as clear that the accused in the case referred to has not been “acquitted” as it is that he has not been “convicted.” The case has been indefinitely continued. I am of the opinion, however, that the word “acquitted,” as used in the statute in question, should be given a broader and less technical meaning; and that the word “acquitted,” as there used, was intended to cover the case supposed. Unless the disposition of the case supposed is an acquittal, the statute makes no provision whatever as to the operator’s right to a license. The disposition of a case by placing it on file is in substance intended as a final disposition of the case. When made, as here, upon stipulation that the accused pay costs, it amounts in effect to an arrangement with the accused, approved by the court, that it shall be a final disposition. *Commonwealth v. Maloney*, 145 Mass. 205, 210. It was common practice at the time when the provisions of G. L., c. 90, § 24, were first enacted (1916) to make what is in substance final disposition of cases in this way. This same section enacts in its later provisions that, except as therein provided, no prosecution for a second offence shall be “placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceedings.” Placing a case on file is thus referred to as a mode by which it is “disposed of”; and is further recognized as a proper mode of disposing of a prosecution for a first offence under the section, and also for a second offence, provided the requirements stated are complied with. I assume that these requirements were complied with in the case referred to. The statute should not be so construed as to leave no provision whatever as to

the license rights of an operator whose case has been disposed of by placing it on file; and yet this result would seem to follow unless the word "acquitted" be construed as broad enough to cover such a disposition. An opinion has been rendered by a former Attorney General to the effect that an entry of *nolle prosequi* is an acquittal within the meaning of the act. V Op. Atty. Gen. 385. Placing a case on file has the additional element of being the act of the court. *Commonwealth v. Tufts*, 239 Mass. 458, 537. I am therefore of the opinion that, under the facts stated in your fourth question, there was an acquittal within the meaning of that statute.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Legislative Printing—Clerks of the House and Senate.

All House and Senate bills and all documents intended for presentation to the General Court by any member or member-elect may be printed under the direction of the Clerks of the House and Senate, respectively.

The statutes and the rules of the General Court provide for the printing by the Clerks of certain other documents.

SEPT. 10, 1924.

MR. WILLIAM H. SANGER, *Clerk of the Senate*; MR. JAMES W. KIMBALL, *Clerk of the House of Representatives*.

GENTLEMEN:—You have orally requested my opinion relative to your authority to contract for legislative printing.

St. 1923, c. 362, § 5, as amended by St. 1923, c. 493, which places State printing, with certain exceptions, under the supervision of the Division of Personnel and Standardization and provides that the Commission on Administration and Finance may make contracts for printing for State departments, specifically provides that the act shall not apply to legislative printing. The authority to contract for legislative printing is, therefore, not affected by that statute.

G. L., c. 5, § 10, provides that one thousand copies of the journals of the Senate and of the House of Representatives shall be printed annually under the direction of the Clerks thereof. St. 1924, c. 492, § 3, provides that the Clerks of both branches of the Legislature shall prepare and print the manual of the General Court. G. L., c. 5, § 12, provides that the joint committee on rules of the General Court shall publish during each regular session of the General Court bulletins of committee hearings. Section 5 of that chapter provides that the joint committee on rules shall prepare and print, from time to time during the legislative session, a cumulative index of all acts and resolves passed.

There is no statute which specifically refers to the printing of bills.

Rule 28 of the rules of the House of Representatives, as amended on May 25, 1923, in part provides:—

"Recommendations and special reports of state officials, departments, commissions and boards, reports of special committees and commissions, bills and resolves introduced on leave or accompanying petitions, recommendations and reports, and resolutions, *shall be printed under the direction of the Clerk*, who also may cause to be printed, with the approval of the Speaker, other documents filed as herein provided."

Rule 42 of the rules of the House provides, in part, that "bills shall be printed or written in a legible hand." Rule 42 should be read in the light of Rule 28. I am accordingly of the opinion that all House bills, in accordance with the rules, should be printed under the direction of the Clerk of the House until some provision to the contrary is made by the Legislature or by the House.

Rule 13 of the joint rules, as amended on May 25, 1923, provides:—

"Papers intended for presentation to the General Court by any member or member-elect shall be deposited with the Clerk of the branch to which the member belongs or has been elected; . . .

Papers so deposited and referred previously to the convening of the General Court shall be printed in advance, conformably to the rules and *usages* of the Senate or House. . . . A bulletin of matters so referred shall be printed, under the direction of the Clerks of the two branches, as of the first day of the session."

While the rule does not specifically authorize the Clerks of the respective branches of the Legislature to print such papers, it does not provide for printing in accordance with the rules and *usages* of the Senate or House. In the past, bills have been printed under the direction of the respective Clerks. The House rules so provide with respect to House bills. Rule 20 of the rules of the Senate specifically provides that when the President orders bills and resolves to be printed, they shall be printed under the direction of the Clerk. In the absence of any provision to the contrary, and in view of the parliamentary practice, usage and rules, I am of the opinion that the Clerks of the House and Senate, respectively, under Rule 13, may cause to be printed, in advance of the convening of the General Court, all papers referred to in that rule.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Elections — Primaries — Candidates for County Commissioner.

Under G. L., c. 54, § 157, providing for the election of two county commissioners for certain counties, not more than one of whom shall be from the same city or town, a candidate who has received at the primaries a smaller number of votes than another candidate of the same party from the same town cannot be a nominee, although he has received the second largest number of votes.

SEPT. 27, 1924.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR: — You state that at the recent primaries the total vote cast for Republican candidates for nomination as county commissioners of Barnstable County, where two are to be elected, was as follows:

John D. W. Bodfish, of Barnstable	1945
Frank G. Thatcher, of Barnstable	1887
Benjamin F. Bourne, of Bourne	1769
Arthur Underwood, of Falmouth	1127

In connection with your preparation of the ballots you ask my advice as to who are the Republican nominees.

G. L., c. 54, § 158, provides for the election of county commissioners. It is provided that "at the biennial state election in nineteen hundred and twenty-four, and in every fourth year thereafter, there shall be chosen . . . by the voters of each of the other counties (*i.e.*, excepting Middlesex, Suffolk and Nantucket) . . . two county commissioners for the county; . . ." It is further provided as follows:—

"Not more than one of the county commissioners and associate commissioners shall be chosen from the same city or town. If two persons residing in the same city or town shall appear to have been chosen to said offices, only the person receiving the larger number of votes shall be declared elected; but if they shall receive an equal number of votes, no person shall be declared elected. If a person residing in a city or town where a county commissioner or an associate commissioner who is to remain in office also resides, shall appear to have been chosen, he shall not be declared elected. If the person is not declared elected by reason of the above provisions, the person receiving the next highest number of votes for the office, and who resides in another city or town, shall be declared elected."

G. L., c. 53, contains provisions relative to primaries. Section 1 provides, in part, as follows:—

"At any primary, caucus or convention held under this chapter, each party having the right to participate in or hold the same may nominate as many

candidates for each office for which it has the right to make nominations therein as there are persons to be elected to that office, and no more. . . ."

Section 24 provides:—

"Primaries shall be subject to all laws relating to elections and corrupt practices therein, so far as applicable and except as otherwise provided in this chapter and in chapters fifty-four, fifty-five and fifty-six."

If the Republican nominees for the office of county commissioner for the County of Barnstable are held to be the two persons who received the highest number of votes, then, by virtue of G. L., c. 54, § 158, there will be only one Republican nominee who can be elected. Such a result would, in my opinion, be inconsistent with the provisions of G. L., c. 53, § 1, which authorize each party to nominate as many candidates for each office as there are persons to be elected to that office, and no more. In my judgment, this section must be interpreted to mean that the candidates who may be nominated are persons who are capable under the law of being elected, and that each party has a right to nominate as many of such candidates for any office therein described as there are persons to be elected to such office. I am confirmed in this opinion by the provisions of G. L., c. 53, § 24, quoted above, which, in my opinion, require a consideration of the provisions of G. L., c. 54, § 158, in connection with the proper interpretation of G. L., c. 53, § 1.

I therefore advise you that, in the case you have stated, the two persons who are entitled to the Republican nomination for the office of county commissioner of Barnstable County are John D. W. Bodfish and Benjamin F. Bourne.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Probation Officers — Retirement.

The classes of probation officers entitled or required to be retired under G. L., c. 32, §§ 75 and 76, defined.

The classes of probation officers who must be retired upon reaching the age of seventy years defined.

OCT. 9, 1924.

Commission on Probation.

GENTLEMEN:— You have asked my opinion upon the following questions relating to the interpretation of G. L., c. 32, §§ 75 and 76.

"(1) What classes of probation officers are entitled or required to be retired under the provisions of G. L., c. 32, §§ 75 and 76?"

"(2) Whether all probation officers are required to be retired upon reaching the age of seventy years?"

"(3) Whether a probation officer, upon reaching the age of seventy years, having served less than twenty years, is required to be retired?"

"(4) Whether, if in your opinion a probation officer is required to retire upon reaching the age of seventy years, not having served twenty years, he is entitled to the pension prescribed in section 76?"

The original statute providing for pensions for probation officers was St. 1912, c. 723. Sections 1 and 2 of this statute were as follows:—

"SECTION 1. Any probation officer or assistant probation officer whose whole time is given to the duties of his office shall, at his or her request, be retired from active service and placed upon a pension roll by the court upon which it is his duty to attend, with the approval of the county commissioners of the county in which the court is situated; *provided*, that he is certified in writing by a physician designated by such court to be permanently disabled, mentally or physically, for further service by reason of injuries or illness sustained or incurred through no fault of his in the actual performance of his duty as such officer. Any probation or assistant probation officer whose whole time is given to his duties as such officer and who has faithfully performed his duties

as such officer for not less than twenty consecutive years, and who is not less than sixty years of age, shall also be retired under the provisions of this act at his or her request without the aforesaid certification.

SECTION 2. Every person retired under the provisions of this act shall receive an annual pension equal to one half of the compensation received by him at the time of his retirement, this amount to be paid by the county employing him, or, if he is employed by more than one county, then by the counties by which his salary is paid, and in the same proportion. It shall be the duty of every county to appropriate annually the sums required for this purpose."

This statute provided only for retirement at the option of the probation officer or assistant probation officer who should become entitled to retirement under its terms. Except as such an officer should choose to take advantage of the provisions of the statute, his tenure of office remained, as theretofore, governed by the provisions of those contemporary statutes which were the predecessors of what is now G. L., c. 276, § 83. That is to say, he held office during the pleasure of the court which appointed him.

St. 1916, c. 225, introduced the first provision for compulsory retirement. Section 1 thereof read as follows:—

"Any probation officer of any court who shall be eligible to a pension for twenty years' service under the provisions of section one of chapter seven hundred and twenty-three of the acts of the year nineteen hundred and twelve, shall hereafter be retired upon attaining the age of seventy years."

It is quite plain upon the face of this enactment that the only probation officers as to whom retirement became mandatory were those who, because of their twenty years' continuous full-time service, should become entitled to pensions upon retirement and who should attain the age of seventy years.

G. L., c. 32, §§ 75 and 76, are now as follows:—

"SECTION 75. Any probation officer or assistant probation officer whose whole time is given to the duties of his office shall, at his request, be retired from active service and placed upon a pension roll by the court upon which it is his duty to attend, with the approval of the county commissioners of the county in which the court is situated, provided, that he is certified in writing by a physician designated by such court to be permanently disabled, mentally or physically, for further service by reason of injuries or illness sustained or incurred through no fault of his in the actual performance of his duty as such officer. Any such probation officer or assistant probation officer who has faithfully performed his duties for not less than twenty consecutive years, and who is not less than sixty, shall be retired at his request without the aforesaid certification. Such probation officer must be retired upon attaining the age of seventy.

SECTION 76. Every person retired under the preceding section shall receive an annual pension equal to one half of the compensation received by him at the time of his retirement, to be paid by the county employing him, or, if he is employed by more than one county, by the counties by which his salary is paid, and in the same proportion."

The first and second sentences of section 75 have not been materially altered from the form in which they appear in the statute of 1912. In the second sentence the words "such probation officer or assistant probation officer" are substituted for the words "probation or assistant probation officer whose whole time is given to his duties as such officer," the view of the Legislature having apparently been that the omitted description could be incorporated by the use of the word "such," which would refer back to the words in the first sentence of section 75—"whose whole time is given to the duties of his office." The third sentence of section 75 is plainly intended to be a condensation of the statute of 1916. The word "such" in this sentence was expected to serve as a substitute for the description found in St. 1916, c. 225—"who shall be eligible to a pension for twenty years' service under the provisions of section one of chapter seven hundred and twenty-three of the acts of the year nine-

teen hundred and twelve." It therefore refers to the sort of officer who is described in the second sentence of section 75 as "such probation officer or assistant probation officer who has faithfully performed his duties for not less than twenty consecutive years."

It does not appear with any convincing force that the Legislature, by the various elisions in section 75, intended to alter the pre-existing law. The reaching of this conclusion is aided by the familiar principle "'of statutory construction, that mere verbal changes in the revision of a statute do not alter its meaning and are construed as a continuation of the previous law.'" *Main v. County of Plymouth*, 223 Mass. 66, 69. *Savage v. Shaw*, 195 Mass. 571. *Derinza's Case*, 229 Mass. 435, 442. *Ollila v. Huikari*, 237 Mass. 54, 56. I therefore answer your questions as follows:

As to the first: that the probation officers who are entitled to be retired under section 75 are those whose whole time is given to the duties of their office, and who have either been certified in writing by a physician, designated by the court upon which they attend, to be permanently disabled, mentally or physically, for further service, by reason of injuries or illness sustained or incurred through no fault of theirs, in the actual performance of their duty as such officers, and whose retirements have been approved by the county commissioners of the county in which the court is situated, or who have faithfully performed their duties for not less than twenty consecutive years and who are over the age of sixty years; that those probation officers are required to be retired, under the provisions of section 75, who, having reached the age of seventy, are then entitled, by virtue of having given their full-time service for not less than twenty consecutive years, to receive upon retirement the pension provided by section 76, or who, being over the age of seventy years, have, subsequently to reaching that age, become entitled, for the same reasons, to receive upon retirement such a pension.

As to the second: that only such probation officers are required to be retired upon reaching the age of seventy years as are characterized as subject to such compulsory retirement in my answer to your first question.

As to the third: that a probation officer who, upon reaching the age of seventy years, has served less than twenty years is not required to be retired.

As to the fourth: that it is rendered immaterial by the answer given to the previous questions.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Taxation — Board of Appeal.

Under G. L., c. 58, § 27, as amended by St. 1922, c. 382, providing that the Commissioner of Corporations and Taxation, with the approval of the Attorney General, may abate certain taxes, in cases where they shall appear to have been illegally exacted, excessive or unwarranted, and that the decision of the Commissioner and Attorney General shall be final, no appeal lies to the Board of Appeal from the refusal of the Commissioner to grant relief under that provision.

Nov. 2, 1924.

Board of Appeal.

GENTLEMEN:— My opinion is asked whether an appeal lies to the Board of Appeal from the refusal of the Commissioner of Corporations and Taxation to grant relief under the provisions of G. L., c. 58, § 27, as amended by St. 1922, c. 382, to an applicant for abatement of income taxes. Said section 27, as amended, is, in part, as follows:—

"If it shall appear that an income tax, a legacy and succession tax, or a tax or excise upon a corporation, foreign or domestic, was in whole or in part illegally assessed or levied, or was excessive or unwarranted, the commissioner may, with the approval of the attorney general, issue a certificate that the party aggrieved by such tax or excise is entitled to an abatement, stating the amount thereof. If the tax or excise has been paid, the state treasurer shall pay the

amount thus certified in such manner as the certificate shall provide, without any appropriation therefor by the general court. No certificate for the abatement of any tax or excise shall be issued under this section unless application therefor is made to the commissioner within two years after the date of the bill for said tax or excise, or for an amount exceeding the sum which in equity and good conscience ought to be abated under all the circumstances of the case. . . . The decision of the commissioner and attorney general shall be final. . . . This section shall be in addition to and not in modification of any other remedies."

Provision is made in G. L., c. 62, § 43, for application to the Commissioner for abatement of an income tax, and in section 45 for appeal to the Board of Appeal upon the refusal of the Commissioner to abate such tax under section 43. There is no other provision in the statutes for appeal to the Board of Appeal from an assessment of an income tax, unless such provision is to be found in G. L., c. 58, § 27.

I understand that the application to the Commissioner for an abatement was made not under G. L., c. 62, § 43, but under G. L., c. 58, § 27, as amended. That section contains an express provision to the effect that "the decision of the commissioner and attorney general shall be final."

In my opinion, it is clear that no appeal lies to the Board of Appeal from the refusal of the Commissioner to grant relief under that section, and that the board is without jurisdiction in the matter.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Drainage Law — Financial Improvement.

A reclamation district organized under St. 1923, c. 457, under an arrangement whereby the expense of the improvement is to be apportioned between the district and the county, may not issue bonds for the purpose of financing the county's share of the undertaking, with the understanding that the district shall subsequently be reimbursed.

Nov. 7, 1924.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:—You state that plans have been made for construction work required for the proper drainage of the Green Harbor district, the expense of which is to be apportioned between the reclamation district at Green Harbor and the county commissioners of Plymouth County, that the county has no money available from its appropriation of the current year to pay its share of the expense, and that it has been suggested that the project should be funded by issuing bonds of the district, to which the county's share of the expense is to be repaid as soon as the money is made available by appropriation. You ask my opinion whether such a procedure is permissible.

You state that the district is organized under St. 1923, c. 457, and St. 1924, c. 93. St. 1923, c. 457, provides for the organization of reclamation districts, repealing earlier law on that subject. It is amended by St. 1924, c. 93, in respects not here material.

Provisions for financing proposed improvements in reclamation districts are contained in sections 9 and 10 of the 1923 statute. These sections are, in part, as follows:—

"SECTION 9. As soon as possible after the estimate of the expense of the proposed improvements has been made by the commissioners and reported to the board, said commissioners shall request the clerk to call a meeting of the district for the purpose of deciding upon a method of financing such improvements. If the district so votes the commissioners shall petition the county commissioners of the county where the greater part of the land lies, annexing a certified copy of the petition under section five and of the determination of the board thereon, and a statement of the estimated expense of the proposed improvements and shall request the county commissioners to vote to pay in the first instance the total expense involved in making the improvements ap-

proved by the board, and the said county commissioners may so vote. To defray any expense incurred by said county commissioners under such vote, the county treasurer, with the approval of the county commissioners, may issue bonds or notes of the county to an amount not exceeding such expense, payable in such period, not exceeding twenty-five years from their dates of issue, as the county commissioners may determine. . . . Payments on account of principal and interest shall be made by the county and repaid to the county by the district.

SECTION 10. The district may, instead of instructing the commissioners to petition the county commissioners as provided in the preceding section, vote to finance the expense of the improvements in accordance with any one of the three methods hereinafter specified. (1) If all the members of the district agree, the district may raise by assessments upon the proprietors or by voluntary contributions and deposit with the state treasurer the total sum required to meet the estimated expense of the improvements. Such deposits shall be held by the state treasurer to the credit of the district, and payments shall be made therefrom as provided in section fourteen. (2) The district may pay the whole expense of the improvements from time to time as the work is performed and for this purpose may incur debt for a temporary loan in anticipation of the collection of assessments from the members of the district during the calendar year in which said debt is incurred or during the next succeeding calendar year. (3) The district may incur debt to the amount necessary to pay the estimated expense of the proposed improvements and may issue therefor notes or bonds, and may, if the board approves, issue notes or bonds on the condition that the first payment on account of the principal shall be deferred for a period of not more than five years from the date of issue of such notes or bonds and that the whole amount of such debt shall be payable within a period of not more than twenty-five years after such notes or bonds are issued."

The proposed plan for financing the construction evidently is the third method specified in section 10. The phrase "the estimated expense of the proposed improvements" evidently refers to the estimate of the expense of the proposed improvements, which by section 9 is to be made by the district commissioners and reported to the board before any method of financing the improvements is decided upon. I do not understand that any such estimate has yet been prepared; but I must assume that the estimate, when made, will be an estimate of the expense of improvements for which the district will be finally responsible, and that it will not include other costs not to be properly chargeable to the district.

In my opinion, bonds of the district may not be issued for the purpose of financing the county's share of the undertaking, with the understanding that the district is to be repaid by the county when funds are made available.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Board of Appeal — Delegation of Duties.

The duties of the State Treasurer and State Auditor as members of the Board of Appeal constituted by G. L., c. 6, § 21, are official duties, and during their illness, absence or other disability may be performed by their respective deputies, in accordance with G. L., c. 10, § 5, and c. 11, § 2.

Nov. 8, 1924.

Board of Appeal.

GENTLEMEN: — You have asked my opinion as to the authority of the State Treasurer and the State Auditor, respectively, to delegate the performance of their duties as members of the Board of Appeal to their deputies or to other persons, and as to the authority of such deputies to perform such duties during the illness, absence or other disability of the State Treasurer or the State Auditor.

The Board of Appeal is constituted by G. L., c. 6, § 21, which is as follows: —

"The state treasurer, the state auditor and a member of the council designated by the governor, shall constitute the board of appeal from decisions of the commissioner of corporations and taxation."

G. L., c. 10, § 5, provides, in part, as follows:—

"The state treasurer may, with the consent of the governor and council, appoint, and may for cause with such consent remove, a first and a second deputy treasurer, shall prescribe their respective duties, and, with the approval of the governor and council, shall determine their salaries. *During the illness, absence or other disability of the treasurer, his official duties shall be performed by the said deputies in the order of seniority. . . .*"

G. L., c. 11, § 2, provides for the appointment by the State Auditor of a first deputy auditor, in the following terms:—

"He shall, with the consent of the governor and council, appoint a first deputy auditor, at a salary to be fixed by the auditor, with the approval of the governor and council, who shall perform such duties as may be assigned to him by the auditor and who may be removed by him for cause at any time, with the consent of the governor and council. *If, by reason of sickness, absence or other cause, the auditor is temporarily unable to perform the duties of his office, the first deputy shall perform the same until such disability ceases.* In the event of a vacancy in the office of auditor, the first deputy shall be continued in office and shall perform all statutory duties of the auditor until an auditor shall be duly qualified. . . ."

The office of second deputy auditor, for which provision is made in G. L., c. 11, § 3, was abolished by St. 1922, c. 545, § 27.

The duties which the Board of Appeal constituted by G. L., c. 6, § 21, is called upon by the statutes to perform, are, in my judgment, official duties. It is therefore my opinion that during the illness, absence or other disability of the State Treasurer or the State Auditor the duties of those officers, respectively, as members of the Board of Appeal may be performed by their deputies, in accordance with the provisions of G. L., c. 10, § 5, and c. 11, § 2, respectively. I am of the opinion that neither the State Treasurer nor the State Auditor has any power to delegate the performance of his duties as a member of the Board of Appeal in any other manner than is provided by the statutory enactments above referred to.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Statements of Political Expenses—Filing.

Statements of political expenses required by G. L., c. 55, §§ 16 and 17, should not be accepted for filing prior to the last day for filing nominations, in the case of nomination expenses, nor prior to the election, in the case of election expenses.

Nov. 10, 1924.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR:—You request my opinion as to whether statements of political expenses, required by G. L., c. 55, §§ 16 and 17, may properly be accepted for filing by your office prior to the beginning of the periods referred to in said sections as the periods within which such statements shall be filed.

Section 16 is as follows:—

"Every candidate for nomination to a public office shall, within seven days after the last day for filing nominations for that office, and every candidate for election to a public office shall within fourteen days after the election held to fill the office, file a statement setting forth each sum of money and thing of value expended, contributed, or promised by him, for the purpose of securing or in any way affecting his nomination or election to the office, and the name of the person or political committee to whom the payment, contribution or promise was made and the date thereof, or, if nothing has been contributed, expended or promised by him, a statement to that effect."

Section 17 provides that —

"The treasurer of every political committee . . . shall, within thirty days after such election, file a statement . . ."

Inasmuch as the statements required of candidates for election and of treasurers of political committees must cover the entire period preceding election, any statement filed prior to election is, obviously, incomplete. Although the practical objection to the acceptance of statements of candidates for nomination prior to the last day for filing nominations may not be so serious, I am of the opinion that here, too, statements submitted to your office prior to the date fixed by the statute should not be accepted.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Police Officer — Expenses of serving Warrant — Payment.

The expenses of a police officer, necessarily incurred in the service of a warrant or capias in a criminal case tried in a district court, should be paid by the clerk of the district court.

Nov. 11, 1924.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You request my opinion as to whether expenses incurred by a police officer in connection with the service of a warrant are included in the "fees and expenses of officers" which are to be paid by clerks of district courts under the provisions of G. L., c. 218, § 47.

G. L., c. 262, § 21, provides that an officer serving a precept in criminal cases shall be allowed "the actual, reasonable and necessary expenses incurred in going or returning with the prisoner . . . and if he uses the . . . conveyance of another person, he shall be allowed the amount actually expended by him therefor." The officer must certify that the use was necessary and that he paid the amount stated.

G. L., c. 262, § 50, provides that although no officer who receives a salary or an allowance by the day or hour shall be paid any fee or extra compensation for official services performed by him in any criminal case, yet "his expenses, necessarily and actually incurred, and actually disbursed by him, . . . in a criminal case tried in a district court," shall be paid by the town where the crime was committed.

G. L., c. 218, § 47, provides that clerks of district courts "shall" pay "the fees and expenses of officers entitled thereto from the funds in their hands payable to the city or town liable for the payment of such fees and expenses." The expenses herein referred to are the expenses described in G. L., c. 262, §§ 21 and 50. See St. 1890, c. 440, § 8. These include expenses necessarily and actually incurred in the service of a warrant or capias, as well as of other precepts.

In my opinion, therefore, the expenses to which you refer are properly paid by clerks of district courts under G. L., c. 218, § 47.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Insurance — Contracts of Guaranty — Security Guaranty Insurance — Credit Insurance — Title Insurance.

The business of security guarantee insurance is not a form of the insurance business authorized by G. L., c. 175.

Nov. 11, 1924.

Hon. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR: — You have requested my opinion upon certain questions as they relate to the following facts set forth in your letter:

"The Investors Guaranty Corporation of New England is a domestic business corporation formed under the provisions of G. L., c. 156. Among the purposes for which it was organized are the following: —

To examine and guarantee the validity and legality of bonds or other evidences of indebtedness of any private or public corporation; to guarantee the payment of real estate mortgages, also payment of investment bonds and notes secured by mortgage or otherwise, or unsecured, including the payment of interest thereon at a fixed rate per annum; to undertake in whole or in part the liabilities of any person, firm or corporation.'

This corporation desires to begin the transaction of business, and the question has been raised as to whether or not any of the aforesaid purposes constitute the business of insurance under G. L., c. 175."

The questions which you propound are these:—

"1. Is there any distinction between a contract of guaranty and a contract of insurance where the guarantor receives a consideration for his guaranty?

2. Do any of the aforesaid purposes purport to permit this corporation to engage in the business of insurance as defined by section 2 of said chapter 175?

3. If the preceding question is answered in the affirmative, are those provisions of this charter which purport to permit the transaction of insurance invalid and of no effect because the corporation was not organized under section 49 of said chapter 175?

4. If the second question is answered in the affirmative, do any of the purposes above specified constitute credit insurance as set forth in the tenth clause of section 47 of said chapter 175?

5. If the second question is answered in the affirmative, do any of the purposes above set forth constitute title insurance as set forth in the eleventh clause of said section 47?

6. May the Commissioner lawfully grant a certificate to said corporation under section 32 of said chapter, provided its capital is sufficient: (a) If question 4 is answered affirmatively and questions 3 and 5 in the negative? (b) If question 5 is answered in the affirmative and questions 3 and 4 in the negative?

7. Is this corporation, in view of the provisions of its charter above specified, governed by the provisions of G. L., cc. 173 and 174?"

1. I answer your first question in the affirmative. There are various contracts of guaranty which are not contracts of insurance. A contract of guaranty of such a character is considered in Attorney General's Report, 1921, p. 11.

I am of the opinion that the word "guarantee," as used in the first clause of the purposes of organization, as above set forth, has its primary signification, and relates to a guarantee by the company of the correctness of its examination into the legality and validity of bonds and other evidences of indebtedness which it makes for its customers, and that the word as used in this clause does not connote "indemnification" to the customer for the loss which he might sustain by the repudiation or non-payment of the evidences of indebtedness. This being so, no power to make contracts of insurance is conferred by the first clause.

2. I answer your second question in the affirmative. The word "guarantee" is often used in a broad sense, including in its scope other contracts than those of pure guaranty, and I am of the opinion that the word "guarantee," as used in the second clause of the purposes of incorporation, in the phrase "to guarantee the payment of," has the broad meaning, and as there used connotes "indemnification" of the owner of the securities whose payment may be "guaranteed" as to the loss which he may sustain by reason of the failure of the makers of such securities to fulfill their obligations to him. As thus used, a power to make contracts of insurance purports to be created in the corporation with relation to the various forms of hazard indicated in the second clause. The carrying into effect of this power will result in the formation of contracts of insurance of the type commonly known as "guaranty insurance," and more specifically as "security guaranty insurance."

This form of insurance is one recognized in many jurisdictions, and in some is made by statute specifically one of the kinds of insurance business which may be transacted within a given State, as, for example, in New York.

The term "guaranty insurance" is not used with any hard and fast meaning,

P.D. 12.

and has been said to be generic in its scope and signification. *People v. Potts*, 264 Ill. 522. It includes various kinds of insurance, and among them the payment of losses sustained by the holders of evidences of indebtedness (*People v. Rose*, 174 Ill. 310; 1 Joyce, Insurance, § 12), including the payment of losses sustained by the holders of debentures [*Finley v. Mexican Inv. Corp.* (1897), 1 Q. B. 517; *Shaw v. Royce* (1911), 1 Ch. 138; *In re Law Guarantee Soc. v. Munich Re-Ins. Co.* (1912), 1 Ch. 138], and losses by mortgagees (*Penn. Co. v. Central Trust*, 255 Pa. 322).

The contemplated agreement to indemnify, which is signified by the words "guarantee the payment of" in the purposes of incorporation before me, is intended to protect the party purchasing mortgages, bonds and other evidences of indebtedness, with whom such agreement may be made, against loss resulting from a designated hazard connected with such securities and evidences of indebtedness, and falls within the definition of contracts of insurance set forth in G. L., c. 175, § 2.

3. In answer to your third question, I am of the opinion that the provisions of section 49 of chapter 175 must be followed with relation to the organization of corporations formed for any of the purposes mentioned in such chapter. The purpose of carrying on the business of guaranty insurance, as provided for by the articles of incorporation of the company under discussion, is not one of the purposes mentioned in such chapter. It could not therefore lawfully be formed for the purpose of carrying on such kind of insurance business under section 49, nor can it lawfully carry on such business irrespective of the manner in which it was actually formed, by reason of the prohibitions of section 3.

4. I answer your fourth question in the negative. Although "credit insurance," the subject of clause 10 of section 47 of chapter 175, is a form of guaranty insurance, the purposes of the corporation under discussion do not purport to empower it to transact all of the numerous kinds of insurance business which fall under the general head of guaranty insurance, but purport to authorize it to do business only as to those kinds of guaranty insurance enumerated in the purposes. Credit insurance relates to the coverage of debts due merchants from customers (*People v. Mercantile Credit Co.*, 166 N. Y. 416; *Strouse v. American Credit Ins. Co.*, 91 Md. 244; Joyce Insurance, § 12), and the language of clause 10 of section 47 does not extend the meaning of credit insurance beyond its usual signification. In this connection it is to be noted, as casting light upon the intention of the Legislature to give to the words "the business commonly known as credit insurance or guaranty," in section 47, clause 10, only the usual meaning given to "credit insurance," which confines it to the coverage of debts due merchants from customers, that this clause was originally enacted by St. 1896, c. 447, immediately after the opinion of the Supreme Court in *Clafin v. United States Credit System Co.*, 165 Mass. 501, wherein the court had held that no authority was given by previously existing statutes to incorporate companies "to insure mercantile credits or accounts." The wording of the purposes does not show an intent to empower the corporation to engage in this subsidiary branch of guaranty insurance.

5. I answer your fifth question in the negative. The powers which the second clause of the purposes of organization purports to give to the company do not come within the enumerated purposes of clause 11 of section 47, commonly known as "title insurance." The guarantee of payment of mortgages referred to in the second clause of the purposes of organization does not relate to "any mortgage held or sold by the insurer," as do provisions of clause 11 of section 47, but refers to loss through the non-payment of mortgages with which the insuring company has no connection. The guarantee does not run specifically against loss by reason of encumbrances or defective titles but relates more particularly to loss by reason of non-payment from any cause. The powers given in the first clause of the purposes do not relate to those commonly exercised in the business of title insurance, as such, nor do they fall within those enumerated in clause 11.

The third clause of the purposes of organization purports to give the power "to undertake the liabilities of any person, firm or corporation." The word "undertake" has, among other meanings, that of "guarantee." Such a power

is a broad one, but it does not give authority to the corporation to hold or sell mortgages or to carry out the other purposes mentioned in clause 11 of section 47, nor does it give authority to engage in the business of credit insurance, within the meaning of clause 10.

6. In relation to your sixth question, I am of the opinion that the purposes of incorporation do not give power to the corporation to engage in either the business of credit insurance or that of title insurance, as defined by clauses 10 and 11 of section 47, respectively, as I have previously indicated, but that the powers given by the purposes of incorporation purport to give to the corporation power to engage in the business of guaranty insurance, so called, in so far as that form of insurance relates to securities of various sorts. This form of the insurance business is not one of the kinds which are authorized by the provisions of chapter 175, so that the Commissioner may not lawfully grant a certificate to the said corporation under section 32 of chapter 175.

7. I answer your seventh question in the negative.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Commissioner of Agriculture — Inspection of Apples — Interstate Commerce.

The Commissioner of Agriculture has the right to inspect apples during the process of packing in this Commonwealth notwithstanding a declared intention by the owner to ship such apples to points outside of the Commonwealth.

Nov. 13, 1924.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture.*

DEAR SIR:— You request my opinion as to whether the Commissioner of Agriculture has the right to inspect apples during the process of packing in this Commonwealth, in spite of a declared intention on the part of the owner or packer to ship them outside of the State.

G. L., c. 94, §§ 110 and 114, read as follows:—

“SECTION 110. The commissioner of agriculture shall make and may modify rules and regulations for enforcing sections one hundred to one hundred and seven, inclusive, one hundred and nine and one hundred and twelve, and shall, either in person or by his assistant, have free access at all reasonable hours to each building or other place where apples are packed, stored, sold, or offered or exposed for sale. He may also, in person or by his assistant, open each box, barrel or other container, and upon tendering the market price may take samples therefrom.

SECTION 114. Apples shipped in the course of interstate commerce and packed and branded in accordance with the act of congress approved August third, nineteen hundred and twelve, and known as ‘The United States Apple Grading Law,’ shall be exempt from sections one hundred and one to one hundred and seven, inclusive, one hundred and nine, one hundred and ten, one hundred and twelve and one hundred and thirteen.”

Apples which are in the process of being packed have not been “shipped in the course of interstate commerce,” and therefore section 114 is inapplicable. Nor, in my opinion, apart from the provisions of section 114, is inspection, under section 110, of apples in the process of being packed an interference with interstate commerce, which does not begin until the goods “commence their final movement for transportation from the State of their origin to that of their destination.” *Coe v. Errol*, 116 U. S. 517, 525; *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 150.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Landlord and Tenant — Lease by Parol — Lessor — Contract to furnish Water, Heat, Light, etc.

St. 1920, c. 555, § 1, imposing a penalty upon any "lessor" who wilfully fails to perform an obligation to furnish water, heat, light, etc., applies to tenancies created by parol as well as by writing.

Nov. 17, 1924.

MR. EUGENE C. HULTMAN, *Chairman, Commission on the Necessaries of Life.*

DEAR SIR:— You request my opinion as to whether St. 1920, c. 555, applies "to tenants at will as well as to tenants under lease."

I assume that you refer to a distinction between a tenancy created by parol and a tenancy created by an instrument in writing. A tenancy at will may be created by an instrument in writing. *Murray v. Cherrington*, 99 Mass. 229.

St. 1920, c. 555, § 1, reads as follows:—

"Any lessor of any building, or part thereof, who is required by the terms, expressed or implied, of any contract or lease to furnish water, heat, light, power, elevator service or telephone service to any occupant of the building, who wilfully or intentionally fails to furnish such water, heat, light, power, elevator service or telephone service at any time when the same is necessary to the proper or customary use of the building, or part thereof, or any lessor who wilfully and intentionally interferes with the quiet enjoyment of the leased premises by such occupant, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months."

The word "lease," although often used as referring to the written instrument by which a tenancy is created, is also used, in the law, with reference to the letting or creation of a tenancy. This is its primary meaning. In this sense a lease may be made by parol as well as by writing, and although it is provided under G. L., c. 183, § 3, that a lease by parol "shall have the force and effect of an estate at will only," this provision does not make it any the less a lease. *Elliott v. Stone*, 1 Gray, 571, 574. For example, also, in R. S., c. 60, § 26, the term "such lease" is used in reference to the preceding words—"all estates at will."

There is still less reason for restricting the meaning of the word "lessor" to one who lets by an instrument in writing; and, in my opinion, this word, as used in St. 1920, c. 555, is not to be so construed.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Taxation of National Banks and Other Moneyed Capital.

A tax on national bank shares at a rate uniform throughout the Commonwealth would not, in conjunction with the present system of local taxation, be constitutional under pt. 2d, c. 1, § 1, art. IV, of the Massachusetts Constitution.

Similarly of a corresponding uniform tax upon "other moneyed capital in the hands of individual citizens coming into competition with the business of national banks."

A tax upon such competing moneyed capital at the local property tax rate, with the exclusion of such capital from the Massachusetts income tax, would not offend against the Federal Constitution, nor, though more doubtfully, against Mass. Const. Amend. XLIV.

A tax upon the income of mercantile, manufacturing and business corporations, either as an excise or as an income tax under Mass. Const. Amend. XLIV, would be constitutional; but if imposed under that amendment, it must conform to its limitations.

A tax upon the income of national banks and other financial corporations at a rate lower than that upon the income of mercantile, manufacturing and business corporations would be constitutional, at least if imposed as an excise.

A tax upon the income of national banks under U. S. Rev. Stat., § 5219, cl. 1 (c), need not be at the same rate as the tax upon competing moneyed capital of individuals or copartnerships.

Nov. 17, 1924.

MR. CHARLES A. MORSS, *Chairman, Special Commission on the Taxation of Certain Banking Institutions.*

DEAR SIR: — In connection with the performance of the duties imposed upon your Commission by chapter 20 of the Resolves of 1924, you have asked my opinion upon certain questions of law relating to the powers of the General Court in the imposition of taxes upon national banking associations or their shares or property. Before taking up the specific questions a brief preliminary discussion will be helpful.

By Mass. Const., pt. 2d, c. I, § 1, art. IV, the General Court is empowered "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same."

Until the adoption of the income tax amendment in 1915 this clause contained the sole grant of power to levy taxes contained in our Constitution. It will be noted that it authorizes two main classes of taxes, namely: first, property taxes, which are required to be proportional and reasonable; and second, duties and excises, which are merely required to be reasonable.

Mass. Const. Amend. XLIV is as follows:—

"Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises."

This amendment authorizes the imposition of an income tax under certain specific conditions and limitations. It permits the selection of certain classes of property; the imposition of an income tax upon the income of such property, and the exclusion of any class of property thus taxed upon its income from the proportional taxes authorized by the original Constitution. It requires, however, "that the tax shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property." Thus, this amendment, subject to certain express conditions and limitations, has modified the requirement of the original Constitution that property taxes shall be proportional. Except as thus modified this requirement still remains in full force.

The Fourteenth Amendment to the Constitution of the United States provides that no "state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

It is well settled that this limitation does not require equality in taxation, but merely such reasonable classification in the application of tax laws that the result shall not be so unfair and unequal as to amount to an arbitrary taking of property under the guise of taxation. Thus, this provision imposes little if any limitation beyond that of our own Constitution requiring that both property taxes and excises shall be reasonable.

The most important Federal limitation upon the power to tax national banks grows out of their character as instrumentalities of the Federal government, created by it for the performance of certain of its governmental functions. It is a fundamental limitation, implied from the nature of our government,

that the States can impose no tax upon these banks as such instrumentalities or with reference to their shares as the property of the shareholders which will to any extent impair the efficiency of the banks as Federal agencies. For this reason, when the national banking system was first established in 1863, Congress expressly defined the extent to which the States should be permitted to tax the property or shares of these banks. It is settled beyond question that no tax imposed by States upon national banks, their property or their shares, is valid which does not comply with the limitations imposed by this act of Congress. As a result of recent discussions of the matter of national bank taxation, this provision, which has long appeared as section 5219 of the Revised Statutes of the United States, was amended by an act of Congress which became effective March 4, 1923. This act is as follows:—

“The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:

1. (a) The imposition by said State of any one of the above three forms of taxation shall be in lieu of the others.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares or the net income as above provided of any national banking association owned by non-residents of any State, or the dividends on such shares owned by such non-residents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section.”

The result is that any legislation which you may suggest for the future taxation of national banks, their property or their shares must comply with the requirements of U. S. Rev. Stat., § 5219, as amended.

For a further discussion of U. S. Rev. Stat., § 5219, of its history and meaning, of the situation which brought about this amendment, and of the recent litigation in Massachusetts concerning bank taxation, I refer you to a communication dated April 12, 1923, sent by me to the House of Representatives in response to an order passed by it, which communication was printed as House Document No. 1441 of that year. Attorney General's Report, 1923, p. 85.

I proceed to the discussion of your specific questions. The first three questions may be considered together. They are as follows:—

“ (1) Can the General Court, in the manner permitted under clause 1 (b) of section 5219 of the United States Revised Statutes, pass a law which will impose a tax upon the shares of national banks at a uniform rate throughout the Commonwealth?

(2) If your answer to the previous question is in the affirmative, can such uniform rate be fixed at a rate which is lower than the tax on real and personal property in the city or town in which the national bank is located?

(3) If your answers to questions 1 and 2 are in the affirmative, could the same rate of taxation that would be applied to national banks by such a contemplated statute be imposed upon ‘other moneyed capital in the hands of individual citizens coming into competition with the business of national banks?’ ”

These questions appear to assume a compliance with the limitations imposed by U. S. Rev. Stat., § 5219, as amended, which, as I have stated, is a necessary prerequisite. The tax suggested is a property tax imposed under the tax powers of the original Massachusetts Constitution upon the shares of national banks as the property of their shareholders. Accordingly, the question is whether such a tax would comply with the proportional requirement of that Constitution.

I interpret these questions as suggesting no fundamental changes in the general policy of the Commonwealth of levying and imposing all taxes upon real estate and upon personal property, not subject to the income tax, by the cities and towns of the Commonwealth at the rates made necessary by the local requirements. These questions appear merely to suggest the selection of two classes of personal property, namely: shares in national banks and “other moneyed capital in the hands of individual citizens coming into competition with the business of national banks,” and the taxation of the same either by the Commonwealth or by the cities and towns at a uniform rate throughout the Commonwealth, determined by some method entirely different from the manner in which local tax rates are determined, and differing substantially from the local rates in the municipality where each bank whose shares are thus taxed is located. It is plain that such a tax would not be valid even though the rates adopted were lower than the rate of taxation on real and personal property in any town in which any national bank was located. It contemplates the taxation of two classes of property upon their capital value as property, at a different rate from the tax of the same character imposed upon real estate and other classes of personal property subjected to this form of taxation. Such a tax would plainly not be proportional. *Portland Bank v. Apthorp*, 12 Mass. 252; *Oliver v. Washington Mills*, 11 Allen, 268; *Cheshire v. County Commissioners*, 118 Mass. 386; *Perkins v. Westwood*, 226 Mass. 268; see, also, *Opinions of the Justices*, 195 Mass. 607, and 220 Mass. 613.

It has been suggested that, as the taxation of national bank shares is limited by a Federal restriction lying entirely outside of the Massachusetts Constitution, the proportional requirement of that Constitution would be satisfied if the General Court adopted a method of taxing bank shares which did not violate the limitations imposed by the act of Congress, and at the same time approached as nearly as possible to a proportional tax without actually being such a tax under our Constitution as an independent instrument.

In my judgment, no such question can now arise, since the Federal statute, as now amended, plainly permits a tax upon bank shares which shall be unquestionably proportional by authorizing the inclusion of those shares in the general local property tax, provided only all other competing moneyed capital is also so included.

It follows that each of these questions must be answered in the negative.

Your fourth question is as follows:—

“ (4) Would it be repugnant to the provisions of the Federal or the Massachusetts Constitution to impose a tax on ‘moneyed capital in the hands of individual citizens coming into competition with national banks’ at the local

property tax rate, and exclude such capital in the hands of individuals from the tax now imposed upon the income therefrom under the provisions of the income tax law?"

In my judgment, such a tax would not be repugnant to the Federal Constitution for it could not be said to be based upon a classification so unreasonable and arbitrary as to amount to a confiscation of property.

The sole question is whether such a method of taxation would comply with the requirements of Mass. Const. Amend. XLIV. "Moneyed capital in the hands of individual citizens coming into competition with national banks" is now subject to an income tax imposed under this amendment, and is exempt from the local property tax. The suggestion is that this class of property be taken out of this income tax and be put back under the local property tax, subject to the proportional requirement, where it was before the adoption of the income tax law in 1916.

The income tax amendment permits that a tax levied under its authority may be "at different rates upon income derived from different classes of property." But it requires that such a tax "shall be levied at a uniform rate throughout the Commonwealth upon incomes derived from the same classes of property." Obviously, moneyed capital employed in the banking business is invested in notes, bonds and money at interest, which classes of property are taxed under the income tax law when owned by citizens generally. The result would be that property of this general character, when representing an investment of banking capital, would be subject to a property tax at the local rate, and when owned by citizens in general not engaged in the banking business would be taxed upon its income only. Whether or not this is permissible depends upon the sort of classification which Mass. Const. Amend. XLIV permits. Does it require that classification to be based upon the fundamental character of the property itself or may the use to which property is put be a basis of classification in the imposition of taxes under this amendment? If classification based upon the character of the property itself is required, your question must be answered in the affirmative. If classification based upon use is permitted, the tax which the question suggests would seem to be permissible. The Supreme Judicial Court has held that this amendment is to be construed broadly as a grant of an important tax power by the people to the General Court. *Tax Commissioner v. Putnam*, 227 Mass. 522. But it has not as yet had occasion to deal with any question relating to the character of the classification permitted by the amendment. Presumably, if a tax such as this question proposes is put in force, an attack upon its validity will be promptly made in the courts. It is not possible to advise, in view of the absence of authority upon this matter, how such litigation is likely to result. My own judgment is, however, that Mass. Const. Amend. XLIV permits classification of property based upon the use to which it is put or the general character of the business in which it is employed, and that a tax of the nature suggested by your question is thus authorized by the amendment.

Your fifth question is as follows:—

"(5) Can the General Court, under the Massachusetts Constitution, impose a tax upon the income of mercantile, manufacturing and business corporations?"

I answer this question in the affirmative. By G. L., c. 63, §§ 30-52, inclusive, an excise tax is now imposed upon such domestic corporations, based in part upon the value of their corporate excess and in part upon their net incomes; and a similar tax is imposed upon such foreign corporations, based in part upon the value of their corporate excess employed within the Commonwealth and in part upon their net incomes derived from business carried on within the Commonwealth. This has been sustained as a valid exercise of the power conferred by the Massachusetts Constitution to impose reasonable excises. *Eaton, Crane & Pike Co. v. Commonwealth*, 237 Mass. 523. There is no doubt that such an excise would be equally valid if the corporate excess feature were eliminated and it were based entirely upon net income earned within the Commonwealth.

It would also be well within the power of the General Court to impose a tax

upon the income of such corporations, whether derived from the property owned by them or otherwise, under the provisions of Mass. Const. Amend. XLIV. Such a tax, however, would be, in the main and perhaps entirely, a property tax and not an excise imposed upon a corporate franchise or upon the privilege of doing business within the Commonwealth. To be valid it must, of course, comply with the conditions and limitations contained in that amendment. If different rates were adopted for the income of corporate property from those applied in the taxation of the property of individual inhabitants, difficult questions as to the validity of such a classification would at once arise. As your question can readily be answered in the affirmative by a reference to the power to levy excises, there seems to be no occasion for discussing this last-mentioned phase of the matter further at the present time.

Your sixth question is as follows:—

“(6) Would it be repugnant to the Massachusetts and the Federal Constitution for the General Court to pass a law which would establish a rate of taxation on the income of national banks and other financial corporations which was lower than the rate or burden of taxation imposed upon mercantile, manufacturing, and business corporations?”

The only limitation imposed upon such a tax by the Federal Constitution or growing out of the nature of the Federal government is that arising from the fact that national banks are instrumentalities of the Federal government and thus beyond the reach of any State taxation which to any extent impairs their efficiency as Federal agencies. Prior to the amendment to U. S. Rev. Stat., § 5219, which became effective March 4, 1923, a valid tax could not be imposed upon the income of a national bank. *Owensboro National Bank v. Owensboro*, 173 U. S. 664.

As amended, however, that section authorizes the States “to tax the income of such associations” upon the condition that,—

“In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.”

I have no doubt that a tax upon the income of a national bank which complies with this limitation is valid. The Federal statute, as thus amended, is a conclusive determination by Congress that a tax upon the income of a national bank thus limited will not foster unfriendly competition against them or in any manner impair their efficiency as Federal agencies.

It is also unimportant, in my judgment, whether a tax upon the income of national banks, which otherwise complies with this limitation, is regarded and imposed by a State as an excise or as a property tax. The purpose of U. S. Rev. Stat., § 5219, both in its original form and as amended, was merely to protect the banks from tax burdens which, when compared with the similar burdens imposed upon their competitors, would create and foster an unequal and unfriendly competition. *Mercantile Bank v. New York*, 121 U. S. 138; *Merchants' National Bank v. Richmond*, 256 U. S. 635.

In determining questions which have come before it under this Federal statute the Supreme Court of the United States has always regarded the burden and the effect of the tax. It has paid little attention to mere matters of form. In my judgment, section 5219, as amended, authorizes the imposition by a State of any form of tax upon or measured by the income of a national bank permitted by its Constitution, provided the specific limitations mentioned in the section are observed. So far as the Federal law is concerned, therefore, the General Court may impose a tax upon the income of national banks either under its general power to levy excises or under the power granted by Mass. Const. Amend. XLIV to impose income taxes.

In my judgment, the carrying on of business within the Commonwealth by a national bank, under its corporate franchise and subject to the protection of our laws, is a proper object of an excise, even under the somewhat narrower

rule stated by our court in *Gleason v. McKay*, 134 Mass. 419, and *O'Keeffe v. Somerville*, 190 Mass. 110, to the effect that no valid excise can be imposed upon the exercise of a natural right. Of course, it is true that, unlike the foreign corporation, a national bank cannot be excluded from the Commonwealth. Nor can regulations be imposed upon its methods of business which would interfere with the performance of its governmental functions. Yet, as is pointed out in *Greves v. Shaw*, 173 Mass. 205, 208, such banks are, by the Federal statutes creating them, given a definite local status. They are in fact exercising their corporate franchises here, and their business is subject to all the general laws of the Commonwealth which do not conflict with any specific Federal statute or impair their efficiency as Federal agencies. As decided in the last-mentioned case, their shares are within the jurisdiction of the Commonwealth as property for the purpose of descent and distribution and also for the purposes of a legacy and succession tax, even when owned by non-residents of the Commonwealth. Thus, in many respects they partake of the nature of domestic corporations rather than that of foreign corporations. The position of these banks is somewhat analogous to that of foreign corporations carrying on within the Commonwealth a business consisting solely of interstate commerce. Such corporations cannot be excluded from the State, but our court has held that even though their business is solely interstate commerce it is a proper object, under our Constitution, for the imposition of an excise. *Alpha Portland Cement Co. v. Commonwealth*, 244 Mass. 530.

In my judgment, therefore, an excise tax measured by a specific percentage of the net income of national banks and other financial corporations would be valid both under the Federal and State Constitutions, provided the limitations of U. S. Rev. Stat., § 5219, cl. 1 (c), were observed, and the tax was not at a higher rate than that assessed upon other financial corporations or than the highest rate assessed upon mercantile, manufacturing and business corporations doing business within the State.

In view of the conclusions just stated, it seems unnecessary to discuss further whether a tax such as is suggested could be validly imposed under Mass. Const. Amend. XLIV. As already stated, the Federal statute, in its amended form, is broad enough to permit either an excise or a property tax. The difficulty would come in attempting to frame a tax under the amendment, of the character suggested by your question, which would not run counter to the limitations of the amendment requiring income of all property of the same class to be taxed at a uniform rate throughout the Commonwealth. There seems to be no occasion for considering the difficult questions of classifications which would thus arise, when the desired result can be reached, without raising those questions, under the power to levy excises. With these reservations the answer to your sixth question is therefore in the negative.

Your seventh question is as follows:—

“(7) If a tax is imposed upon the income of national banks under the provisions of clause 1 (c) of said section 5219 of the Federal statutes, would it be necessary, to conform to the provisions of said section, to impose a tax at the same rate upon other moneyed capital in the hands of individuals or co-partnerships coming into competition with national banks?”

The answer to this question is in the negative. U. S. Rev. Stat., § 5219, as amended, permits the States to choose one, but only one, of three methods of taxation, namely: a tax upon the shares as property; an income tax upon the dividends derived from the shares; or a tax upon the income of the bank. If the tax upon the shares is chosen, then the limitation stated in clause 1 (b) becomes effective, and the tax must not be at a greater rate than is assessed upon other moneyed capital as defined in that clause. If an income tax upon the dividends is chosen, the only limitation is that imposed by clause 1 (d), that the tax shall not be at a greater rate than is assessed upon the income of other moneyed capital. If, on the other hand, as your question assumes, a tax is imposed upon the income of the bank itself, then the only limitation is that imposed by clause 1 (c), namely: “that the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the

highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits." The limitation imposed by clause 1 (b) plainly has no application to a tax imposed upon the income of the bank.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Insurance — Contracts of Insurance — Service Contracts.

A contract to render services to the owner of an automobile, and to reimburse him for a portion of all expenditures for towing, is not a contract of insurance.

Nov. 17, 1924.

Hon. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR: — You have asked my opinion as to whether a certain form of contract, called "Service Contract A," which is made with its customers by the Liberty Automobile Service League, Inc., constitutes a contract of insurance under the provisions of G. L., c. 175, § 2.

Under the provisions of the contract, a copy of which you have submitted with your letter, the League agrees, for a stated consideration paid by the other party to the contract, to "furnish and render unto him the following services:"

"(1) The association will represent said owner in the adjustment of any claim or controversy whatsoever relative to the use, maintenance and operation of said automobile.

(2) The association will help members in the financing and purchasing of new or second hand cars and list their machines for sale or exchange.

(3) The association maintains a purchasing department for the benefit of its members, furnishing them with tires and accessories at a substantial discount.

(4) Call the nearest garage available and have your car towed in. Get a receipted bill and the association will reimburse you, maximum five dollars. Mail us a receipted bill giving membership number, motor number and make of car.

(5) The influence and co-operation of the association will be used in all movements pertaining to the improvement of highways and the betterment of automobile conditions."

With the exception of the fourth, the foregoing agreements made by the League are contracts to render service, and are not contracts of insurance. Each of these agreements lacks the distinguishing feature of payment of loss or reimbursement which is essential to the formation of a contract of insurance under the provisions of our statutes. A long line of opinions by my predecessors in office has recognized the distinction between contracts to render service and contracts of insurance, and the principles of law involved therein are set forth and the earlier opinions of the Attorneys General are cited in Attorney General's Report, 1921, p. 143. The decisions to which you refer, *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, and *Physicians' Defense Co. v. Cooper*, 199 Fed. 576, do not recognize the line of distinction between the two classes of contracts that has been the basis of the opinions of former Attorneys General of this Commonwealth, are in conflict with decisions of courts of last resort in other jurisdictions, and are not authoritative in this Commonwealth.

The fourth agreement made by the League in this "Service Contract," which relates to towing, although providing for reimbursement of expense incurred by the other party to the contract, to the extent of five dollars, is not a contract of insurance. In the terms in which it is drawn the element of hazard or risk is absent. The reimbursement which is to take place is not predicated upon the happening of any accident or of any casualty or of any specific event. The other party to the contract may at any time, for any reason whatsoever, elect to have his car towed, and may thereafter collect five dollars from the League. That loss which is to be reimbursed should be caused by occurrences outside the direct control of the parties to the contract, is of the essence of insurance.

The contract contains also a statement under the heading "Additional Services," as follows:—

"The Liberty Automobile Service League, a voluntary association of automobile owners, has retained counsel to render legal services to the association in advice and counsel as requested, and to render legal services to the individual members of the association when retained directly by such members or any of them, for a period of 2 years."

Then follows a detailed statement of services to be included.

This is merely a statement that the League has retained counsel whose services will be available to members if employed by them. The seventh clause thereunder, providing that the association will furnish to its members a \$5,000 bail bond, is not in itself a contract of insurance.

I am of the opinion that the instrument called "Service Contract A" is not a contract of insurance.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Teachers' Retirement Association — Membership.

Supervisors of adult alien education, employed under G. L., c. 69, § 9, are not teachers employed in a public day school, within the meaning of the teachers' retirement law.

Nov. 18, 1924.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:—You request my opinion as to whether the teachers' retirement law, G. L., c. 32, §§ 6-19, applies to supervisors of adult alien education.

These supervisors are employed under the provisions of G. L., c. 69, § 9, which is as follows:—

"The department, with the co-operation of any town applying therefor, may provide for such instruction in the use of English for adults unable to speak, read or write the same, and in the fundamental principles of government and other subjects adapted to fit for American citizenship, as shall jointly be approved by the local school committee and the department. Schools and classes established therefor may be held in public school buildings, in industrial establishments or in such other places as may be approved in like manner. Teachers and supervisors employed therein by a town shall be chosen and their compensation fixed by the school committee, subject to the approval of the department."

The word "teacher" as used in G. L., c. 32, § 7, providing for membership in the Teachers' Retirement Association, is defined in section 6 of that chapter as "any teacher, principal, supervisor or superintendent employed by a school committee or board of trustees in a public day school in the commonwealth."

"Public school" is defined in this same section (as amended by St. 1924, c. 281) as "any day school conducted in the commonwealth under the superintendence of a duly elected school committee, also any day school conducted under sections one to thirty-seven, inclusive, of chapter seventy-four."

I am of the opinion that supervisors of adult alien education cannot be said to be employed in "a public day school" within the meaning of this provision. The question seems to have been settled by the opinion of my predecessor holding that schools and classes maintained under Gen. St. 1919, c. 295 (continued in G. L., c. 69, § 9), are not public schools. In this opinion it is said (V Op. Atty. Gen. 573):

"The phrase 'public schools,' as used in the Constitution and the laws of this Commonwealth, has acquired a common and well-settled meaning. It refers and is limited to schools which form a part of the general system of education for the children of the Commonwealth, and which are the kind of schools that cities and towns are by statute required to maintain as a part of our system of common education (R. L., c. 42, § 1), and that children of legal school age are obliged to attend (R. L., c. 44, § 1).

Schools or classes established and maintained for the instruction of voluntary pupils in certain specified branches of education, which do not form a part of the general system of education which the law requires cities and towns to maintain, are not included within the meaning of said term."

I see no reason to question the soundness of this opinion. It follows that a supervisor employed for the purpose of giving instruction in such schools and classes under G. L., c. 69, § 9, is not a teacher employed in a public day school in the Commonwealth, within the meaning of the teachers' retirement law.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Insurance — Broker's License — Fee.

An applicant for an insurance broker's license is not exempt from payment of a fee because of previous service as a woman nurse in the United States Army.

Nov. 19, 1924.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You request my opinion as to whether a certain applicant for an insurance broker's license under G. L., c. 175, § 167A, a new section enacted by St. 1924, c. 450, is exempt from paying the fee prescribed by sections 166 and 167, on the ground that the applicant, whom I assume from the use of the word "she" in your letter to be a woman, served as a nurse in the United States Army during the World War.

The certificate which you state has been filed with you, for the purpose of establishing such exemption, recites that the applicant "was called into service of the United States, February 18, 1918, as a nurse in the United States Army, from civil life and assigned to Base Hospital, Camp Devens, Massachusetts."

The statute relative to the proposed exemption reads as follows:—

"No fee for a license issued under section one hundred and sixty-six or one hundred and sixty-seven shall be required of any *soldier, sailor or marine* resident in the commonwealth who has served in the army or navy of the United States in time of war or insurrection and received an honorable discharge therefrom or release from active duty therein, if he presents to the commissioner satisfactory evidence of his identity."

In my opinion, the language of this statute is not applicable to female nurses who have served in the Army of the United States. The words used in the statute designating those entitled to exemption are "any soldier, sailor or marine." These words do not describe women nurses. There are no phrases used in this statute which would enlarge the usual meaning of these words so as to include women nurses, such as have been used in other statutes relative to the status of "veterans" or of persons who "voluntarily enlisted" in the military service. Gen. St. 1918, c. 92; G. L., c. 31, § 21.

The ordinary meaning attached to the word "soldier," as used in relation to the forces of the United States Army, is that of an enlisted man. Enlistment is of the essence of the status of such a soldier. *In re Grimley*, 137 U. S. 147. As was pointed out in an opinion by one of my predecessors in office (V Op. Atty. Gen. 471), women nurses are not "enlisted" in the United States Army in the ordinary technical sense of the term. Under the Federal statutes and the practice of the War Department, they do not acquire the status of soldiers (U. S. Comp. Stat. 1918, Title XIV, §§ 1831-3). In the absence from the statute under consideration of definitive phrases enlarging the ordinary meaning of the word "soldier," it must be taken in its usual sense, which does not connote a woman nurse.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Department of Public Works — Authority to sell Certain Land belonging to the Commonwealth.

The Department of Public Works, as the successor of the Commission on Waterways and Public Lands, which succeeded the Board of Harbor and Land Commissioners, is not authorized to sell and convey land of the Commonwealth in the absence of specific authority from the Legislature.

Nov. 25, 1924.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR:— You request my opinion as to the right of the Department of Public Works to sell a certain lot of land without specific authority from the Legislature.

It appears that under the provisions of St. 1898, c. 469, and St. 1899, c. 447, the Board of Harbor and Land Commissioners constructed jetties at the entrance to Green Harbor in the town of Marshfield. In connection with the construction of the southerly jetty the lot of land in question, measuring one hundred feet on the beach and fifty feet on the adjoining property, was purchased by the Commonwealth for \$250, in order to secure access to the inshore end of this jetty. The Commonwealth received a warranty deed under date of September 3, 1898, which has been duly recorded in the Plymouth County registry of deeds. Said deed contains a provision that no building shall be erected upon the lot.

The Board of Harbor and Land Commissioners was abolished by Gen. St. 1916, c. 288, and all the rights, powers, duties and obligations conferred and imposed by law on said board were thereby transferred to the Commission on Waterways and Public Lands, which was created by said act. By Gen. St. 1919, c. 350, § 111, the Commission on Waterways and Public Lands was in turn abolished and all the rights, powers, duties and obligations of said Commission were thereby transferred to the Department of Public Works, which was established by said act and which was thereby made the lawful successor of said Commission. By section 113 it was provided that the Department of Public Works shall be organized in two divisions, namely, a Division of Highways and a Division of Waterways and Public Lands. The duties of said Division of Waterways and Public Lands relative to Commonwealth lands are set forth in G. L., c. 91, § 2, which provides as follows:—

“The division shall, except as otherwise provided, have charge of the lands, rights in lands, flats, shores and rights in tide waters belonging to the commonwealth, and shall, as far as practicable, ascertain the location, extent and description of such lands; investigate the title of the commonwealth thereto; ascertain what parts thereof have been granted by the commonwealth; the conditions, if any, on which such grants were made, and whether said conditions have been complied with; what portions have been encroached or trespassed on, and the rights and remedies of the commonwealth relative thereto; prevent further encroachments and trespasses; ascertain what portions of such lands may be leased, sold or improved with benefit to the commonwealth and without injury to navigation or to the rights of riparian owners; and may lease the same. It may sell and convey, or lease, any of the islands owned by the commonwealth in the great ponds. It may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth flats, may lease any portion thereof with or without improvements thereon, may regulate the taking of material from the harbor and fix the lines thereon for filling said lands. All conveyances and contracts, and all leases for more than five years, made under this section shall be subject to the approval of the governor and council.”

In an opinion of one of my predecessors, Hon. Herbert Parker, to the Board of Harbor and Land Commissioners, dated March 23, 1904 (II Op. Atty. Gen. 479), it was decided that the Board of Harbor and Land Commissioners was not authorized to sell and convey certain land of the Commonwealth, and that if such a sale were desirable competent authority must be secured to effect it.

Inasmuch as the Division of Waterways and Public Lands of the Department of Public Works is the successor of the Board of Harbor and Land Commissioners, the reasons set forth in said opinion apply with equal weight to the present instance.

Where the Legislature desires a department to exercise its discretion to dispose of lands of the Commonwealth no longer needed, it grants that power in specific terms. In the absence of such granted power, it is my opinion that your Department cannot sell the land in question without specific authority from the Legislature.

Very truly yours,

JAY R. BENTON, *Attorney General.*

INDEX TO OPINIONS.

	PAGE
Agriculture, Commissioner of; inspection of apples; interstate commerce	134
Animal Industry, Division of; approval of Director to nomination of local inspector of animals	69
Quarantine stations; tuberculin test; disposition of diseased animals	90
"Anti-aid" amendment; reimbursement of towns for teachers' salaries	114
Appeal, Board of; delegation of duties by members	129
Apples, inspection of; interstate commerce	134
Back Bay lands; restrictions	119
Blue Book; printing of Constitution therein	90
Boston Elevated Railway Company; dividends "earned and paid"	41
Liberty of contract; aliens; equal protection of the laws	25
Burial expenses for persons dying from certain contagious diseases; overseers of the poor; local boards of health	98
Cattle which react to tuberculin test; restriction of importation	65
Civil service; promotion of Metropolitan police officer	118
Constitution; Blue Book	90
Constitutional law; "anti-aid" amendment; reimbursement of towns for teachers' salaries	114
Boston Elevated Railway Company; liberty of contract; aliens; equal protection of the laws	25
Eastern Massachusetts Street Railway Company; maintenance and repair of that portion of highways occupied by its tracks	25
Police power; membership in political committees	35
Restriction of importation of cattle	65
Ratification of proposed amendment to the Federal Constitution; submission to the people for an expression of opinion	85
Rearrangement of the Constitution; adoption	48
Regulation of resale of theatre tickets	84
Taxation; legacies and successions; uniting interests passing to one beneficiary	53
National banks	135
Undertakers; license; registered embalmers	61
"Conviction"; interpretation	40, 120
County commissioners; election of more than one candidate from the same city or town in certain counties	124
District attorneys; traveling and other expenses; payment	57
Dividends "earned and paid"; interpretation	41
Domicil of minor child; power of widowed mother to change	96
Drainage law; reclamation district; improvement; issuance of bonds by county	128
Eastern Massachusetts Street Railway Company; maintenance and repair of that portion of highways occupied by its tracks	25
Elections; county commissioners; more than one candidate from the same city or town in certain counties	124
Presidential primaries; candidates for delegates to national party conventions; preferences	48

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1925



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1925



The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 20, 1926.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1925.

Very respectfully,

JAY R. BENTON,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL, State House.

Attorney General.

JAY R. BENTON.

Assistants.

ALEXANDER LINCOLN.

JOSEPH E. WARNER.

LEWIS GOLDBERG.

A. CHESLEY YORK.

JAMES H. DEVLIN.

A. PERRY RICHARDS.¹

ROGER CLAPP.

CHARLES F. LOVEJOY.

MELVILLE FULLER WESTON.

ALFRED R. SHRIGLEY.²

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

¹ Resigned January 21, 1925.

² Appointed March 1, 1925.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES
FOR THE FISCAL YEAR.

Appropriation for 1925	\$100,000 00
Appropriation for 1924, unexpended balance brought forward . .	397 63
Appropriation for small claims, St. 1925, c. 211	5,000 00

\$105,397 63

Expenditures.

For salary of Attorney General	\$8,000 00
For law library	496 92
For salaries of assistants	35,546 34
For clerks	7,620 00
For office stenographers	6,531 00
For telephone operator	1,360 21
For legal and special services	8,883 90
For office expenses and travel	3,304 84
For court expenses	13,684 96
For small claims	2,725 86
<hr/>	
Total expenditures	\$88,154 03

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 20, 1926.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my annual report.

The cases requiring the attention of this Department during the year ending November 30, 1925, to the number of 9,771, are tabulated below: —

Corporate franchise tax cases	3,214
Extradition and interstate rendition	296
Grade crossings, petitions for abolition of	60
Indictments for murder	51
Land Court petitions	78
Land-damage cases arising from the taking of land by the Department of Public Works	25
Land-damage cases arising from the taking of land by the Metropolitan District Commission	18
Land-damage cases arising from the taking of land by the State House Building Commission	1
Land-damage cases arising from the taking of land by the Department of Mental Diseases	4
Land-damage cases arising from the taking of land by the Pilgrim Tercentenary Commission	1
Miscellaneous cases arising from the work of the above-named commissions	35
Miscellaneous cases	1,700
Petitions for instructions under inheritance tax laws	49
Public charitable trusts	188
Settlement cases for support of persons in State hospitals	63
*All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	3,988

Capital Cases.

Indictments for murder disposed of during the year 1925:

Bristol County. — In charge of District Attorney Stanley P. Hall: Mary Juszynska and Eli Lapointe.

Essex County. — In charge of District Attorney William G. Clark: Vito Caruso.

Hampden County. — In charge of District Attorney Charles H. Wright: Rovina Rhoust Andrews, John H. Burns, Manuel Pereira and Stanley Zelinski.¹

Hampshire County. — In charge of District Attorney Thomas J. Hammond: Elberta M. Miles.

Middlesex County. — In charge of District Attorney Arthur K. Reading: Joseph H. Bennett, Cosmo DiNitto, Hilda James, Peter V. King, Palmer Lucas, Joseph Mailhot, James L. Mortimer,¹ Hallie Mowbray, Gilbert Richards,¹ Raymond D. Thiery¹ and Salvatore Vona.

Norfolk County. — In charge of District Attorney Winfield M. Wilbar: Alfred W. Bedard and James F. Weeks.

Plymouth County. — In charge of District Attorney Winfield M. Wilbar: Jose Julio Borges, Dominic D'Agestino and Christian Martin.

Suffolk County. — In charge of District Attorney Thomas C. O'Brien: Harry Alexander, Joseph Carpeneto, Frank Crecorian, Guiseppi DeFlumeri, Frank Festa, Ah Fong, J. Thomas Gettigan, John Harvey and Gennaro Longobardi.

Worcester County. — In charge of District Attorney Emerson W. Baker: Henry Freeman and Walter F. White.¹

The following indictments for murder are pending:

Berkshire County. — In charge of District Attorney Charles H. Wright: Chester Darling, Louis Mercier, Luther Todd and Mary Todd.

Middlesex County. — In charge of District Attorney Arthur K. Reading: Vincenzo Bruzzese, John J. Devereaux, Edward J. Heinlein, John J. McLaughlin, Robert L. C. Shafer, Robert A. Smith and Richard Stewart.

Norfolk County. — In charge of District Attorney Winfield M. Wilbar: Celestino Madeiros, Nicola Sacco and Bartolomeo Vanzetti.

Plymouth County. — In charge of District Attorney Winfield M. Wilbar: George Abrahams, Napoleon J. Cooke and Joseph Silipo.

Suffolk County. — In charge of District Attorney Thomas C. O'Brien: Sabatino Troisi.

¹ Committed to State Hospital.

The Administration of Criminal Justice in Massachusetts.

The increase in crime, and particularly in crimes of violence, in recent years has acutely focused public attention upon the "crime wave," its causes and the probable remedy therefor. This most important public question is not local in character, is not confined to Massachusetts, but is country-wide. One of the leading authorities on this subject has stated that we have had in the last three or four years the most sustained and vigorous challenging of our system of administering criminal justice that has ever occurred in this country. This challenge must be met.

The paramount duty of every civilized State is the protection of society. If that fails, all fails. It should be realized, however, that the commission of crime cannot be completely suppressed, even in the most perfect society and under the most improved laws and administration, but it can be greatly reduced, and the efforts of the State should be directed toward reducing the commission of crime to the lowest possible degree. It should be further realized that the mere enactment of laws will not in and of itself reduce crime. Laws are not self-enforcing. The human equation appearing in the administration of laws is the most important factor.

Too many people believe that the remedy for any evil is the passage of a law, neglecting altogether the vital fact that a law which is not carefully considered and which does not fit properly into the general machinery of the administration of justice may bring far greater evils in its wake than the specific evil which it is designed to remedy.

It is therefore of the utmost importance that hysteria should not be the basis of, nor be allowed to control, new legislation. The time demands clear thinking, unencumbered by passion, an actual knowledge of the facts, and a proper appreciation of all of the factors which enter into the whole situation. The convict should not be coddled or petted. He should not be treated as, or made to feel as if he were, the favored guest of the household. On the other hand, we should beware of turning back to the barbaric age. The pendulum must not be permitted to swing to either extreme, always remembering that the protection of society as a whole is the desired end.

Too frequently some of the numerous factors which obtain in the crime problem are lost sight of. In endeavoring to suppress or reduce crime we must seek the causes of crime and endeavor to strike at the roots. The various factors, as I see them, are:

1. The home problem.
2. The apprehension of the criminal.
3. The legal procedure with respect to trial and conviction.
4. The attitude of the public toward the accused.
5. The punishment of the criminal.
6. The attitude of the administrators of criminal justice.

These factors are all interdependent, are all part of one piece of machinery, and a breakdown with respect to any one of them seriously hampers society in its efforts to suppress crime.

THE HOME PROBLEM.

The suppression of crime must start with the proper care of the child. A better home life, a proper environment, a correct training, a kind appreciation of the child's problems, a sympathetic but firm supervision over the child's habits and companions, would serve to strike at the very roots of the creation of criminals. The obligations with respect to these things are manifestly squarely on the shoulders of the respective parents. Legislation can be of little practical help. The schools obviously can be, and are, of great assistance, but they have charge of the child for only a small portion of its daily life. They cannot control its outside activities. A child cannot be expected, if it be permitted to run wild without adequate parental control, to grow up into a law-abiding citizen. If a child is allowed to roam the streets at will, to choose its companions and playfellows indiscriminately, to become part of the street-corner gang, and to imbibe freely of the practices and habits of the more vicious elements in the street, is it to be wondered at that such child grows up to be a gangster and criminal? The duty of parents with respect to the care of their children is clear. In the failure of parents vigorously to exercise that duty lies the first weak link in the chain. An aroused understanding on the part of parents with respect to their obligations would materially aid in the solution of the criminal problem.

THE APPREHENSION OF THE CRIMINAL.

If persons who commit crime are not apprehended swiftly on the heels of their crimes, criminal justice must fail. The police are the first line of defense against the criminal. Quick and certain apprehension is the first step in deterring the commission of crime. If criminals are not apprehended, crime will, as a matter of course,

flourish. An adequately large police force is, therefore, of vital necessity. The men on the force must be of unquestioned honesty and integrity, and should be properly trained to cope with the situation they are required to meet.

The police forces of the various municipalities should be properly co-ordinated and vigorously supervised. Why longer delay unifying the police departments of the cities and towns that make up metropolitan Boston? Here we have one of the large metropolitan cities of the world, with a population of nearly two million people, policed by forty separate and distinct police forces. Why not lead, and not follow, other great cities in installing a radio system as an important aid to the police in the capture of criminals? The installation of a central broadcasting station and sufficient receiving stations, solely for police use, which would be ready any minute of the day or night, would mean that the police alarm could be broadcast immediately all over the State, the fleeing criminals more effectively followed, and, so far as metropolitan Boston is concerned, all the exits from the city guarded almost at once.

Co-operation with police agencies throughout the country should be achieved. The records of criminals should be carefully compiled and made available through some central agency to all of the authorities engaged in the administration of criminal justice.

LEGAL PROCEDURE WITH RESPECT TO TRIAL AND CONVICTION.

The next step after apprehension of the criminal should be his trial and conviction. Important as it is that the criminal be speedily caught, it is equally of vital importance that the trial and conviction should speedily follow. Delay in bringing him to trial means the disappearance of witnesses, at times a change of testimony on their part due to sinister influences, an actual or pretended loss of memory, and loss of interest on the part of witnesses. Delay usually favors the criminal. Also, and this is of perhaps equal importance, punishment cannot be a sure deterrent to potential criminals unless it follows so closely on the heels of the crime as to make its impression while the crime itself is still fresh in the minds of the public. Otherwise, the crime remains in the public mind as an unpunished one, even though at some later and unrelated date adequate punishment is actually imposed. The failure to bring the criminal to speedy trial and punishment actually induces the commission of other crimes, because of the feeling that in the long run crime goes unpunished.

Under our system a defect in the form of an indictment may mean long, legal battles before or during trial, and may result in the discharge of the defendant, regardless of his guilt, thus necessitating the return of a new indictment. This needlessly involves expense and delay, may mean the defeat of justice, may prevent the conviction and punishment from acting as a deterrent, and does tend to bring the administration of justice into disrepute. There seems to be no valid reason for not empowering the court to allow the prosecuting officer at any time to amend the indictment as to matters of form which do not prejudice the defendant. I accordingly recommend legislation to this effect. In addition, in my opinion legislation should be enacted to the effect that mere errors of form should neither invalidate an indictment nor be grounds for the defendant's discharge.

In the Federal courts and in England it is competent for the court to comment upon the evidence and to express an opinion thereon. The court's view as to the evidence is not binding upon the jury but is merely advisory. This right of the court has operated in a very satisfactory manner and has been of great assistance to the jury. It has enabled the jury to get a clearer view of the case and better to comprehend the law applicable to the situation as laid down by the court. I recommend that careful study be given to the question of the advisability of legislation giving the court such right in this State.

After a conviction has been obtained the judgment should not be reversed unless there has been substantial harmful error. I recommend the enactment of legislation to the effect that the conviction should not be set aside for errors of form or for any other reason except substantial error which tended to prejudice the defendant.

THE ATTITUDE OF THE PUBLIC TOWARD THE ACCUSED.

Even though the machinery of the law moves quickly and effectively in apprehending the criminal and placing him on trial, its work is set at naught if the general public, as represented in the jury box, will not convict the guilty. The public too often stands in a position of utter indifference toward convicting those who have committed crime. Too often it is stirred by sympathy for both the admitted and convicted criminal. Too often it forgets its duties to itself, the duty to protect society against criminals, and looks upon the trial of a criminal case as a game with which it is not concerned but in which it is merely a curious or interested spectator. And with that attitude and in that frame of mind it too often looks upon the defendant as an

under-dog who is pitted in an unequal contest against a powerful adversary, the prosecuting officer, and as a consequence is full of open sympathy for the defendant and hopes for his acquittal. This attitude is necessarily reflected in the jury box, which is merely a cross section of the general public.

Too many men attempt to dodge jury service to avoid personal inconvenience. They do not desire to see justice thwarted by failure to secure proper juries; they do not even desire to have men freely excused from jury service for personal business reasons. Perhaps they even condemn the practice of dodging jury duty. And yet, when they themselves are summoned for jury service, and it is inconvenient for them to serve, they resort to every artifice and device to evade the duty. They regard themselves as isolated cases. They fail to realize that there is nothing unique about their cases, that they are merely individual units in large masses of so-called good citizens, desiring to see a proper administration of criminal law but insisting that they be excused and that some one else carry the burden. They fail to realize that, if the better citizenry of the Commonwealth succeeds in evading jury duty, juries will necessarily be composed entirely of the inferior elements in the community, with disastrous effects upon criminal justice. A man cannot regard himself as a good, law-abiding citizen and evade the call to jury service. When he attempts to dodge jury duty solely for purposes of personal convenience he unwittingly allies himself with the forces of evil.

The attitude of some newspapers, at times, in publishing articles about certain criminals in such a manner as to give the impression that the criminals are heroes and that they are worthy of admiration and perhaps emulation, or that they are helpless, persecuted individuals who are without fault for their present situation and to whom all sympathy and assistance should be given, is another factor in turning public sympathy away from the protection of society and centering it upon the guilty. Newspapers, like other good citizens, do not deliberately seek to hamper or defeat justice; but at times unthinkingly, and at times unwittingly, for news effect, they so glorify the criminals as almost to idealize crime itself. The resultant effect is frequently disastrous to the cause of criminal justice. The newspapers stand in a position of public trust. Their duty to the public and to society is clear. They should be true to that duty.

No legislation can deal with this situation. What is needed is an aroused public conscience as to its duties, an understanding on the

part of the public that a criminal trial is not a game conducted for its entertainment or amusement, but a step toward making society a safe place to live in, and an appreciation by the public that unless it, acting through the jury, abandons the policy of misplaced sympathy and convicts the guilty, criminal justice must fail, crime will enormously increase, and the public, not the criminal, will pay the penalty. There can be no effective criminal justice without the support of the public.

THE PUNISHMENT OF THE CRIMINAL.

After the trial and conviction of the criminal, punishment should be speedy, certain and adequate. That alone can effectively deter the commission of crime. A smaller penalty imposed and carried into effect while the crime is still fresh in the public mind is of far greater value as a deterrent than a greater penalty imposed or carried into effect when the crime and the very existence of the criminal has been blotted out of the public mind by other happenings. Delay between the time of conviction and the carrying of the sentence into effect should be reduced to a minimum. The courts have ample power in most cases to effect this result. They should use it.

Too frequently there is groundless delay between the time of imposing the sentence and carrying the sentence into effect. Where the defendant has real questions for the consideration of the Supreme Judicial Court it is proper that the execution of the sentence be stayed pending the determination of the questions raised by him. Frequently, however, his exceptions are wholly without merit or frivolous, and it is a foregone conclusion that such exceptions will be dismissed and the conviction sustained. In such cases it is a miscarriage of justice, a hampering of the administration of criminal law, and perhaps even an inducement to the commission of crime, to stay the execution of sentence. No further legislation appears to be necessary to remedy this situation. G. L., c. 279, § 4, provides that sentence shall be imposed upon conviction of a crime, except in capital cases, although exceptions have been alleged or an appeal taken, and that the execution of the sentence be not stayed unless the court files a certificate that there is reasonable doubt whether the judgment should stand. Too frequently such certificate is filed as a matter of course, although the court is not in doubt. This provision of law should be literally enforced by the courts. The execution of sentence should never be stayed unless the court *actually* has a reasonable doubt whether the judgment should stand.

THE ATTITUDE OF THE ADMINISTRATORS OF CRIMINAL JUSTICE.

Under this head I include police, prosecuting officers, judges, and probation, parole, commutation and pardon authorities. I have referred at length to the required attitude of the first three authorities. All should be imbued and should act with an eye singly to the public welfare and the protection of society. This applies with especial emphasis to the probation, parole, commutation and pardon authorities. They should always subordinate the welfare of the individual convict to the welfare of society as a whole. In determining whether a convict should be released prior to the expiration of his sentence the sole test should be whether it is to the interest of society that he be released, and such release should not be granted unless the answer to that question is in the affirmative.

In striving to eradicate one evil we must be careful not to create other greater evils. Spasmodic, offhand or hysterical legislation may bring greater evils in its wake than those such legislation may be designed to cure. All new legislation must be made to fit into the intricate background of established law. Existing institutions should not be lightly scrapped unless and until we are satisfied that they are no longer useful. Features in our legal or administrative machinery of recognized strength and worth should not be destroyed to make room for provisions of doubtful and untried value. Judicial power and judicial discretion cannot be arbitrarily cut down without a wholly bad effect on the administration of justice. The hands of the court should not be bound unless and until the Legislature, after careful study and mature deliberation, feels that such action is essential.

I have endeavored above to outline some of the factors and problems involved in the administration of criminal justice. I now desire to call your attention expressly to the following matter:

It appearing in the newspapers from time to time that the Registrar of Motor Vehicles had information about certain criminal cases, which he alleged had not been properly disposed of, the Registrar, on December 7 last, was asked to furnish specific cases, in which, in his opinion, there had been miscarriages of justice. On the following day a similar request was made to the Police Commissioner of the city of Boston. The cases presented now total nearly four hundred. An intensive investigation is being made into each case to determine the actual facts with respect to the charges as to deficiencies in our criminal laws and in their administration. This work is being expedited,

and as soon as completed will be embodied in a special report to the Legislature, with recommendations for such legislation as is thought to be immediately necessary in the situation, and to point out such other remedial action as is needed to diminish crime and to improve the administration of criminal justice.

On November 21 last, a conference was called of the District Attorneys, at which were considered proposed recommendations to be made to the General Court for changes in the criminal law. These recommendations will be included in the special report referred to above.

In bringing this part of my annual report to a close, I think it is of importance to point out that a scientific study of the situation from every angle has not as yet been made. There has been no continuing body to follow closely and investigate the administration of criminal justice. We have been content to deal with individual phases of the whole problem without the aid of all of the facts. The dean of one of the leading law schools in the country, referring to the crime problem, said recently:

There is very little exact information available. . . . The most important thing just now is to ascertain the facts. Very little of what is said and written on this subject has any sure foundation in exact knowledge of the facts. Perhaps the first step toward something better would be adequate provision for research.

I recommend that the Legislature, after enacting such acts as it deems necessary to meet the present situation, give careful consideration to the advisability of establishing a commission to make a survey of criminal justice in the Commonwealth, to study the causes of crime and factors in the administration of criminal justice, and to make recommendations based on scientifically ascertained facts. Such a commission should not consist entirely of lawyers, because, as has been pointed out above, a number of the factors involved in the general problem are not legal in character.

The efforts now being made, not only in this State but throughout the Nation, are bound to secure the changes that will make our system of administering criminal justice a capable and effective agency to protect society against its enemies. The present public concern and agitation is justified. The ancient system, long since discarded in England, continues with us. The time has come for wise and deliberate changes in our system of procedure, so that, as has been said, criminal justice will be prompt and effective and free from its present burden of technicalities and formalism that a dead past has imposed upon it.

Certifying the Entire Record in Homicide Cases.

Upon my recommendation, St. 1925, c. 279, entitled, "An Act relative to certain appeals in murder and manslaughter cases and to the elimination of delay therein," was enacted and went into effect September 1. This act abolishes bills of exceptions in murder and manslaughter cases, and provides that in such cases the testimony and all the proceedings shall be taken stenographically and submitted *in toto* to the Supreme Judicial Court in the event of an appeal, that the defendant who desires to appeal must file a claim of appeal in writing within twenty days after the verdict, and that within ten days after notice of the completion of the record by the clerk of the court such defendant must file an assignment of errors. The record is then ready for submission to the Supreme Judicial Court, and, upon being filed there, the case is ripe for argument.

The effect of this act is to eliminate the vast delay (sometimes years) usually involved in agreeing upon a bill of exceptions in any important case, and to save considerable expense to the government. This saving of time was strikingly shown very recently in two murder cases argued before the Supreme Judicial Court. In one case, under the former system, the trial was held in 1921, and has just been argued upon a bill of exceptions; in the other case, under the new act, the trial was held in October, 1925, and has already been argued in the Supreme Judicial Court.

Proceedings Against Certain Delinquent Tax Collectors.

G. L., c. 58, § 8, as amended by St. 1923, c. 283, provides that whenever it appears to the Tax Commissioner that, at the end of two years from the commitment of a warrant to a collector, any taxes upon such warrant remain uncollected, or, if collected, have not been turned over to the city or town treasurer, the Tax Commissioner shall, within three months, bring the matter to the attention of the Attorney General, who may bring an action of contract in the name of the city or town against the collector, and upon his bond, to recover the amounts uncollected.

While a large number of such cases is referred each year by the Tax Commissioner to this Department, most of them are cleared up satisfactorily without litigation. The 1923 amendment shortened, by one year, the report to the Attorney General of outstanding taxes, and thereby greatly increased the number of cases in which he was required

to secure collections or an accounting. In order to effect a clearance of all warrants uniformly up to and including the year 1922 (the last year reported), and to further the statutory provisions for the prompt collection of taxes, actions were begun against 58 present or former tax collectors and their bondsmen in 37 cities and towns of the Commonwealth. At the time of instituting these actions the total amount of taxes which were uncollected, or if collected had not been turned over, exceeded \$2,387,000. Since these actions were begun the back taxes involved in the suits in 16 cities and towns have all been cleared. This leaves 47 cases on our list for trial.

Municipal Defalcations.

During the progress of the auditing of city and town accounts under the direction of Mr. Theodore N. Waddell, Director of Accounts, several large defalcations of public moneys came to light, the leading cases being those in the towns of Wayland, Natick, Stockbridge and Charlton. These individual cases had the prompt attention of this Department. The general situation, however, as Mr. Waddell's investigations continued, became so serious that on November 3 last I held a conference with Mr. Waddell and Mr. Edward H. Fenton, his chief examiner, who has charge of this particular branch of the work, and directed them to furnish me with every case that in their opinion involved a serious defalcation that was not barred by the statute of limitations. These cases were compiled and forwarded to me, with complete auditor's reports by cities and towns, and the cases were then taken up with the several District Attorneys, with directions to present the same to their respective grand juries.

Alleged Fraud at Bar Examination.

Rumors became current following the bar examination of June 30, 1925, to the effect that copies of the questions which were the subject of that examination had been sold prior thereto to many of the applicants for admission to the bar. I deemed this a matter of vital importance to all the citizens of the Commonwealth, and I ordered at once an investigation of conditions. Several hundred persons were questioned, and the investigation proceeded continuously from October 1, 1925, to January 5, 1926, with the result that evidence was obtained which is deemed of sufficient importance to present to the grand jury of Suffolk County for its consideration.

Interstate Rendition.

The number of interstate rendition and extradition cases handled by this Department through Assistant Attorney General Lewis Goldberg during the past year was 296. These included all manner of crimes, from simple misdemeanors to the most serious felonies. A large number of fugitives were returned to this Commonwealth upon charges of desertion, nonsupport and abandonment of wives and minor children.

At the request of the Governor, an analysis was made of sixty-nine requisitions which were issued for the return of fugitives charged with the crimes of desertion, abandonment or nonsupport during a period of six months, for the purpose of determining the approximate cost of interstate rendition for such crimes, the final disposition of such cases, and the extent to which families of fugitives had been benefited by such proceedings. These included requisitions upon the Governors of thirteen States, — thirty-three upon New York, nine upon Pennsylvania, six upon Florida, four upon California, four upon New Jersey, four upon Illinois, two upon Vermont, two upon Maine, and one each upon Connecticut, Ohio, Alabama, Tennessee and Texas. All the requisitions, with the exception of that upon the Governor of Texas, were honored. The total cost of the interstate rendition proceedings in the sixty-nine cases was \$7,621.29, or an average cost of \$110.45 for each case. In no case was the defendant acquitted. Seven defendants were committed to houses of correction for terms ranging from three to nine months. Three defendants, after being placed upon probation and ordered to make payments to their families, fled from the Commonwealth and have not since been apprehended. One defendant was committed to the Boston State Hospital for observation. In the remaining fifty-eight cases, the families of the fugitives were directly benefited. In at least thirteen of the fifty-eight cases a reconciliation was effected, and, so far as is known, the defendants are now living with and supporting their families. In the remaining forty-five of the fifty-eight cases, and in some of the thirteen cases where a reconciliation had been effected, the court ordered the defendant to make weekly payments to the probation officer for the support of the family, or to the family directly, of amounts ranging from \$3 to \$30 per week, the average order being for \$10 to \$12 per week. In ten cases, bonds or bank accounts, averaging \$1,000 each, were filed or deposited with the probation officer to insure the enforcement of the

court's order relative to payments. In many cases the defendants had also been ordered to pay all the expenses of the interstate rendition proceedings. Such expenses were fully paid or are being paid in twenty-seven cases.

In addition to the foregoing direct benefits to the families of the fugitives, there are other benefits derived from bringing such fugitives back to the Commonwealth. One is the saving to the community of poor relief, which, in many cases, until the apprehension and return of the fugitive, was given by the community to the family. The second benefit is the deterrent effect upon would-be or potential family deserters. The fact that the various District Attorneys endeavor to, and do, secure the return from various parts of the country of men who abandon or fail to support their families undoubtedly deters other persons from committing the same crime. The practice of bringing such fugitives back from all parts of the country, wherever the facts indicate that a direct benefit will be obtained from the return of such fugitives, will be continued.

Hearings were held in eleven cases of fugitives sought by other States. In each of these cases the fugitive was represented by counsel, and in only one case was the judgment of this Department challenged by action in the courts, and then our action was sustained. In no case has the Governor of any other State refused to surrender fugitives from the justice of Massachusetts upon the ground that the papers accompanying the requisition, and passed upon by this Department, were not in proper form.

First Report of the Judicial Council.

A long step forward in the administration of justice was taken when the Legislature in the spring of 1924 created the Advisory Judicial Council. This council was established for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth.

On November 8, 1924, the organization of the council was effected. Hon. William C. Loring had been appointed by the Chief Justice of the Supreme Judicial Court to represent that court; Hon. Franklin G. Fessenden by the Chief Justice of the Superior Court to represent that court; and Hon. Charles T. Davis, the judge of the Land Court, to represent that court. His Excellency the Governor appointed from the Probate bench Hon. William M. Prest of the Suffolk Probate Court; from the District Court bench, Hon. Frank A. Milliken of

New Bedford; and from the bar, Addison L. Green, Esq., Frank W. Grinnell, Esq., Robert G. Dodge, Esq., and Hon. Frederick W. Mansfield.

This council, in compliance with the terms of the statute, has submitted to the Governor its first report, containing the results of its investigations to date, with recommendations for certain changes in the Massachusetts system at this time. The filing of this initial report marks the beginning of a continuous constructive program for the improvement of our judicial system. The high standing of the council's membership and their attainments upon the bench and at the bar call for the most serious and careful consideration of their suggestions by the General Court.

Massachusetts Reports.

The contracts made on behalf of the Commonwealth under chapter 30 of the Resolves of 1923 for the publication and sale of the Massachusetts Reports and the publication of the Advance Sheets of the opinions and decisions of the Supreme Judicial Court, as described in the annual report of the Attorney General for the year ending January 16, 1924, have proved to be of decided advantage to the Commonwealth and to the bar in general. Adequate and convenient service of a high character has been rendered under the contracts, and, as the plates for the publications are owned by the Commonwealth and there is no copyright upon the volumes, there can be no raising of price in the future.

The number of volumes to constitute an edition under the present contract, three thousand seven hundred and fifty, was procured from the former publisher of the reports. A proper number of back volumes must be kept on hand to meet the public needs. No provision has been made for the storing of such back reports pending their sale. The publisher, Mr. Samuel Usher, is willing to retain a reasonable number of the edition of each volume at his place of business for the purpose of carrying out his contract to act as agent for the Commonwealth in the sale of the volumes, but because of lack of space he cannot store without additional expense the large number of volumes that accumulate as the editions proceed. This difficulty can partially be obviated by providing for a smaller edition in a new contract to be made; but it still is necessary that some storage facilities be provided for these back volumes, which are the property of the Commonwealth until sold to retail buyers. It therefore is recommended

that the Secretary of the Commonwealth be authorized to provide, subject to the approval of the Superintendent of Buildings, a place for the storage of such unpurchased volumes of the Massachusetts Reports as the publisher does not keep at his place of business for sale on behalf of the Commonwealth, and that suitable appropriation be made therefor.

The present contracts of Mr. Samuel Usher expire on June 30, 1926. Under the contracts, to this date, seven volumes have been distributed, and two more will be distributed under the terms of the present contract. It therefore is recommended that the Attorney General, the Secretary of the Commonwealth and the Reporter of Decisions be authorized to make new contracts for the publication of the Massachusetts Reports and the Advance Sheets on terms no less favorable to the Commonwealth than the contracts now in existence and for a period of from three to five years, as in their discretion they shall deem best.

Publication of the Opinions of the Attorneys General.

I recommend that a sufficient sum of money be appropriated for the purpose of continuing the publication of the opinions of the Attorneys General, there now being, in my judgment, a sufficient number, of public interest, to warrant the publication of Volume VI.

Public Charitable Trusts.

The Attorney General is charged with the duty of representing and protecting, so far as lies within his power, the interests of the indefinite body of the public who are or may become the beneficiaries of trusts for charitable uses. With the increase of the population and wealth of the community, and the consequent addition year by year to the already vast sums permanently devoted by donors and testators to such trusts, this duty increases slowly but steadily its demands upon the time of this Department. The consideration of accounts of charitable trustees, and the participation in litigation relating to the establishment or administration of such trusts, have become matters of almost daily routine. A full description of the work of the Department in this respect during the past year would be beyond the compass of this report. Two of the most important causes which have been dealt with are referred to at length below.

Whether the great variety of charitable activities administered by individual trustees and charitable corporations, and the constantly increasing wealth at their disposal, will not in the near future lead to

the desirability of some systematic survey of the entire situation, with a view to greater public supervision and co-operation, is a question not unworthy of thought. During the nineteenth century this subject received most elaborate consideration in England, resulting in the making of extensive changes by act of Parliament. Doubtless the problems of this Commonwealth will be found to be different in numerous respects, but it does not seem inappropriate to make some reference at this time to the possibilities of this situation.

CASE OF THE ROBERT B. BRIGHAM HOSPITAL.

Reference to this matter was made in the report of a year ago. Since that time the hearings upon the petition of the city of Boston have been terminated and a decision rendered. It was my conclusion that the hospital has been fairly administered, in a creditable manner, and in sincere intent to comply with the provisions of the will and charter; and that the bringing of an information at this time would serve no useful purpose. A suggestion was made, however, that the hospital corporation might well bring a bill for instructions by the court upon several questions of law which seemed more open to doubt, and such a bill has been filed in the Supreme Judicial Court.

There has also been brought a suit in that court by one of the members of the corporation, who is also one of the trustees of a fund for the benefit of the hospital, in which are sought to be raised substantially the questions which were considered upon the petition of the city. At the date of writing this report a demurrer to this latter bill has been sustained by a single justice; and both suits are expected shortly to come before the full bench for determination.

There was also filed with this office a petition by the city of Boston asking the Attorney General to take suitable steps against the trustees of the will of Robert B. Brigham, because of certain changes of investments alleged to amount to mismanagement of the trust. This petition was subsequently withdrawn, so that there is now no matter formally pending except certain accounts of the trustees and the two suits referred to above.

LOTTA M. CRABTREE CASE.

This litigation, to which brief reference was made in my last report, is still in progress, and promises to continue to be so for some time. Miss Crabtree's will, the probate of which is being contested by numerous persons claiming kinship, gave to charitable purposes, the chief

of which is the aid of disabled world war veterans, amounts totaling in excess of \$2,500,000. The claim of one contestant, who asserted herself to be a daughter of Miss Crabtree, has been disposed of adversely by the Probate Court, after a trial lasting over a month. There is now pending a petition for leave to file a late appeal from this decision. Because of the importance of this case, its progress has been carefully observed, and Assistant Attorney General Melville F. Weston was deputed to attend the trial mentioned in the preceding paragraph.

At the close of the evidence and arguments at that trial, the Probate judge required the claimant, Ida M. Blankenburg, to show cause why she should not be committed for contempt of court for perjury committed by her before him during the trial of the case; and requested the Attorney General to appear and assist the court by presenting the said charge before it. In compliance with this request I designated Assistant Attorney General Weston to prosecute this case. The defendant was found guilty of contempt and sentenced to six months in jail. To reverse this judgment a writ of error was sued out from the Supreme Judicial Court, and is now pending before that court.

Excessive Requirement of Oaths and Affidavits.

The legal requirement that various documents shall be verified by oath or affirmation administered by a justice of the peace or notary public has become burdensome to the citizens of the Commonwealth and the solemnity and seriousness of an oath lessened by its perfunctory use. An illuminating letter on this subject was written to one of the newspapers, which reads, in part, as follows:

To attach an oath to every official and hundreds of unofficial acts, like the continuous enactment of legislation, in both of which errors Massachusetts holds the record, tends to defeat the very purpose for which oaths and legislation exist, by bringing both into contempt. Probably most of us will agree that the main purpose in requiring an oath is to impress the individual with the solemnity of his act, although doubtless there are those who would say that the purpose was to lay the foundation for a charge of perjury.

From either point of view, to carry oath-making to the extreme that makes a joke of the process of administering the oath defeats its purpose. So many oaths are required of every man of affairs that every private business office must have a magistrate in attendance, some subordinate usually being designated to operate the swearing mill just as one would be designated to wind the office clock or to lock the safe. Jurats are filled out in advance of signatures; oaths are taken over the telephone (the right hand held up before it); men swear to the best of their knowledge and belief about matters that they cannot possibly be familiar with; errand

boys are sent to them to obtain their oaths off-hand to matters of belief so vague that no court would permit them to testify about them, or to pages of figures prepared by days and weeks of labor in which they had no share and for the accuracy of which they can vouch only because of their confidence in the persons who did prepare them. In these latter cases a voucher may be a proper assumption of responsibility, but the oath adds nothing to the voucher. And in all such cases not only is all the solemnity of an oath lost, but no conviction for perjury could possibly be had.

At the relation of His Excellency the Governor an investigation was made by this Department of the many documentary forms used in the Commonwealth in which a jurat was required either by statutory enactment or department regulation, with a view to eliminating the necessity for the jurat therefrom by appropriate legislation.

To bring about the elimination of many useless oaths and affidavits that are now required I recommend the following amendment to the General Laws:

Chapter two hundred and sixty-eight of the General Laws is hereby amended by inserting after section one the following new section: — *Section 1A.* Except in a judicial proceeding or in a proceeding in the course of justice, no written statement required by law shall be required to be verified by oath or affirmation before a magistrate if it contains or is verified by a written declaration that it is made under the penalties of perjury.

Whoever signs and issues such a written statement containing or verified by such a written declaration shall be guilty of perjury and subject to the penalties thereof if such statement is wilfully false in a material matter.

The Admissibility of Private Conversations between Husband and Wife in Divorce Cases.

The Legislature in 1911 departed from the doctrine that had been established at common law and by statute that husband and wife are excluded on considerations of policy from testifying to conversations between them.

By St. 1911, c. 456, § 7, husband and wife were permitted to testify as to private conversations with the other in cases involving desertion and nonsupport.

I recommend that the exception to the general rule be further extended by permitting husband and wife to testify as to confidential conversations between them in libels for divorce and suits for separate maintenance.

Service upon Corporations.

Considerable difficulty has been met in instituting legal proceedings against corporations. G. L., c. 223, § 37, provides that in an action against a domestic corporation service "shall be made upon the clerk, cashier, secretary, agent or other officer in charge of its business." In the great majority of instances the most accessible, as well as the most natural, officers upon whom to serve process are the president or treasurer, but it is rarely possible for a deputy sheriff to certify that the president or treasurer is in fact an officer in charge of the business of the corporation within the meaning of the statute.

I recommend that section 37 be amended by inserting the words "president, treasurer" after the words "shall be made upon the" in the twelfth and thirteenth lines of the section, so that these officials may be included among those upon whom service may be made by reason of the offices which they hold.

Initiative Petitions.

Under the provisions of article XLVIII of the Articles of Amendment to the Constitution, initiative petitions, after being signed by ten qualified voters, must be submitted to the Attorney General for his consideration. If the Attorney General certifies that the measure is in proper form for submission to the people, that it is not substantially the same as any measure which has been qualified for submission or submitted to the people within three years, and that it does not contain subjects excluded from the popular initiative, it may then be filed with the Secretary of the Commonwealth, but not otherwise.

Four initiative petitions were filed with the Attorney General, — one to provide for the election of the members of the Public Utilities Commission, one to amend the law relative to veterans' preference in employment under civil service, and two to provide for old-age pensions. The first two initiative petitions were certified by me and duly filed. I declined to certify the two initiative petitions relative to old-age pensions on the ground that they contained subjects excluded from the popular initiative. A petition for a writ of mandamus has been filed against me in the Supreme Judicial Court for the County of Suffolk by one of the signers of the last two initiative petitions, seeking to compel me to certify the petitions on the ground that they do not contain subjects excluded from the popular initiative. A hearing upon the petition for the writ has not as yet been held.

Settlement of Small Claims against the Commonwealth.

The year just past is the first full year during which St. 1924, c. 395, has been in operation. During the year thirty-five claims have been considered and disposed of. Three others were called to the attention of the Department but have never been presented or pressed by the claimants. At the close of the year there remained nine claims pending and undecided. Nineteen claims, for a total of \$2,120.40, were allowed and paid; sixteen were resolved adversely to the claimants, either by decision on the merits, by rejection because not within the jurisdiction conferred by the statute, or by the withdrawal of the claimant after partial consideration had been had.

The claims presented have been interestingly diversified. They include fifteen claims arising from automobile collisions, three for damage done by trespassing animals, five for negligent acts of employees other than automobile collisions, three for damage to the personal property of employees, one for personal injuries to an employee not covered by the Workmen's Compensation Act, one for loss of personal property of a State guardsman, one for taxes paid under alleged mistake, one for damage done by deer, one arising from the accounting with a delinquent State official, one for money paid to the State Treasurer by a public administrator and sought to be recovered by the alleged heirs, one for money expended by a contractor whose contract was not finally approved, one for the value of property stolen by an escaped insane person, and one for the counsel fees incurred by an employee in defending a suit arising from an automobile collision.

In the matter of three claims, the Department co-operated with the House committee on ways and means in ascertaining the facts, there being bills for reimbursement pending before the Legislature. In general, the statute in its present form seems well adapted to its purposes, and to practical ease of administration, and no changes in it seem necessary or desirable at this time.

Alpha Portland Cement Company Cases.

The opinion of the Supreme Court of the United States in the Alpha Portland Cement Company cases, handed down on May 4, 1925, was adverse to the contention of the Commonwealth, reversing the decisions of our State court. This decision of the United States court held that a foreign corporation engaged exclusively in interstate

commerce within the Commonwealth was not subject to an excise tax under our law.

Subsequently, W. & J. Sloane, a foreign corporation transacting interstate commerce alone within the State, brought suit in the Supreme Judicial Court to recover an excise tax paid more than six months before the filing of the petition, alleging that the effect of the decision of the Supreme Court of the United States was to declare the excise imposed by our tax law on all foreign corporations (G. L., c. 63, § 39) to be unconstitutional, and hence that under G. L., c. 63, § 52, the entire corporation tax law of 1919 was null and void, and the time for filing petitions for abatement of taxes imposed thereunder was extended for a period of six months from the date of the decision. The court decided against the petitioner, holding that the decision of the Supreme Court of the United States did not declare the tax imposed on foreign corporations by section 39 to be unconstitutional, but only the assessment of such a tax upon a corporation doing nothing but interstate commerce within the State.

Both before and immediately after this decision, up to the end of the six months' period (November 4), a large number of petitions (792 in all) were filed by both domestic and foreign corporations, founded on the alleged invalidity of the corporation tax law under section 52. To all these petitions motions to dismiss have been filed in behalf of the Commonwealth, and a speedy disposition of the cases will be sought.

The Regulation of Billboards.

The laws of the Commonwealth respecting the regulation of advertising within view of highways and certain other public places, and the regulations made pursuant thereto by the Department of Public Works, Division of Highways, have been attacked upon the ground of unconstitutionality. To test their validity in this respect forty different suits have been brought in the Supreme Judicial Court and one in the District Court of the United States, on behalf of various persons and corporations engaged in the business of outdoor advertising. The defense of these cases is being made by this Department. The suit in the Federal court has been dismissed upon the motion of the defendants, and this ruling will doubtless be carried to the Circuit Court of Appeals. In the cases in the State court, the plaintiffs have obtained temporary injunctions against interference with their present plant and business, but no trial of any determinative issue

has yet been reached. Very considerable public interest has been manifested in the subject-matter of these suits, especially upon the part of organizations interested in civic development.

Daylight Saving Law.

The constitutionality of the so-called Daylight Saving Law of the Commonwealth was attacked in the United States District Court for the District of Massachusetts by a bill in equity in which the Attorney General, the Secretary of State, the Treasurer and Receiver General and the Commissioner of Education were named as defendants, and injunctions against each of them in his official capacity were sought. Assistant Attorney General Lewis Goldberg was assigned to the case. The issues were argued before a Federal court consisting of three judges, in accordance with the requirements of Federal law, to the effect that when injunctions are sought against State officers on the ground of alleged unconstitutionality of a State statute the court must consist of three judges instead of one. Briefs were filed in behalf of both parties. The court refused to issue any injunctions and granted the motion to dismiss the bill in equity. Under the Federal statute an appeal may be taken directly to the Supreme Court of the United States. The plaintiffs have indicated an intent to carry the case to that court by appeal.

Cottage Farm Bridge.

An application was filed with me by certain persons requesting leave to begin in my name an action against the Metropolitan District Commission to restrain the members thereof from filling in Charles River, in the process of constructing the Cottage Farm Bridge, so as to narrow the river at that site to approximately one hundred and seventy feet. The authority to construct the bridge is contained in St. 1921, c. 497, as amended by St. 1924, c. 416. Two petitions were received by me, urging me to refuse the use of my name.

I held two public hearings at which it developed that the existing opening in the river was only eighty feet; that plans showing clearly that the river was to be filled in and narrowed to approximately one hundred and seventy feet were shown to the legislative committees which were considering the amendment of 1924, and that the question of filling in and narrowing the river was discussed at great length at each of the legislative hearings. It further appeared that one of the petitioners, a member of the Legislature, filed a bill with the 1925

General Court specifically prohibiting the filling in of the river at the site of the Cottage Farm Bridge, and that the legislative committee to which the bill was referred reported leave to withdraw.

Upon analysis of the statutes and the facts, I was of the opinion that the Legislature, by the amendment of 1924, intended to authorize the Metropolitan District Commission to fill in and narrow the river as now proposed. The Legislature of 1925, when specifically requested to prohibit the fill, refused to do so. A serious though not insurmountable difficulty in permitting the use of my name lay in the fact that the Commission, under the General Laws, had a right to call upon me to advise and defend them, and that I might thus, in my official capacity, be compelled to act as plaintiff, counsel for the plaintiff and counsel for the defendants. If, in my opinion, public rights were being adversely affected, and there were no other remedy available, I should not hesitate to bring action merely because of that embarrassing difficulty. In this case, however, the Legislature was about to convene. The chairman of the Commission stated at the public hearing that the contract to build the bridge could not possibly be made before February. The Legislature had dealt with the problems of the Cottage Farm Bridge at various times over a period of years. If suit were brought, it probably would have involved great delay in obtaining a final determination of the question. If my view of the statute were incorrect, and if the Commission were proposing to exceed its authority in filling in the river, the remedy by filing a bill with the Legislature to prohibit such action was direct, simple, speedy and effective. Taking everything into consideration, I was of the opinion that I ought not to permit suit to be instituted in my name against the Metropolitan District Commission, and I denied the application.

The Arbitration of Controversies between Parties to Contracts.

At the request of the Governor this Department assisted in drafting an act making enforceable a provision inserted in a written contract that controversies arising thereunder be submitted to arbitration, and appeared before the judiciary committee in its support. There was an existing statute (G. L., c. 251) which provided for the submission to arbitration of disputes already arisen, but until the present statute (St. 1925, c. 294) was passed, there was no effective statutory provision for enforcing an agreement to arbitrate disputes that might thereafter arise.

It is impossible to tell as yet how extensive a use will be made of this so-called "commercial arbitration" statute. The Boston Chamber of Commerce is working on a set of rules and plans to promote arbitration proceedings, and the State Chamber of Commerce is preparing literature to call to the attention of its members the advantage of making use of the act.

Official Abstracter and Conveyancer.

The Commonwealth, through its several departments, boards and commissions, each year, either by gift, purchase or eminent domain, takes title to a great number of parcels of real estate. This is particularly true in the case of lands acquired for State forests and experiments in forest management, and for State highways. All instruments of conveyance and the title to be transferred thereby are passed upon by the Attorney General. During the past year one hundred and seven instruments of conveyance were passed on as to matters of legal form and title, together with twenty-four forms of leases. Many unusual and complicated title questions have been presented in connection with the examination of titles, due to the character of the property involved, that is, water rights, forest lands, etc.

For years it has been the practice, of necessity, to have the preliminary abstract of titles to land made by counsel employed by the various departments, the employment being subject to the approval of the Attorney General. The time will soon come when, in my opinion, it will be advantageous to establish a title bureau, such as has been in existence in the State of New York for some time.

Meanwhile, there will be considerable saving if much of the title work now done under the direction of the several State departments is centralized in this office. I therefore recommend the creation of the office of official abstracter and conveyancer, to be appointed by the Attorney General, whose duties shall be prescribed by him, and to include the work above mentioned and other similar duties.

Board of Appeal on Motor Vehicle Liability Policies and Bonds.

St. 1925, c. 346, § 3, provides for a board of appeal on motor vehicle liability policies and bonds, serving in the Division of Insurance, and consisting of the Commissioner of Insurance, or his representative, as chairman, the Registrar of Motor Vehicles, or his representative, and an Assistant Attorney General to be designated by the

Attorney General. The organization of this board has been effected, with Assistant Attorney General Roger Clapp the designee of this Department.

The Aberjona River.

Under Resolves of 1925, c. 16, the Department of Public Health was requested to investigate the discharge of sewage and industrial waste into the Aberjona River, and to consider, with the advice of the Attorney General, whether such discharge, if injurious or a public nuisance, might not be abated under general law, and whether, if it might be so abated, the provisions of St. 1911, c. 291, which related to this particular stream, might properly be repealed or modified or might be so amended as to be made of general application. The Attorney General designated Assistant Attorney General Roger Clapp to assist the Department of Public Health, and he gave legal aid and advice upon the matters under consideration. The report has been submitted to the Legislature.

Belchertown State School.

The General Court, by chapter 22 of the Resolves of 1925, referred to the Attorney General the matter of certain claims against the Commonwealth on account of alleged damage done by the escape of sewage from the Belchertown State School. Under the authority of the resolve I assigned an Assistant Attorney General, who gave a hearing to the parties and who investigated the whole subject. In accordance with the request of the Legislature, a report has been filed with the Clerk of the House of Representatives.

Controverted Election in the House of Representatives.

The committee on elections, on the part of the House of Representatives, requested the assistance of this office in the petition of William F. Madden of Boston that he be seated as a representative from the Fifteenth Suffolk District. I assigned Assistant Attorney General James H. Devlin, who sat with the committee and gave them such legal aid and advice as they required in the matter.

Department of the Attorney General.

The pressure of work upon this Department has remained, as during the preceding two years, at a very high point. The total number of cases requiring the attention of the office was 9,771, an increase over the preceding year of 2,096. The number of cases recorded does not

indicate the total amount of business transacted during a given year, as no card record is made of consultations with and oral advice given to State officers, departments, boards and commissions.

The number of official opinions rendered by the Department during the year was 364.

The collections of the Department for the fiscal year amounted to \$125,343.05.

One hearing was held before the Supreme Court of the United States and several hearings have been held before a special master appointed by that court. Four cases have been tried in the United States District Court, and a hearing held in the United States Court of Claims. Seventeen cases have been argued before the Supreme Judicial Court of this Commonwealth, and there have been 42 hearings and trials before a single justice of that court. There have been 20 hearings and trials in the civil session of the Superior Court. Fourteen cases have been tried in the Probate Courts, 4 in the Land Court, and 4 cases prosecuted in the local district courts. The Department has been in attendance at 29 hearings before the Industrial Accident Board, and 11 hearings have been held in extradition cases, one being before the High Court at Ottawa in Canada.

Of the 388 acts and resolves passed at the last session of the Legislature, 234 of them, when engrossed, were referred to the Attorney General by the Governor, and reports given in writing as to their legal form and constitutionality.

Two hundred and sixty-four contracts and 107 instruments of conveyance submitted by various State departments were passed upon as to matters of legal form.

Our General Laws provide that before town by-laws, building, plumbing, electrical wiring and other regulations can take effect they must be submitted to the Attorney General for approval. Year by year this branch of the Department's work has been increasing, so that now the by-laws and regulations submitted by towns have become so numerous as to require a large part of the time of one assistant. A new and important development of the work has been the review of zoning laws adopted by several of the larger towns in the State. During the past year 80 sets of town by-laws and regulations were passed upon, of which 12 were zoning laws.

Certain changes have been made in the personnel of the Department during the year.

On January 21 last, Alfred Perry Richards, Esq., of Plymouth, who was appointed an Assistant Attorney General on January 17, 1923,

resigned his office, which he had filled with fidelity and great ability. His special work while attached to the Department was the supervision of public-charitable trusts and public administrators.

On January 29 last, at the relation of the Department of Public Utilities, I approved the employment of Hon. Henry A. Wyman of Boston, and Charles H. Gilmore, Esq., of Melrose, as special counsel, to assist that Department in the investigation of the telephone rates of the New England Telephone and Telegraph Company.

On February 24 last, at the relation of the Department of Public Utilities, I approved the employment of William B. Sullivan, Esq., of Danvers, as special counsel to assist that department in the matter of petitions filed by the Boston & Maine Railroad with the Interstate Commerce Commission for permission to abandon four branch lines in Massachusetts, comprising the line from Wakefield to Newburyport, the line from Danvers to North Andover, the line from Peabody to Wakefield Centre, and the Tewksbury lines.

On March 1 last, Alfred R. Shrigley, Esq., of Hingham, was appointed an Assistant Attorney General.

On October 13 last, at the relation of the District Attorney for the Middle District, I appointed Hon. George R. Stobbs of Worcester a Special Assistant Attorney General, to render such assistance as the said District Attorney desired in the criminal case now pending against one Marsino in the Supreme Court of the United States.

Before bringing this report for 1925 to a close, I desire to attest my appreciation of the ability, fidelity and earnestness with which Assistant Attorneys General Alexander Lincoln, Joseph E. Warner, Lewis Goldberg, A. Chesley York, James H. Devlin, Roger Clapp, Charles F. Lovejoy, Melville Fuller Weston and Alfred R. Shrigley have performed their respective duties and responsibilities. They have rendered to the Commonwealth service of a very high order. Also, in the administration of the Attorney General's office the other members of the staff, by their faithfulness, loyalty and industry, which I deeply appreciate, have played a most important part in the work done during the past twelve months.

I annex to this report such official opinions rendered during the past year as it is thought may be of interest and which may properly be made public at this time.

Respectfully submitted,

JAY R. BENTON,
Attorney General.

SPECIAL REPORT OF THE ATTORNEY GENERAL
SUPPLEMENTARY TO HIS ANNUAL REPORT
RELATIVE TO THE ADMINISTRATION OF CRIM-
INAL JUSTICE IN THIS COMMONWEALTH.

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, February 26, 1926.

To the Honorable Senate and House of Representatives.

In transmitting the annual report of the Department of the Attorney General to your honorable body on January 20th, last, I stated that it was my intention to file a special report with you in the matter of the administration of criminal justice in Massachusetts.

From time to time, various statements, purported to have been made by the Registrar of Motor Vehicles, appeared in the newspapers, reflecting upon the administration of criminal justice, generally and in specific instances, and upon the courts and various authorities concerned with that phase of the law. These charges were of so grave a character that I deemed it my duty to cause an investigation to be made. Accordingly, on December 7th, last, I requested the Registrar of Motor Vehicles to submit to me the specific cases in which he believed that there had been a miscarriage of justice, and all facts in his possession relative thereto, and all other information he could furnish me in connection therewith. On the following day I made substantially the same request upon the Police Commissioner for the City of Boston. The cases presented by these two officials totaled nearly four hundred, and related solely to the County of Suffolk.

Each of these cases was first examined by this department. It then appeared that there were eighty-six cases which were of greater importance than the others and which merited special consideration and intensive investigation. It quickly became apparent that it would be impossible for this department alone to make such investigation of the eighty-six cases as was required in time to make a report upon all of the cases to this session of the Legislature. I, therefore, carefully selected a group of members of the Boston bar, of high standing, and requested each of them to investigate thoroughly one of the more important cases and report to me all of the facts found, together with his conclusions and

any recommendations he saw fit to make. The lawyers were designated by me as special counsel and were given full authority to act in the premises. The attorneys who promptly answered this call to public service were the following:

Hon. J. Weston Allen	Newton.
James H. Baldwin, Esq.	Newton.
Charles B. Barnes, Esq.	Hingham.
Joseph W. Bartlett, Esq.	Newton.
George P. Beckford, Esq.	West Roxbury.
Stoughton Bell, Esq.	Cambridge.
Edgar P. Benjamin, Esq.	Roxbury.
William R. Bigelow, Esq.	Natick.
Charles W. Blood, Esq.	Newton.
Louis A. Boutwell, Esq.	Malden.
Bartholomew A. Brickley, Esq.	Brookline.
Lincoln Bryant, Esq.	Milton.
Charles R. Cabot, Esq.	Newton.
Albert M. Chandler, Esq.	Newton.
Hon. Frederick H. Chase	Concord.
A. Barr Comstock, Esq.	Dedham.
Robert A. B. Cook, Esq.	Wellesley.
Philip E. Coyle, Esq.	Brookline.
Charles P. Curtis, Jr., Esq.	Boston.
Hon. Elmer L. Curtiss	Hingham.
Hon. Frederick W. Dallinger	Cambridge.
Hon. Frederick S. Deitrick	Cambridge.
John H. Devine, Esq.	Lexington.
Judd Dewey, Esq.	Boston.
Joseph J. Donahue, Esq.	Brookline.
William J. Drew, Esq.	West Roxbury.
Richard C. Evarts, Esq.	Cambridge.
Elias Field, Esq.	Boston.
Fred T. Field, Esq.	Cambridge.
Felix Forte, Esq.	Somerville.
Walter H. Foster, Esq.	Belmont.
Francis G. Goodale, Esq.	Weston.
Walter B. Grant, Esq.	Dorchester.
Leon C. Guptill, Esq.	Winthrop.
John E. Hannigan, Esq.	Boston.
Arthur P. Hardy, Esq.	Malden.
Walter Hartstone, Esq.	Newton.
Hon. Arthur D. Hill	Boston.
Albert Hurwitz, Esq.	Brookline.
Harold P. Johnson, Esq.	Woburn.
Melvin M. Johnson, Esq.	Brookline.
Herman Loewenberg, Esq.	Dorchester.
John W. Lowrance, Esq.	Hingham.
Henry S. MacPherson, Esq.	Brookline.

Lloyd Makepeace, Esq.	Malden.
Hon. Frederick W. Mansfield	Roxbury.
Andrew Marshall, Esq.	Jamaica Plain.
Hon. Nathan Matthews	Boston.
Lowell A. Mayberry, Esq.	Newton.
Hon. David T. Montague	Boston.
Charles W. Mulcahy, Esq.	Brookline.
Hon. John R. Murphy	Boston.
Wendell P. Murray, Esq.	Revere.
Hon. H. Huestis Newton	Everett.
Philip Nichols, Esq.	Newton.
Fred L. Norton, Esq.	Brookline.
Hugh W. Ogden, Esq.	Brookline.
Raymond T. Parke, Esq.	Lynn.
Cornelius A. Parker, Esq.	Dorchester.
Hon. Herbert Parker	Lancaster.
Leland Powers, Esq.	Newton.
William C. Prout, Esq.	Boston.
William L. Pullen, Esq.	Newton.
Fletcher Ranney, Esq.	Boston.
William C. Rogers, Esq.	Cohasset.
Charles F. Rowley, Esq.	Brookline.
Kendall A. Sanderson, Esq.	Lynn.
John Louis Sheehan, Esq.	Brookline.
Gen. John H. Sherburne	Brookline.
Roland H. Sherman, Esq.	Winchester.
Rutherford E. Smith, Esq.	Newton.
Arthur A. Sondheim, Esq.	Brookline.
Hon. John A. Sullivan	Boston.
William B. Sullivan, Esq.	Danvers.
James F. Terry, Esq.	Weymouth.
Hon. David I. Walsh	Fitchburg.
Charles S. Warshauer, Esq.	Brookline.
Alexander Whiteside, Esq.	Boston.
Joseph Wiggin, Esq.	Malden.
Thomas L. Wiles, Esq.	Hingham.
Butler R. Wilson, Esq.	Boston.
Robert G. Wilson, Jr., Esq.	Boston.
Lothrop Withington, Esq.	Brookline.
Joseph W. Worthen, Esq.	Winchester.
Hon. B. Loring Young	Weston.

These gentlemen examined the cases entrusted to them with painstaking care, ability and commendable earnestness, and have given a great deal of time out of their private practice to the work. It has been done without compensation, and they have rendered to the Commonwealth a service of a very high order. To each of them I publicly express my sincere thanks for the service rendered.

The eighty-six more important cases that were investigated, arranged alphabetically, are as follows:

Benjamin Arndt *et al.*
Walter J. Barrett, *alias*.
Charles O. Boland.
Mary Brown and Laura Freeman.
Albert Bruno.
Anthony Bruno.
Burgess, Lang & Co.
George Byrnes.
Leo Canavo, *alias*.
Michael Catino.
George Cooper.
Jeremiah Commarata.
Thomas Conroy.
William J. Corcoran.
Antonio Correnti.
Lawrence P. Cronin.
John J. Cummings, *alias*.
Felice deNapoli.
Henry W. Derrah.
Arthur J. Desautelle and William Dondero.
John J. Devereaux.
Thomas P. Dineen.
Blair S. Dixon.
David I. Dodge.
Arthur A. Donnelly.
Leo F. Duffy.
Joseph Enos.
John Erickson.
William J. Farrell.
William Ferreirri.
Frank Ferris and Thomas Sullivan.
Joseph F. Foley.
Joseph Forti and Louis Vitozsky.
Morris Friedman.
Carl Ghella.
William Gillar.
John J. Gilmore.
Harry Gold.
Jacob Goldberg.
Frank Golding.
Nathan Goldman.
John J. Griffin.
Luigi Guarna.
Edward J. Heinlein.
Edward L. Hopkins.
Michael E. Hurley.
Rovie Johnson.

John J. Keating.
John Keller, *alias*.
John Kirby.
Joseph Lanes.
Bernard J. Logan, *alias*.
William J. Manning.
Clarence McCoy.
Leo McCue.
Joseph McGlinchey.
Theodore R. Mignault, *alias*, and Herbert J. Dugan *et al*.
Frank T. Mockler and M. Vincent Casper.
Florence Moore.
George Moore *et al*.
Carmina Morabito.
Charles Mullen.
David Namet.
Thomas Nelson.
John J. Norton.
Gabrielle Porciello.
The "Quencher" case.
John E. Radigan.
Iganzio Rair, *alias*.
Walter Reth.
Salvatore C. Rizzo.
Charles Roper.
William H. Russell.
Michael Sagesse *et al*.
Chester W. Scoyne.
Florence G. Sennott, *alias*.
G. Willis Slobodkin and Edward Clayton.
John Smith, *alias*.
Chester Snyder, *alias*.
Carl L. Stevens.
John Stewart, *alias*.
Frank J. Stone, *alias*.
Nathan Sugarman and Samuel Levine.
Syrian Democratic Club.
John M. Teehan.
Moses Zoll *et al*.

These cases have been studied by this department, the history of each case carefully analyzed and the recommendations thoroughly considered.

Certain of the investigators have recommended further action in particular cases along certain lines, and proper action will be taken by this office based upon the facts disclosed.

The remaining minor cases were investigated by the assistant attorneys general and by the police, and the greater part of them have to do with the matter of bail.

While the reports upon the cases investigated are not attached to this report, they are on file at my office, and any or all of the cases, and the reports thereon, and all records and information in connection therewith, are available to the General Court.

General Findings.

The various cases investigated involved questions concerning the proper handling and disposition of cases by the district attorney's office and by the courts, various issues arising out of the admission of defendants to bail, delays in bringing defendants to trial, the placing of defendants upon probation, appropriate sentences after conviction, the release of defendants upon parole, the revocation of parole and miscellaneous matters. It should be borne in mind that the number of cases investigated in this present inquiry is small compared with the total volume of criminal business in Suffolk County. Nor do the cases investigated, which were not selected at random but which were complained of to this department as cases in which there was a miscarriage of justice, represent a cross section of all of the cases handled by the office of the district attorney of that county. Care should, therefore, be taken lest undue weight be given to some of the criticism leveled at the office of the district attorney. The judgments of various men as to what constitutes a proper disposition of a case differ. It is easy to criticize after the disposition of a case and after subsequent events demonstrate that in the particular instance the disposition was not a good one from the viewpoint either of society or of the individual defendant. Hindsight is better than foresight. As the court said, in *Commonwealth v. Dascalakis*, 246 Mass. 12, 27:

Perfection cannot be demanded even if a standard of perfection could be formulated. Criticism after an adverse event is easy.

Mere errors of judgment in a small number of cases out of a large mass or mere differences of opinion as to whether a relatively small number of cases were properly handled or disposed of do not constitute sufficient ground for strikingly adverse criticism. After a very careful and intensive study of all of the cases reported to me, I do not find a case where it can be demonstrated that the district attorney of Suffolk County, or the courts, or any official connected with the administration of criminal law acted from a corrupt or impure motive. There are cases in which some of the assistants of the district attorney, who are no longer connected with that office, are found by the special counsel to have been lax in a vigorous enforcement of the law. In some cases the special counsel have differed from the district attorney or from the courts in the manner of

handling and disposition of cases. Of course, the special counsel have the advantage of subsequent events in assisting them to arrive at a conclusion as to what constituted a proper disposition. I believe that in the main the errors of judgment on the part of the district attorney's office are due to the fact that that office is considerably undermanned. The volume of business is so large that it is physically impossible for the office, with its present staff, to give to each case the time necessary for its proper consideration.

Specific Findings and Recommendations.

The cases inquired into fell into well-defined groups and were analyzed and studied in that way. Taking each group up in turn, I make the following findings, suggestions and recommendations.

BAIL.

By far the greater percentage of the cases investigated involved issues and problems arising out of and incidental to the admission of defendants to bail. These cases indicate a certain laxness or looseness in the admission of defendants to bail in Suffolk County, a lack of co-operation between the various authorities having to do with bail and the probation and parole authorities having records of defendants, laxity in promptly securing default warrants, failure energetically to prosecute suits against sureties after default, settlement of cases against sureties for nominal amounts even though the defendants have not been apprehended prior to the settlement, and an amazing willingness to remove defaults without committing the defendant and without increasing bail even though such defendant has been defaulted in the same case time and time again. The object of bail manifestly is to insure the presence of the defendant in court when wanted. Any procedure which frequently falls short of this requirement is an indictment of the manner in which the system of bail is carried on. In my opinion, no additional legislation is necessary to remedy the situation as it apparently exists in Suffolk County at the present time. There is now ample power to handle the entire problem properly. In the light of the investigations and the facts disclosed, I make the following recommendations:

1. That before the admission to bail by bail commissioners, the arresting officer obtain, wherever possible, the record of the person arrested and submit such information to the district attorney or assistant district attorney and the bail commissioner. By so doing the officers fixing the amount of bail will be better enabled to determine the amount of bail required in the particular instance to insure the presence of the defendant when wanted.

2. When bail is fixed in open court, the record of the defendant should be ascertained through the probation and parole authorities and other sources and submitted to the court before the amount of bail is determined.

3. That in all cases the financial condition of the persons offering themselves as sureties should be more carefully scrutinized and the question whether such sureties are good moral risks be determined.

4. Where the defendant has a bad criminal record, bail should be set at a much higher amount than is usual for the offence with which the man is charged.

5. Where the defendants are defaulted, default warrants should be asked for immediately.

6. Suits should be commenced against sureties immediately upon default.

7. Greater co-operation between authorities for the apprehension of defendants who have defaulted should be established.

8. Where defendants who have defaulted voluntarily surrender themselves, the bail should be very substantially increased unless the defendants prove that they were blameless.

9. Where defendants who have defaulted are apprehended, the default should not be removed and they should not be admitted to bail, but should be remanded to await trial, unless such defendants affirmatively demonstrate to the satisfaction of the court that the default was in no wise their own fault. Greater and more effective co-operation should be developed between the courts, the district attorney's office, police, bail commissioners, probation and parole authorities. Such co-operation, in my opinion, is absolutely essential, not only for the remedying of the situation with respect to bail problems, but also for a more effective administration of justice.

10. The cases indicate that defaults apparently are removed almost as a matter of course, and that the defendants are then admitted to bail in the same amount, and at times even upon a lesser amount. No penalty is thus attached to a default by a defendant. Such a situation obviously is unsound. It encourages defaults. It lessens respect for the administration of law. It impedes justice. The burden of proof should always be upon the defendant to satisfy the court in a competent manner that he is blameless in the default, and, unless the court is so satisfied, the defendants should be treated as recommended above. A more stringent attitude on the part of the courts with respect to defaults, the remanding to jail without bail to await trial of defendants who do not prove that they are guiltless in the matter of default, will, in my opinion, speedily eradicate this phase of the evil.

11. The custom has apparently grown up in Suffolk County of com-

promising suits against sureties for nominal, or practically nominal, amounts. This practice in and of itself is an inducement to defendants to default and to persons to act as sureties upon bail bonds, who otherwise would be far more careful as to the type of cases in which they appear as sureties. There seems to be no valid reason, except inability to satisfy an execution, for settling suits against sureties for less than the full amount of the bond where the defendants have been defaulted and not apprehended. I recommend that the practice herein referred to be forthwith abolished, that suits against sureties be prosecuted vigorously to a successful conclusion, that execution be obtained for the full amount of the bond, and that every effort be made to obtain full satisfaction of the execution.

PROBATION.

A considerable number of the more important cases investigated involved the question whether there had been an abuse of the probation system. In a number of cases, defendants, who, in the light of their criminal records, were not fit subjects for probation were time and again placed on probation. This was due in some instances to the fact that the probation officers did not have the complete records of the defendants; in others, to the fact that the defendants under various aliases were enabled to conceal their identity and thus conceal their records also; in others, to the fact that the district attorney was not fully informed of the records; and in other cases, to the fact that the court was not fully apprised of the record of the defendant before him. There were still other cases where courts with complete records before them nevertheless placed men on probation who might be deemed unworthy of such treatment, and who had long criminal records. Under similar circumstances, great leniency has been shown in some cases to habitual offenders and men have been repeatedly placed on probation though they repeatedly violated the terms of their probation. Cold statistics or figures cannot in all cases demonstrate that the court erred in judgment. Various factors necessarily are taken into consideration in the treatment of human beings, which do not appear as a matter of record. Nevertheless, sufficient facts do appear to warrant me in making certain definite recommendations for additional legislation and for improved procedure.

That a probation system, properly administered, is, and should be, a logical and component part of our administration of criminal law, in my opinion, cannot be disputed. Since 1878 a probation officer has been attached to the criminal court in the City of Boston. For the last thirty-five years a probation officer has been attached to every police and district court in the Commonwealth. In 1898, the power to place on probation

was extended to the Superior Court, and that court was given the power to appoint probation officers in every judicial district, which it promptly proceeded to do.

The need for a central clearing house for probation records was recognized in 1908, when a Commission on Probation was created, which is appointed by the chief justice of the Superior Court. This commission was given the power to prescribe the form of all records and of all reports from probation officers, to make rules for the registration of reports and for the exchange of information between the courts, to provide for organization and co-operation of probation officers in the several courts, and to promote co-ordination in the probation work of the courts. Probation officers were required to transmit to the commission, in such form and at such times as it should require, detailed reports regarding the work of probation, and police officials were required to co-operate with the commission and with probation officers in obtaining and reporting information concerning persons on probation.

Beginning December 1, 1914, the Commission on Probation required probation officers in the courts of Suffolk County to send to its office every record in the criminal sessions on the day such record was incurred. On April 1, 1916, this requirement was extended to probation officers in courts whose jurisdiction adjoined Suffolk County, and, on July 1, 1924, it was extended to all of the courts of the Commonwealth. The commission now maintains in its office a file of individual cards containing the records of defendants who have been convicted. This file, I am informed, now numbers about 650,000 names. The commission is capable of functioning in a very satisfactory manner as a general clearing house for all of the courts of the Commonwealth, and seems to be capable of expansion to whatever demands may be made upon it.

While probation officers are required by the commission to report records to the commission regularly and promptly, it is manifest that a number of probation officers do not seek information from the commission for the purpose of completing their own records and enabling them to present to the court a complete and detailed record of the defendants whose cases are to be disposed of. Particularly is this true of courts and probation officers distantly removed from the County of Suffolk. It seems clear to me that courts cannot properly dispose of cases, administer just deserts to defendants and properly protect society unless they know the whole record of the defendants before them.

I therefore recommend legislation requiring probation officers to obtain from the commission whatever records are available relative to defendants before the disposition of their cases. I further recommend that the General

Court consider the advisability of legislation requiring each court to obtain from the commission, through the probation officer attached to it, the record of each defendant appearing before it before disposing of his case.

There have been a number of instances where defendants, who were on probation from one court, have appeared in other courts and have been there placed on probation or had their cases otherwise disposed of without the probation officer from the former court being informed of the subsequent proceedings. Such a situation interferes with the proper functioning of the probation system and prevents the proper treatment of such defendants. It should not be tolerated. There should be greater co-operation between the probation officers of the several courts and greater co-ordination of their respective activities.

I recommend the enactment of legislation requiring probation officers, when they learn that defendants in the court to which they are attached are on probation in another court, to notify forthwith the probation officer of such other court of the subsequent proceeding.

From a number of the cases it appeared that defendants were able to conceal their identity under aliases or otherwise. While it cannot always be possible to identify defendants as persons who have records and whose records are available, the number of cases in which such concealment has been successful are altogether too many. Greater stress should be laid upon placing records in such shape as to make identification of defendants more easy. I believe that considerable difficulty in this respect could be obviated if probation officers were more searching in their efforts to place identifying descriptions and marks upon the records of the individual defendants, and I so recommend.

It further appears that the records in the office of the Commission on Probation do not now contain parole records. In my opinion, it is essential for a complete system to have these records also concentrated in the Commission on Probation. If a defendant is paroled, and his parole is revoked for its violation once or, perhaps, several times, manifestly this information is of vital importance to the court in determining whether such defendant should be placed upon probation or should be dealt with in a severe fashion for the protection of society. The absence of such records in the office of the Commission on Probation leaves the court without any information on that vital question. The statute now requires the Commissioner of Correction upon request to give at all times to the Commission on Probation and to probation officers such information as may be obtained from the records concerning prisoners under sentence or who have been released. Such requests are not regularly made.

I recommend legislation requiring the Commissioner of Correction and all parole authorities regularly and promptly to send to the Commission on Probation detailed and complete records relative to paroles of, and length of periods served in the various penal institutions by, the respective prisoners.

PAROLE.

Some of the cases considered dealt with the problem as to whether parole or permits to be at liberty had been granted to defendants unwisely. Here, too, judgments in specific cases differ, and the fact that a defendant subsequently and during his term of parole committed a serious felony does not, in and of itself, demonstrate that the issuance of the permit to be at liberty was unwise.

As I stated in my report of last January, parole officers "should be imbued and should act with an eye singly to the public welfare and the protection of society. They should always subordinate the welfare of the individual convicted to the welfare of society as a whole. In determining whether a convict should be released prior to the expiration of his sentence, the sole test should be whether it is to the interest of society that he be released, and such release should not be granted unless the answer to that question is in the affirmative."

This necessarily involves a searching examination and study of each case before the prisoner is paroled. To enable such authorities properly to act, they should have before them all available records of the prisoner.

I recommend that all parole authorities before acting in any individual case utilize the facilities afforded by the Commission on Probation for the purpose of obtaining the detailed and complete record of the prisoner. I further recommend active co-operation in each instance between the parole and probation authorities.

I have already referred to the submission by parole authorities of their records to the Commission on Probation. In a number of instances it appears that paroled prisoners during the period of parole appear before the courts as defendants, and the parole authorities are not notified. Unless the parole authorities happen to obtain this information, the fact that the paroled prisoner has committed another crime is unknown to them and the parole is consequently not revoked.

I therefore recommend the enactment of legislation requiring probation officers forthwith to notify the proper parole authorities whenever it appears that a paroled prisoner, during the period of his parole, is before the court to which they are attached.

DISPOSITION OF CASES.

I have already referred to the question whether there has been maladministration in the disposition of cases by the courts or by the district attorney's office. There has unquestionably been a number of cases in which there seems to have been an improper disposition by the courts or by the district attorney's office, although there is no evidence that this was due to improper motives or sinister influence. In some cases, habitual and persistent offenders have been repeatedly placed on probation or fined or given small terms of imprisonment. In some cases undue leniency seems to have been shown to habitual offenders and to men with bad criminal records. A nol prossing of some cases indicates poor judgment or insufficient consideration with respect to those cases. This applies as well to the filing of some cases. Repetition of such instances will, in my opinion, to a certain extent be avoided if the suggestions and recommendations I herein make are carried out and followed. If the number of assistants to the district attorney of Suffolk County were increased, it would be possible for that office to give more attention to each individual case, and thereby more effectively assist in the administration of the law.

There ought to be more effective co-operation between the district attorney's office and the police, particularly the arresting or complaining officers, and the probation officers. I believe that no disposition ought to be made of a case by the district attorney, and no recommendation ought to be made by him to the court as to the amount of bail, the reduction of bail or the disposition of a case until that office has obtained from the arresting or complaining officers and the probation officers all the information available relative to the case under consideration and the record of the defendant. Through such co-operation the cases where defendants are released on insufficient bail or have their cases filed or nol prossed, or are placed on probation, or are given fines, or short sentences, where such disposition is an improper one, would be reduced to a minimum. Such co-operation should extend to all officials in any way concerned with the administration of the criminal law.

The system now in vogue with respect to handling of indictment warrants appears to be somewhat lax. The district attorney apparently makes no attempt to see to it that the warrants are duly issued, placed in the hands of the proper officers and served. The issuance of indictment warrants and the placing of them in the hands of the officers is left entirely to the clerk of the court. In my opinion the supervision of indictment warrants should rest upon the district attorney's office.

I recommend that the district attorney's office see to it that such warrants are properly issued, that they are placed in the hands of the proper

officers, and that he keep in touch with the police for the purpose of having the defendants apprehended as speedily as possible.

Respect for the courts is essential in a proper administration of justice. Defendants who are defaulted should, wherever possible, be apprehended and brought before the court, regardless of what the proper disposition of their cases should be. For that reason an indictment should, in my opinion, never be nolle prossed where the defendant has been defaulted and has not been brought before the court subsequent to such default.

It has been brought to my attention that in at least one instance examination of the Government's case and the Government's witnesses had been held by the district attorney in the presence of the defendant or of his witnesses or counsel. Such a practice manifestly affords an opportunity to defendants and their witnesses or to unscrupulous counsel to manufacture testimony to meet the Government's case, and in that manner hampers the proper administration of justice.

I recommend that the examination of the Commonwealth's witnesses should never be held in the presence of the defendant, his witnesses or his counsel.

In one instance, a defendant with a bad criminal record was held in jail to await the action of the July grand jury. To suit the convenience of the arresting officer the case was presented to the grand jury in June, and secret indictments were returned. The clerk of the Superior Court at that time had no notice that the defendant was then confined in jail. In July, the papers from the Municipal Court, where the defendant had been held for the grand jury, were forwarded to the clerk of the Superior Court, and in the usual course submitted to the district attorney. Because of the June indictments the grand jury, for the purpose of clearing the record, returned no bills upon the papers sent up from the lower court. When the papers with the notations of "no bills" were returned to the clerk, the latter, not having his attention called to the fact that the June indictments applied to the same defendant, in the usual course notified the keeper of the jail that no bills had been returned, and the defendant was released. This, although an isolated case, illustrates the danger of departing from the usual routine without notification to other officials having to do with the same matter.

A repetition of such an incident could be avoided if, whenever there was a contemplated departure from the usual routine in the procedure with respect to criminal cases, all officials in any way concerned with the case or with the custody of the defendant were notified of the contemplated action, and I so recommend.

There was a suggestion that in some cases applications for search warrants for intoxicating liquors were made in open court. Such a practice,

in my opinion, should never be indulged in. If publicity is given to the fact that a warrant is desired to search certain premises, by making the application in open court, manifestly the persons whose premises are to be searched may be given notice of the proposed search and take steps to defeat the ends of justice.

I recommend that search warrants should never be applied for or considered in open court, but that such application should always be made to the court in chambers.

DELAY IN TRIALS.

In my previous report I pointed out the manner in which delay in bringing defendants to trial vitally hampers an effective administration of the criminal law and hinders the protection of society from the criminal elements. One of the causes of delay is the repeated and numerous continuances granted to the same defendants. There is an old saying that "three continuances are equal to an acquittal."

In many of the cases it appears that continuances have for one reason or another been repeatedly granted. While continuances cannot be altogether avoided, due to a variety of causes, I am of the opinion that they can be considerably reduced by a more stringent attitude on the part of the district attorney and the courts. Repeated continuances involve delay in bringing defendants to trial, usually work in favor of the defendants, and hamper the administration of justice. They ought not to be granted as a matter of favor. They should be allowed only for good and sufficient cause. Another cause of delay is the ease with which defaults are removed. I have above pointed out this evil. Defendants who desire trial postponed can, under the present practice, secure delay by the simple process of defaulting and having the default subsequently removed. This process can be repeated again and again. I have already suggested the remedy therefor.

ABOLITION OF DOUBLE TRIALS FOR MINOR OFFENCES.

A further important cause of delay is the congestion of the court docket due to the large number of cases appealed from the lower courts to the Superior Court. Under our present system, a defendant in a criminal case is entitled to two trials, one in the lower court and one, upon appeal, in the Superior Court. In important cases defendants frequently do not present their defence at all, but rest upon the presentation of the government's case, and, if convicted, appeal. The sole effect of a trial in the district court in such cases is to expose the whole of the Government's case to the defendant and to enable him to prepare his defence accordingly. In the larger number of cases, defendants dissatisfied with the sentences

of the district court appeal solely because of the knowledge that the docket of the Superior Court is so congested that it is impossible to try all of the cases, and that they accordingly will be able to trade with the district attorney or the Superior Court and frequently obtain a lighter sentence. There is no valid reason for affording a defendant two trials in the same case, thus not only giving him his day in court once but twice.

The recommendation of the Judicial Council now before you for the election of jury trial in the Municipal Court of the City of Boston and review of sentences there imposed has my support. I also go a step further. I believe that defendants in the district courts of the Commonwealth as well as in the Municipal Court of the City of Boston should be required to elect whether they will stand trial in those courts, waiving trial by jury, or whether their cases shall be sent to the Superior Court for jury trial without trial in the lower court. The suggested change will require, of course, provision for the correction of errors of law in trials in the lower courts; but the machinery would appear to be available in the appellate division of the Municipal Court of the City of Boston and in the newly created appellate division of the district courts of the Commonwealth.

PRECEDENCE TO THE TRIAL OF CRIMES OF VIOLENCE.

Seventy-one years ago the Legislature provided that a certain class of cases should be given precedence. The statute has been added to from time to time so that today the following classes of cases have to be tried first, in this order: cases of persons in jail; petitions for writ of habeas corpus; cases involving violations of the liquor law; cases involving common nuisances; cases involving desertion, non-support and bastardy.

All the district attorneys have found that this statute has in many instances effectually blocked them from trying very important criminal cases which ought to have been tried at once. In 1923 and 1924 the Attorney General, at the instance of the district attorneys, recommended that this situation be corrected. The recommendation read as follows:—

G. L., chap. 212, section 24, provides that certain cases shall have precedence in the order of trial next after the cases of persons who are actually confined in prison and awaiting trial. The district attorneys are thereby prevented for extended periods from trying any cases except those given precedence by the statute, and certain classes of offences are barred from trial. Not infrequently, important cases, which for special reasons should be tried, are postponed for long intervals. I recommend that the section be so amended as to provide that the court shall have discretion to modify the order of trial if in its opinion there is sufficient ground for so doing.

On January 20 last the Governor transmitted to the General Court a special report of the Judicial Council containing suggestions as to the

best method of giving precedence to trials of crimes of violence. This recommendation is contained in House Document No. 907.

I recommend that a law be enacted so that, in the discretion of the court, the order of trial may be modified in order that any important criminal case, when occasion demands, may be tried without delay.

IMPEACHMENT OF WITNESSES BY THE INTRODUCTION OF PRIOR CONVICTIONS.

G. L., c. 233, § 21, provides for the impeachment of witnesses by the introduction of prior convictions. This statute should be amended to allow the Commonwealth to show prior offences for which the defendants have been placed on probation, given suspended sentences or had the cases filed. The statute uses the word "conviction." The Supreme Court, in days long gone by, so construed the term "conviction" that the Commonwealth cannot introduce records showing that defendants have been time and again placed on probation for the precise offence for which they are now being tried.

A specific case, typical of many cases, will illustrate the need for such amendment. Three young men were on trial for robbery. They had been doing little else for a number of years. They had always "gotten away with it." Time after time, for breaking and entering, carrying weapons, etc., they had either pleaded or been found guilty and had their cases filed, placed on probation or their sentences suspended. All took the witness stand in their own defence. All had an alibi defence. They were positively identified by the victim of the hold-up, and admitted, after their acquittal, that they were guilty.

The principal argument of their attorneys was that here were three young men starting out in their lives, who had never been convicted before, and they argued that if there had been any prior conviction, the Commonwealth would have shown it. The judge was obliged to charge the jury that the Commonwealth *could* introduce records of prior "convictions." The jury acquitted the defendants, following this line of argument.

After they were acquitted, the probation officer showed the jury the records. The jurymen were appalled and incensed, believing that they had been duped by the court and the law, and stated that their verdict of not guilty was based upon the fact that the defendants had not been convicted before.

There is no sound argument against the Commonwealth being allowed to show *all of the facts*, concerning the defendants, to impeach their testimony. This raises no constitutional question. The statute can be amended specifically defining "conviction" as including any action which any

court has finally taken on the case, such as probation, filing and suspended sentences.

There are constant miscarriages of justice as a result of this old definition of "conviction," where juries are actually prevented from learning the true facts which would tend to impeach the testimony of witnesses.

DISTRICT JUDGES SITTING IN THE SUPERIOR COURT.

In previous reports the Attorney General and the several district attorneys have given their full support to the enactment of legislation which authorized the chief justice of the Superior Court to call up justices of the district courts to sit in the Superior Court and try cases of misdemeanors, except conspiracy and libel, with juries. In 1924 we recommended that their jurisdiction be properly increased, and this was done. The district attorneys have found this act of great assistance in enabling them to clear up cases pending in their offices, and they all, with a single exception, are of the opinion that the statute, St. 1923, c. 469, amended by St. 1924, c. 45, should not be allowed to lapse on July 1st, next.

WAIVER OF JURY TRIAL IN THE SUPERIOR COURT IN CRIMINAL CASES.

The recommendation of the Judicial Council that defendants in criminal cases in the Superior Court, with the exception of capital cases, may waive the right of trial by jury, has my support.

Such legislation would not be in conflict with any of the provisions of the Federal Constitution, provided the accused were otherwise assured due process of law. I recommend serious consideration of the system which has worked successfully in Maryland for over 140 years and which has materially aided in the efficient and swift despatch of criminal business. In the year 1924 over 90 per cent of all the cases tried in the criminal court of Baltimore City were tried without a jury. The system was recently adopted by the State of Connecticut and is there giving satisfaction.

REDUCTION OF THE NUMBER OF PEREMPTORY CHALLENGES.

Upon the trial of an indictment for a crime punishable by death or imprisonment for life, each defendant is entitled to twenty-two peremptory challenges of the jurors called to try the case. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court must exclude him. The number twenty-two is purely arbitrary and works to the great disadvantage of the public welfare in many instances.

This may best be illustrated by the example of a specific case which is typical of many such cases tried in the Commonwealth.

Four men were on trial for robbery. Each man had twenty-two peremptory challenges, a total of eighty-eight. There were in attendance at the session of the Superior Court in which the defendants were being tried approximately forty men called for jury service. The entire panel was exhausted by peremptory challenges. Another panel in attendance in the court house was drawn upon, and it, too, was similarly exhausted. The court was finally forced to order the sheriffs to bring in prospective jurors from the highways and byways. If this order were literally carried out, the sheriffs would have had to bring in the hangers-on in the corridors, many of whom were defendants awaiting trials themselves.

In the trials of a recent major crime a conservative estimate of the cost to the Commonwealth of securing the jury is about \$5,000, exclusive of the waste of time of the various panels of jurors held in readiness while counsel for the defendants exhausted, so far as their challenges would allow, the best qualified men. Because of the needlessly large number of challenges it is always necessary in robbery and capital cases to draw from two to five times as many jurors as in ordinary cases.

There is no sound argument in favor of so large a number of peremptory challenges. Jurors may be challenged for cause and will be excused by the court if sufficient reason therefor is shown. Peremptory challenges are used only when good cause cannot be shown for challenging them. The present number of such challenges available to defendants means considerable unnecessary expense to the counties and frequently enables defendants to prevent the most suitable men from serving on the jury.

I recommend serious consideration of the suggestion that the number of peremptory challenges in these cases be reduced.

SPEEDY HEARING OF IMPORTANT CRIMINAL CASES IN THE SUPREME COURT.

In 1924 the Attorney General and the district attorneys suggested that in certain cases the practice of presenting points of law for review, in criminal cases, was open to improvement, and that in such cases the entire record and testimony might properly be certified to the Supreme Court. It was recommended at that time that legislation be enacted making it possible for such certification in all cases involving homicide and in other serious and important cases where, in the exercise of a sound discretion, the presiding justice is of the opinion that there should be such a certification. The Legislature in 1925 enacted a statute which provided for such a certification in any proceedings or trial upon an indictment for murder or manslaughter. See St. 1925, c. 279.

On last Wednesday the Governor transmitted to you a special report of the Judicial Council, in which that body recommends that a justice

of the Superior Court presiding at a proceeding or trial upon an indictment or upon a complaint for any other criminal offence should be given authority to make the act of 1925 apply to the proceeding or trial in question. This recommendation has my earnest support, and the reasons therefor are set forth in my annual reports filed in 1924 (see page 10), in 1925 (see page 7) and in 1926 (see page 15).

RECOMMENDATIONS AT THE INSTANCE OF THE DISTRICT ATTORNEYS.

Following the practice of the past few years, conference was held with the several district attorneys on November 21, 1925, and several proposed recommendations were discussed at the meeting. At the conclusion of the conference it was unanimously voted to authorize me, on behalf of the district attorneys, to make the following recommendations:

A. *Increase of Penalty for Failure of Witnesses to attend.* — It was voted to renew this recommendation, which was made last year.

G. L., c. 233, § 5, provides that witnesses duly summoned and required to appear and testify, who fail to attend, may be punished by a fine of not more than \$20. Failure of an important witness to appear at the trial of a criminal case may often imperil the successful prosecution of such case. The penalty for failure to attend when summoned should be sufficiently adequate to deter witnesses from refusing to appear. It is therefore recommended that the penalty for this offence be increased to a fine of not more than \$300, or imprisonment for not more than three months, or both.

B. *Reduction of Minimum Penalties in Certain Cases.* — It was voted to renew the recommendation on this subject which was made last year to the effect that legislation be enacted carrying out the suggestion of the special commission relative to the criminal law to the effect that a person convicted of any crime excepting treason or murder, punishable by imprisonment in State Prison, may be sentenced to imprisonment in a house of correction for not more than two and a half years. (See Report of Special Commission to Investigate the Criminal Law, House, 1923, No. 224, pages 5, 6, Appendix "C".)

Conclusion.

It has been the purpose of this survey to analyze the situation carefully without bias or prejudgment.

The survey has pointed out certain defects in criminal justice in Massachusetts. Such defects as contribute to the increase of crime and its infrequent punishment should be remedied without delay. Complaints against existing evils should be followed by constructive criticism. This report is an attempt to follow that rule by suggesting remedial legislation

and better methods of administration. New criminal laws will be enacted by the General Court, as they have been in the past, when, in its judgment, they are deemed sound and necessary, but in the final analysis the greatest opportunity for improvement is to be found in the faithful and efficient administration of the laws that exist rather than in new laws.

In concluding this report I desire to make the observation that today, as always, the courts of Massachusetts are striving ably and conscientiously to meet their several responsibilities. It is for us to express continued confidence in them. All citizens should guard zealously the priceless heritage that has been ours since the foundation of the Commonwealth, — complete confidence in our courts, and in their administration of justice.

Respectfully submitted,

JAY R. BENTON,

Attorney General.

OPINIONS.

Reclamation Division — Land of the Commonwealth — Authority of Officials.

Officials have no power to institute petitions for, nor to make the Commonwealth or municipalities parties in, a reclamation project, under G. L., c. 252, §§ 1 and 5, as amended.

DEC. 2, 1924.

DR. ARTHUR W. GILBERT, *Commissioner of Agriculture.*

DEAR SIR:— You have asked my opinion upon certain matters connected with the work of the Reclamation Division. Your inquiries are set forth in your letter in the following language:—

“We should therefore like to know whether, under the present language of the law (G. L., c. 252, as amended by St. 1923, c. 457, and by St. 1924, c. 93), a town or a State authority having charge of an institution, highway or other public property or improvement can be a member of a reclamation district, with the same rights, powers, duties and obligations as members who are individual persons.

We understand that the State or county, even though it might have land involved in a reclamation district, would not be subject to assessment. Is this correct? It sometimes happens also that a highway location is laid out across a marsh which the authority locating the highway is not empowered to drain, even though a better foundation could be obtained by drainage and the ultimate cost of constructing the highway much reduced by this means.

Would the State, county or town highway authorities, under the present law, have authority to petition for the establishment of a reclamation district to deal with such a situation?”

State, county or town authorities or officials who have charge of real property hold the same as representatives or agents of the State, county or town which they serve. They do not themselves have such title to the property in their charge as to bring them within the term “proprietors,” as used in the above-named statutes, the material provisions of which in this regard are as follows.

G. L., c. 252, §§ 1 and 5, as amended by St. 1923, c. 457, § 1:—

“SECTION 1. If it is necessary or useful to drain or flow a meadow, swamp, marsh, beach or other low land held by two or more proprietors, or remove obstructions in rivers or streams leading therefrom, such improvements may be made as provided in the fifteen following sections.

SECTION 5. The proprietors of any area described in section one or a majority in interest either in value or area, may petition the board setting forth their desire to form a reclamation district, as provided in the following section, stating the proposed name of said district, the necessity or desirability of the same, the objects to be accomplished, and a general description of the lands proposed to be affected, together with the names of known owners of said lands. . . .”

The Commonwealth, a county or a town, as the case may be, is the “proprietor” of the land held by officials, within the meaning of the statutes. The fact that the Commonwealth, a county or a town is the

owner of real property within a territory which might be made into a reclamation district by petition of the proprietors of land in such territory will not prevent the formation of such a district, and the Commonwealth, a county or a town will thereafter be treated as one of the proprietors within such district. The Commonwealth or a county which holds the land in such district for a public purpose will not, however, be subject to assessments upon its land in the district, as will other proprietors therein.

State, county or town highway authorities are not invested with power to institute petitions on behalf of the governmental agencies which they respectively represent, for the formation of reclamation districts, and in the absence of specific legislative authorization are not competent to become petitioners themselves nor to make the Commonwealth, a county or a town a petitioner for such a purpose.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Legislative Printing — Clerks of the House and Senate — Attorney General.

The statutes exclude legislative printing from the supervision and control of the Commission on Administration and Finance.

The power to contract for such printing, with certain exceptions, is lodged with the Clerks of the House and Senate.

In the absence of fraud or collusion, the jurisdiction of the Attorney General is limited to passing upon the legal form of the contract.

DEC. 5, 1924.

Commission on Administration and Finance.

GENTLEMEN: — You call my attention to the contract for legislative printing which the Clerks of the House and Senate propose to execute. You assert that the contract is not being awarded to the lowest bidder, and that the contract, if executed, will involve an increased expenditure of some thousands of dollars. You request me to prevent the execution of such a contract with the higher bidder and, I presume, to compel the Clerks of the House and Senate to award the contract to the lower bidder.

The entire matter has been given careful consideration by me, and all the parties in any way interested or involved have been given ample opportunity to be, and were, fully heard by me. The statutes exclude legislative printing from the supervision and control of your Commission, and give the power to contract for such printing, with the exception of bulletins of committee hearings, to the Clerks of the House and Senate. It is for them to take into consideration the circumstances and facilities of the bidders for the work, as well as the terms offered, and to award the contract to such person or persons as in their judgment the interests of the Commonwealth may require. The power and the accompanying responsibility are theirs. The power to publish bulletins of committee hearings is lodged by statute in the joint committee on rules.

The Attorney General is not given any jurisdiction in the matter, either by statute or under the common law, in the absence of fraud or collusion. You have orally stated to me that there is no suggestion of fraud or collusion in connection with the proposed contract.

It is clear, therefore, that there is no power in the Attorney General either to prevent the execution of the contract or to compel the awarding of the contract to a different bidder. The jurisdiction of the Attorney General in this matter at this time is limited to passing upon the *legal form* of the contract, when requested so to do by the Clerks of the House and Senate.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Insurance — Statutory Construction — Reinsurance.

The words "one half of an individual risk," as used in G. L., c. 175, § 20, with relation to the maximum amount of permitted reinsurance, mean one half of the face amount of the policy.

DEC. 13, 1924.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR: — You ask my opinion upon a question of law having to do with the interpretation of that part of G. L., c. 175, § 20, which provides that "no domestic life company shall reinsure its risks without the written permission of the commissioner, but may reinsure not exceeding one half of an individual risk."

In your letter you point out that a question has arisen as to the meaning of this statutory provision, and you set forth the following facts: —

"A certain life company now under examination has been reinsuring one half of the face amount of the policy without the consent of the Commissioner. If it, *v. g.*, should issue a policy for \$60,000 to a person already insured by it under a policy for \$40,000, it would reinsure \$50,000 without permission, that is, one half of the total insurance of \$100,000.

The contention is made that in the case premised it could not lawfully reinsure more than one half of the difference between the reserve value of the \$60,000 policy, taken at \$30,000, and the face amounts of both policies, \$70,000, or \$35,000 without such permission."

You ask to be advised whether the words "one half of an individual risk" mean one half of the face amount of the policy or policies, or whether they mean one half of the difference between the reserve accumulated and the face of the policy.

The word "risk," as used in the statute under consideration, in my opinion, means simply the amount of the loss which the insurer is liable to pay on the death of the insured. It has no relation to the particular fund out of which payment must be made, whether reserve, surplus, capital or amount received by assessment of its members. The liability of the insurer is for the amount written in the policy or policies. This liability is not changed by the accumulation and allocation of a reserve or other similar fund, whose creation, though affecting the probabilities as to the insurer's ultimate depletion of its capital or other basic resources, does not affect the amount of its obligation.

In my opinion, therefore, the words of the statute to which you direct my attention, "one half of an individual risk," mean one half of the face amount of the policy or policies written for the life of the insured.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Resale of Theatre Tickets — License — “Engaged in Business.”

A person may be engaged in business even though service is rendered without charge to the customer and is a matter of accommodation to him.

Theatre tickets are not property in the ordinary sense but are primarily revocable licenses.

The term “reselling,” as used in St. 1924, c. 497, should be construed as the transfer or disposal of a legal or equitable right to a ticket of admission, or to some other evidence of such right of entry, for a consideration.

Whenever any one makes a regular course of business of such transactions he becomes subject to the provisions of the act.

DEC. 17, 1924.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You have requested my opinion as to whether the Jordan Marsh Company, of Boston, is required to be licensed under the provisions of St. 1924, c. 497, entitled “An Act to regulate the sale and resale of tickets to theatres and other places of public amusement as a matter affected with a public interest in order to prevent fraud, extortion and other abuses,” by reason of the service it furnishes its patrons in obtaining theatre tickets. You describe the course of conduct of the company as follows: —

“It appears that the Jordan Marsh Company takes orders for tickets and collects the money therefor, and by phone or other means makes the reservations at the theatre office and issues to the purchaser some sort of order, upon receipt of which at the theatre box office the tickets so reserved are delivered to the purchaser without any further payment therefor.”

For this service the company makes no charge.

The statute describes the persons who must be licensed thereunder as those who “engage in the business of reselling any ticket or tickets of admission or other evidence of right of entry to any theatrical exhibition, public show or public amusement or exhibition required to be licensed under sections one hundred and eighty-one and one hundred and eighty-two, whether such business is conducted on or off the premises on which the ticket or other evidence is to be used.” St. 1924, c. 497, § 2.

The crucial words for your present purposes are, — “engaged in the business of reselling.”

It is clear that the Jordan Marsh Company, in pursuing the course of conduct described, is engaged in business, even though the service is rendered without direct charge to the customer and is a matter of accommodation to him. *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55. The word “sale” has a well-defined meaning.

In *Arnold v. North American Chemical Co.*, 232 Mass. 196, 199, the court said: —

“It is the transfer of property from one person to another for a consideration or value. The word implies *ordinarily* the passing from seller to buyer of the general and absolute title to property as distinguished from a special interest, a bailment, a license, a lease, a pawn or other limited right falling short of complete ownership.”

See also G. L., c. 106, § 3, commonly called the “Sales Act.”

Theatre tickets, however, are not property in the ordinary sense but are primarily revocable licenses, and "while it may be assumed that the resale of a theatre ticket transfers all the right of the original purchaser, the transaction relates to property of such tenuous nature as to render it peculiarly liable to abuses." *Opinion of the Justices*, 247 Mass. 589, 596.

To construe the word "resale" under the provisions of St. 1924, c. 497, as a transfer of the general and absolute title would exclude from its operation a great number of potential transactions which might be clearly subject to the abuses which the statute was intended to obviate. I am of the opinion that the word "reselling" was not used in this act in its ordinary meaning or with the precise and close signification given that term in the Sales Act. Nor does the statute make immediate and tangible gain the criterion of a "resale." Tickets purchased and transferred to another person for less than the purchase price are none the less resold.

In my opinion, the term "reselling," as used in St. 1924, c. 497, should be construed as the transfer or disposal of a legal or equitable right to a ticket of admission, or to some other evidence of such right of entry, for a consideration, and that whenever any one makes a regular course of business of such transactions he renders himself subject to the provisions of that act. To become subject to the statute a person must have acquired some such right to the tickets, which right he disposes of or transfers for a consideration. If no such right is acquired by the person whom it is sought to subject to the provisions of the law, that person cannot be held to be "engaged in the business of reselling" tickets.

Applying these principles to the instant case, if the Jordan Marsh Company acquires any legal or equitable rights to theatre tickets and disposes of such rights to its patrons for a consideration, even though there be no immediate and tangible profits in such transactions, it is engaged in the business of reselling tickets and must be licensed under the provisions of St. 1924, c. 497. If, however, the Jordan Marsh Company does not acquire any such rights in such tickets, and acts either as the agent of the theatre in selling tickets or as the agent of its patrons in buying tickets, and all rights in the tickets are transferred directly from the theatre to the patron, it is not engaged in the business of reselling tickets and is not subject to the provisions of the act.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Civil Service — Secretary appointed by the City Council of Boston.

The appointment of a secretary by the city council of Boston, under St. 1909, c. 486, § 1, is not within civil service.

DEC. 17, 1924.

HON. PAYSON DANA, *Commissioner of Civil Service*.

DEAR SIR:— You ask my opinion as to whether the appointment of a secretary by the city council of Boston, under St. 1909, c. 486, § 1, is within the civil service.

In my opinion, this appointment is not within civil service. St. 1909, c. 486, § 1, reads, in part, as follows:—

" . . . The city council may, subject to the approval of the mayor, from time to time establish such offices, other than that of city clerk, as it may deem necessary for the conduct of its affairs and at such

salaries as it may determine, and abolish such offices or alter such salaries; and without such approval may fill the offices thus established and remove the incumbents at pleasure."

The words "may fill the offices thus established and remove the incumbents at pleasure" seem to me inconsistent with any legislative intent that such appointments or removals shall be subject to civil service. Cf. V. Op. Atty. Gen. 537.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Insurance — Contract of Insurance — Bond for Hospital Expenses.

An undertaking by an insurance company to pay hospital expenses incurred in a specified way, in consideration of a premium, is not a contract of suretyship but a contract of insurance.

DEC. 30, 1924.

HON. WELSEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You have submitted to me copies of two instruments, styled respectively "Hospital Bond" and "Application for a Hospital Bond," issued by a foreign insurance company licensed to do business in this Commonwealth as surety, but not to insure against sickness or bodily injury. The bond purports, in consideration of a stated premium, to guarantee to any hospital in the United States or Canada payment of all expenses which may be incurred within one year thereafter at any such hospital by the other contracting party (called the "principal assured") or members of his immediate family, named therein, not exceeding the amounts therein specified and subject to certain other conditions as stated therein. Payments are to be made directly to the hospital involved. In the application the applicant agrees to pay a stated annual premium upon the signing of the application. No obligation is expressed or implied in either instrument that the "principal assured" shall repay to the company any sum paid out by it under the bond.

You ask the following questions:—

"1. Does the company in issuing such a contract act as a surety on a bond or other obligation within the meaning of the fourth clause of G. L., c. 175, § 47, or, in other words, is such a contract one of suretyship?

2. If you answer the preceding question in the negative, does the said contract constitute one of insurance against loss or damage on account of accident or sickness, and therefore subject to section 108 of said chapter?

3. If you answer the two preceding questions in the negative, does the making of said contract involve the transaction of a form of insurance which is unlawful under section 3 of said chapter because not specifically permitted by said section 47 and which can be transacted only by special license of the Commissioner under clause (g) of section 51 of said chapter?"

1. It is essential to the relation of suretyship that there shall be a valid and binding obligation owed by the principal to a creditor, for the payment or performance of which the surety undertakes to make himself collaterally liable. *Thornberg v. Allman*, 8 Ind. App. 531; *Russell v. Failor*, 1 Ohio St. 327; *Roberts v. Hawkins*, 70 Mich. 566. See *Canton Institution for Savings v. Murphy*, 156 Mass. 305; *Burdett v. Walsh*, 235 Mass. 153. The undertaking of the company, as is shown by the bond and application, is to pay hospital expenses when incurred

according to the terms of the bond, and not to be surety for their payment by another. It is my opinion, therefore, that the contract with the "principal assured" is not a contract of suretyship. Accordingly, I answer your first question in the negative.

2. A contract of insurance is defined by G. L., c. 175, § 2, as follows:—

"A contract of insurance is an agreement, by which one party, for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest."

The basis of this definition is to be found in the opinion of Gray, J., in *Commonwealth v. Wetherbee*, 105 Mass. 149, 160, in which he said the following:—

"A contract of insurance is an agreement, by which one party, for a consideration, (which is usually paid in money, either in one sum, or at different times during the continuance of the risk,) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance, the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case, neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract."

In I Op. Atty. Gen. 345, former Attorney General Knowlton says, regarding this definition:—

"This definition first appears in St. 1887, c. 214, § 3. It was taken from an opinion of Gray, C.J., in *Commonwealth v. Wetherbee*, 105 Mass. 149, and was undoubtedly adopted by the Legislature as a judicial interpretation of the meaning of the word; but an examination of the case cited shows that it was not intended in the opinion to limit the common-law definition of insurance."

The nature of the contract between the company and the "principal assured" is to be ascertained from the terms of the bond and application. The use of the words "assured," "insurance" and "premium" tends to show that the contemplated arrangement, as the parties viewed it, was one of insurance. The intention shown by the instrument appears to be to provide insurance for the "principal assured" and designated members of his family, in consideration of a premium to be paid, against certain losses, to wit, hospital expenses, consequent upon possible accident or ill health. The contract was not intended to be one for personal services. The "Hospital Bond," when duly executed by the parties, is, in my opinion, a contract of insurance within the statutory definition quoted above. See I Op. Atty. Gen. 544; V Op. Atty. Gen. 206; *Physicians' Defense Co. v. Cooper*, 199 Fed. 576. I therefore answer your second question in the affirmative.

Accordingly, no answer to your third question is called for.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Boston Elevated Railway Company — Employees — Public Service — Preference of Veterans and Citizens.

The service in which employees of the Boston Elevated Railway Company are engaged is not any branch of the public service of the Commonwealth.

Statutes containing provisions giving preference to veterans and to citizens of the Commonwealth with respect to their employment in the public service are not applicable to employment in the service of the Boston Elevated Railway Company.

JAN. 5, 1925.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN:— You have requested my opinion as to questions of law raised in a letter from the Department Commander of the American Legion to the chairman of the Trustees of the Boston Elevated Railway Company, of which a copy is transmitted to me. The question presented by this letter seems to be "whether or not it is proper under any contract or agreement to retain non-citizens under seniority rights and discharge veterans and citizens."

Our statutes contain various provisions giving preference to veterans and to citizens of the Commonwealth with respect to their employment in the public service. See G. L., c. 31, §§ 19, 21-28, inclusive; c. 149, § 26. *Lee v. Lynn*, 223 Mass. 109. There is no statute of which I am aware purporting to impose any restriction on the right of aliens to be employed in any other service; and such a statute, if enacted, would be of doubtful validity. *Truax v. Raich*, 239 U. S. 33. *Cf. Opinion of the Justices*, 207 Mass. 601.

The first question to be considered, therefore, is whether the service in which the employees of the Boston Elevated Railway Company are engaged is any branch of the public service.

The relation of the Commonwealth to the company and the powers and duties of the trustees are determined by Sp. St. 1918, c. 159, under which public control of the company was inaugurated. Regarding its scope and purpose the court said, in *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 412:

"Its general scope is indicated by its title, which is, 'An Act to provide for the public operation of the Boston Elevated Railway Company. The accuracy of the title is confirmed by the substance of the act throughout. Its purpose is operation through public officers and not public ownership.'"

The following provisions of Sp. St. 1918, c. 159, relative to the powers and duties of the trustees and the nature of their office should be particularly referred to.

In section one it is provided that the trustees "shall not be considered public officers within the meaning of" St. 1909, c. 514, § 25, forbidding public service corporations to appoint or discharge employees at the request of public officers. It is also provided that "the provisions of section one of chapter seven of the Revised Laws (G. L., c. 12, § 3) shall not apply to the said board," those being provisions which require the Attorney General to act for State departments, officers and commissions in matters relating to their official duties. Section 2 provides that the board of trustees "shall manage and operate the Boston

Elevated Railway Company, hereinafter called the company, and the properties owned, leased or operated by it" for the period of public control; that the trustees, "for the purposes of this act, shall, except as is otherwise provided in this act, have and may exercise all the rights and powers of said company and its directors, and, upon behalf of said company, shall receive and disburse its income and funds"; and that "in the management and operation of the said company and of the properties owned, leased or operated by it, as authorized by this act, the trustees and their agents, servants and employees shall be deemed to be acting as agents of the company and not of the commonwealth, and the company shall be liable for their acts and negligence in such management and operation to the same extent as if they were in the immediate employ of the company, but said trustees shall not be personally liable." Section 3 provides that "the trustees shall have authority to make contracts in the name and on behalf of, and to issue stocks, bonds and other evidences of indebtedness of, the company."

In view of these provisions, it is my opinion that the service in which the employees of the company are engaged is not any branch of the public service of the Commonwealth, and that the statutory provisions referred to above, giving preference to citizens and veterans in the public service, are not applicable. This is in conformity with an opinion given by me to the Speaker of the House under date of January 25, 1924 (Attorney General's Report, 1924, p. 25).

Very truly yours,

JAY R. BENTON, *Attorney General*.

Taxation — Exemption — Public Charity — Theatre.

The words "literary, benevolent, charitable and scientific institutions," in G. L., c. 59, § 5, cl. 3rd, cover, in general, the institutions which are within the equity of St. 43 Eliz., c. 4.

They do not, however, include religious institutions, which are dealt with elsewhere in the statute.

They do include educational institutions, such as schools, libraries, museums and lecture foundations, so long as the educational purpose is not subordinate to a dominant non-charitable purpose.

A theatre, not run for profit but upon a permanent foundation for the advancement of dramatic art, is an educational institution within the scope of this doctrine.

The land owned by such an institution, having been purchased with a view to removing the situs of the institution thereto, is exempt from local taxation, irrespective of occupancy, until such removal, but not for more than two years after such purchase.

JAN. 15, 1925.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:—In connection with your duties under G. L., c. 58, § 1, you have asked my opinion "as to whether the Trustees of the Jewett Repertory Theatre Fund Inc. are taxable on any property which they may hold"; and more particularly upon certain real estate in the city of Boston upon which local taxes were assessed in the years 1923 and 1924. The facts, as stated in your letters and their enclosures, relating to the corporation, its purposes and the manner of its holding of this land are recited below in discussing the various phases of the question.

The relevant portion of G. L., c. 59, § 5, respecting persons and property exempt from taxation is as follows:—

“Third, Personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated in the commonwealth, the real estate owned and occupied by them or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase, except as follows:—

(a) If any of the income or profits of the business of the institution or corporation is divided among the stockholders or members, or is used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes, its property shall not be exempt.

(b) A corporation coming within the foregoing description shall not be exempt for any year in which it wilfully omits to bring in to the assessors the list and statement required by section twenty-nine.”

The exemption is thus made to turn upon the character of the corporation, upon the uses made of its income, and, in the case of land, upon the extent and nature of the occupancy of the premises for which exemption is sought. Wilful non-compliance with G. L., c. 59, § 29, respecting annual returns is made a bar to obtaining the exemption for the year in which such non-compliance occurs.

1. The Jewett Repertory Theatre Fund Inc. is a Massachusetts corporation; and there is no intimation of any wilful delinquency as to the bringing in of the required lists of its property. So far it meets the requirements for the exemption. No facts are given, however, as to the uses made of its income, if any.

2. Does it belong to the class of “literary, benevolent, charitable and scientific institutions” to which the statute refers? These terms have persisted in the exemption provisions ever since their appearance in R. S. c. 7, § 5, cl. 2. In general they cover the cases of institutions which are within the provisions or “within the equity” of St. 43 Eliz., c. 4, “which is the foundation of our law on the subject of charities.” *Mass. Society, etc., v. Boston*, 142 Mass. 24, 27; *Molly Varnum Chap. D. A. R. v. Lowell*, 204 Mass. 487, 493. Although they do not expressly include “educational institutions,” their force has very many times been invoked in behalf of schools, academies and colleges. *Trustees of Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Cambridge v. County Commissioners*, 114 Mass. 337; *Mount Hermon Boys’ School v. Gill*, 145 Mass. 139; *Williston Seminary v. County Commissioners*, 147 Mass. 427; *Amherst College v. Assessors of Amherst*, 173 Mass. 232; *Phillips Academy v. Andover*, 175 Mass. 118; *Harvard College v. Cambridge*, 175 Mass. 145; *Emerson v. Trustees of Milton Academy*, 185 Mass. 414; *Amherst College v. Assessors of Amherst*, 193 Mass. 168; *Watson v. Boston*, 209 Mass. 18; *Wheaton College v. Norton*, 232 Mass. 141; *Thayer Academy v. Assessors of Braintree*, 232 Mass. 402. Even where religious teaching is one of the corporate purposes of a school, if the “paramount and dominant purpose” is education it may be a literary, benevolent, charitable or scientific institution, and need not be held a “religious organization” (which is dealt with in G. L., c. 59, § 5, cls. 10th and 11th, and not in cl. 3rd; see *First Universalist Society in Salem v. Bradford*, 185 Mass. 310). *South Lancaster Academy v. Lan-*

caster, 242 Mass. 553. Further, most gifts for educational purposes are charitable, even though the means employed be other than organized schools. See *Jackson v. Phillips*, 14 Allen, 539, 552; *Richardson v. Essex Institute*, 208 Mass. 311, 318; Perry on Trusts, vol. 2., 6th ed., § 700. Thus exemption from taxation has been afforded, because in whole or in part of educational features, to a society for the prevention of cruelty to animals (*Mass. Society, etc., v. Boston*, 142 Mass. 24, 27-28); to a chapter of the Daughters of the American Revolution, incorporated for various broad purposes, historical and patriotic (*Molly Varnum Chap. D. A. R. v. Lowell*, 204 Mass. 487); and to a Young Men's Christian Association (*Little v. Newburyport*, 210 Mass. 414). See *Salem Lyceum v. Salem*, 154 Mass. 15. Only where the general educational purposes were subordinate to some dominant non-charitable purpose have corporations having an educational aspect been held outside the scope of the exemption. *New England Theosophical Corporation v. Boston*, 172 Mass. 60; *Phi Beta Epsilon Corporation v. Boston*, 182 Mass. 457. Numerous cases not involving questions of taxation have held gifts charitable which furthered education through means other than organized schools; as, for example, gifts for libraries (*Drury v. Inhabitants of Natick*, 10 Allen, 169; *Bartlett, petr.*, 163 Mass. 509; *St. Paul's Church v. Attorney General*, 164 Mass. 188; *Minns v. Billings*, 183 Mass. 126); for maintaining a colonial house and its contents as a museum (*Richardson v. Essex Institute*, 208 Mass. 311; cf. *Molly Varnum Chap. D. A. R. v. Lowell*, *supra*); and for public lectures (*Lowell, etc., Appellants*, 22 Pick. 215). In *Minns v. Billings*, *supra*, at page 131, one of the circumstances emphasized was that "the corporation owns many valuable works of art . . . the most important of which are now kept on exhibition at the museum of fine arts in Boston, where they are frequently exhibited to the public, free of charge." In *Thorp v. Lund*, 227 Mass. 474, 482, holding a gift for "the distribution of donations to the younger musicians, actors and actresses holding engagements with the National Stage of Bergen" to be a public charity, the following language occurs:—

"The National Stage of Bergen is in a sense a national theatre of Norway. . . . It is an institution established directly for the inculcation of patriotism, for the cultivation of music and the drama, and in a broad sense for the promotion of popular education in those departments of the fine arts. The distribution of prizes among the meritorious youth who are pursuing these studies and cultivating their skill in these branches is a charity."

The Jewett Repertory Theatre Fund Inc. was incorporated under the provisions of R. L., c. 125, and acts in amendment thereof and in addition thereto, for the following purposes:—

"To enlighten and educate the public concerning the value of the Repertory Theatre as a vital factor toward the higher development of dramatic art and to establish a permanent playhouse in the city of Boston where the best plays of all times may be presented, where competent actors may be afforded an opportunity of appearing before the public under favorable conditions, and to encourage playwrights and actors in the best traditions of the dramatic profession."

These words show a careful avoidance of any reference to purposes of private advantage. The corporation has no capital stock, nor is there

indicated any expectation of the application of income except towards the furtherance of the stated general purposes. The substance of these purposes is the promotion of dramatic art and the benefiting of the general public through the permanent maintenance of a theatre where may be given a more varied, better performed, and possibly less expensive range of dramatic productions than might perhaps be afforded the playgoing public under the ordinary circumstances of commercial management. Although such purposes are of necessity partly recreational, they are fundamentally educational in the broad sense of that word, and I am of the opinion that a corporation so purposed falls within the class of literary, benevolent, charitable and scientific institutions.

3. The next inquiry is whether the land in question comes within the particular words of the exemption relating to real estate. The facts are that the corporation was organized in March, 1920, that it has had various offices for the transacting of its business, that it bought the land in question July 25, 1922, that negotiations with architects and builders have been in progress since sometime in 1922, that a contract has been let for the construction of a building thereon, executed November 4, 1924, that actual construction was begun November 11, 1924, that the building is contracted to be completed on or before September 1, 1925. The contemplated structure consists of a theatre, an "assembly hall," numerous accessory rooms and administrative offices. If built according to the present plans it cannot be said to be unadapted to the purposes of the corporation.

The types of real estate which are exempt are as follows:—

"Real estate owned and occupied by them (the various kinds of corporations referred to above) or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase."

The language of R. L., c. 12, § 5, cl. 3, was similar. This statute seems plainly to refer to two different classes of real estate: first, the real estate which is owned and occupied for corporate purposes; and second, real estate purchased with a view to removal, *i.e.*, real estate owned and to be occupied in the future. This second class is to be exempt for not more than two years after purchase. Thereafter actual occupancy is required. The history of the statute leads up through a steady development to this conclusion.

The provisions of G. S., c. 11, § 5, cl. 3, were as follows:—

"Third, The personal property of literary, benevolent, charitable, and scientific institutions incorporated within this commonwealth, and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated."

Under this statute the meaning of "occupied," with reference to land held merely for future use, was thrown into considerable doubt by a series of decisions.

In *New England Hospital v. Boston*, 113 Mass. 518, a charitable corporation had taken title to land on April 25, 1871, had employed an architect April 15, 1871, had commenced construction May 27, 1871, had prosecuted the construction diligently, and was held not subject to a tax assessed upon these premises May 1, 1871. In *Redemptorist*

Fathers v. Boston, 129 Mass. 178, the court, in holding a corporation taxable on certain vacant land not serving any immediate corporate purpose but alleged to be held for further building expansion, said "it should at least appear that it had begun to build," citing *New England Hospital v. Boston*, *supra*. In *Trinity Church v. Boston*, 118 Mass. 164, the premises of a religious society upon which a new house of worship to replace a former one destroyed by fire was in process of building were held not taxable by a majority of the court, following *New England Hospital v. Boston*. Wells, J., dissented, upon the ground that G. S., c. 11, § 5, cl. 3, under which that case arose, differed in terms from G. S., c. 11, § 5, cl. 7, relating to places of worship. In *Trinity Church v. Boston*, *supra*, this language, following a reference to *New England Hospital v. Boston*, *supra*, occurred:—

"It is not necessary in this case to define at what stage in the erection of a building the property becomes a house of religious worship, or to say that land only may, under some circumstances, be exempt from taxation, although no building has been actually begun upon it."

The Legislature undertook to resolve this doubt by the passage of St. 1878, c. 214, which read as follows:—

"The real estate belonging to such institutions as are mentioned in the third division of section five of chapter eleven of the General Statutes, purchased with a view of removal thereto, shall not be exempt from taxation for a longer period than two years until such removal takes place."

After this act, "passed probably in consequence of the decision in *Trinity Church v. Boston*" (*Lynn Workingmen's Aid Association v. Lynn*, 136 Mass. 283, 285), the question whether land held with a view to removal was "occupied" or not was arbitrarily determined. Such land was "occupied" during a period of two years after purchase merely by force of the proposed future use. After the two years had passed the land was not "occupied," and so was not exempt, except when actually occupied, "not . . . in the general sense in which a corporation or individual may be said to occupy their real estate when it is not occupied by any one else, but in the sense in which an incorporated college, academy, hospital, or like institution, occupies its college, academy, or hospital, and the lands and buildings connected therewith." *Lynn Workingmen's Aid Association v. Lynn*, *supra*, p. 285. Thus, after the two years were passed, the requirement of occupancy could no longer be satisfied by the mere progress in plans for construction such as formerly sufficed in *New England Hospital v. Boston*, *supra*.

The law was codified in P. S., c. 11, § 5, cl. 3, as follows:—

"Real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated; but such real estate, when purchased by such a corporation with a view to removal thereto, shall not, prior to such removal, be exempt for a longer period than two years."

In R. L., c. 12, § 5, cl. 3, came the change to the present form of the statute. Precisely the same result as formerly is now achieved, not by a requirement of occupancy and then a provision substantially defining what occupancy may consist of in the case of land purchased for future use, but rather by the creation of two classes,—of land "occupied" in

the stricter sense, and of land held for not over two years after purchase with the view of going into occupancy (in the same stricter sense) thereof.

It would seem, however, that the two-year exemption is not extended to all land purchased with a view to future use, "removal" having received, in *Wheaton College v. Norton*, 232 Mass. 141, 147, the following more narrow definition: —

"The words 'purchased . . . with the purpose of removal thereto,' naturally mean a change in the *situs* of the institution from one tract of land to another, and do not mean other land purchased for college purposes. *New England Hospital for Women & Children v. Boston*, 113 Mass. 518."

Applying this test to the Jewett Repertory Theatre Fund Inc., it appears that the premises in question are to be in substitution for the quarters in which the corporation has previously carried on its business, and will constitute a wholly new "*situs* of the institution."

I answer your question, therefore, that, provided no such application of income to non-charitable purposes nor failure to bring in the required lists has occurred to evoke the application of subdivisions (a) and (b) of G. L., c. 59, § 5, quoted above, the Jewett Repertory Theatre Fund Inc. was exempt from local taxation upon its personal property and upon the particular real estate in question at the time that the 1923 and 1924 assessments were levied.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Notaries Public — Justices of the Peace — Appointment — Removal.

Notaries public and justices of the peace are appointed and may be removed by the Governor, with the consent of the Council.

Apart from any legal limitations upon eligibility, all matters pertaining to the appointment and removal of notaries and justices, as, for example, the number of commissions to be issued, the personal qualifications required for appointment, or the grounds for removal, are entrusted to the discretion of the Governor and Council.

JAN. 20, 1925.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — In response to your request, I submit a brief survey of the law relating to the appointment and removal of notaries public and justices of the peace.

In the original Constitution of the Commonwealth, justices of the peace were to be nominated and appointed by the Governor, by and with the advice and consent of the Council, being judicial officers (*Opinion of the Justices*, 107 Mass. 604), within the meaning of Mass. Const., pt. 2nd, c. II, § I, art. IX, which reads as follows: —

"All judicial officers, the attorney-general, the solicitor-general, all sheriffs, coroners, and registers of probate, shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment."

Notaries public, on the other hand, were to be elected by the Legislature. Mass. Const., pt. 2nd, c. II, § IV, art. I, read, in part, as follows: —

“The secretary, treasurer and receiver-general, and the commissary-general, notaries public, and naval officers, shall be chosen annually, by joint ballot of the senators and representatives in one room.”

By Mass. Const. Amend. IV, however, notaries were also brought within the appointing power of the Governor and Council:—

“Notaries public shall be appointed by the governor in the same manner as judicial officers are appointed, and shall hold their offices during seven years, unless sooner removed by the governor, with the consent of the council, upon the address of both houses of the legislature.”

As to the removal of these officers, it is to be observed that Mass. Const. Amend. IV, just quoted, rendered notaries removable by the Governor, with the consent of the Council, upon the address of both houses of the Legislature. Justices of the peace, as judicial officers, were similarly removable under Mass. Const., pt. 2nd, c. III, art. I, which read as follows:—

“The tenure, that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: provided nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature.”

The legislative address as a prerequisite to removal was dispensed with by Mass. Const. Amend. XXXVII, which reads as follows:—

“The governor, with the consent of the council, may remove justices of the peace and notaries public.”

Although the duties of these officers are the subject of numerous statutory provisions, there is no statute relating to removal, and the only statute relating to appointment is as follows (G. L., c. 222, § 1):—

“Justices of the peace and notaries public shall be appointed, and their commissions shall be issued, for the commonwealth, and they shall have jurisdiction throughout the commonwealth except as provided in section thirty-six of chapter two hundred and eighteen.”

Prior to Mass. Const. Amend. LVII, women could not be notaries public (*Opinion of the Justices*, 150 Mass. 586; *Opinion of the Justices*, 165 Mass. 599), and could not, before the adoption of the Nineteenth Amendment to the Constitution of the United States, be justices of the peace (*Opinion of the Justices*, 107 Mass. 604; *Opinion of the Justices*, 240 Mass. 601; Attorney General's Report, 1921, p. 239; Attorney General's Report, 1922, p. 150). Although the restriction just mentioned no longer exists, there may be other limitations upon eligibility to appointment now in force. For example, although leaving the Commonwealth does not of its own force vacate the office (Attorney General's Report, 1923, p. 95), a person not domiciled within the Commonwealth is not eligible to appointment (Attorney General's Report, 1923, p. 85).

It is my opinion that, except for limitations of the type mentioned in the preceding paragraph, all questions relating to the number of justices of the peace and notaries public which it may be thought desirable to have, or relating to the personal qualifications for appointment to

these offices, or relating to the reasons for which such officers once appointed should be removed, are for the determination of the Governor and Council, in the exercise of their sound discretion. It is assumed, of course, that this discretion will not be arbitrarily exercised, but the limits within which it may with propriety be exercised will be very broad. For example, new appointments might be refused or officers already appointed might even be removed, upon the ground that there was a greater number of such commissions already outstanding than was thought desirable. Similarly, it will be proper to inquire with care into the personal qualifications of applicants or into the reasons for which they seek appointment. Particular cases may perhaps furnish occasion for the consideration of other circumstances in connection with appointment or removal.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Submission to Voters of a Question of Public Policy — Majority of All the Votes cast.

G. L., c. 53, § 22, providing that no vote on the submission of a question of public policy shall be regarded as an instruction unless the question submitted receives a majority of all the votes cast at that election, means a majority of all the ballots cast, and not a majority of the votes cast upon the question submitted.

JAN. 22, 1925.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN:— You request my opinion upon a question of law as to the interpretation of G. L., c. 53, § 22, which has arisen in connection with your official duties in examining and certifying, under G. L., c. 54, the result of the votes on a certain question.

G. L., c. 53, §§ 18 to 22, inclusive, provide for the submission of questions of public policy in senatorial and representative districts, upon application. Section 22 provides that no vote thereon shall be regarded as an instruction *unless the question submitted receives a majority of all the votes cast at that election.*

It appears that at the election last November there appeared upon the ballot in certain senatorial and representative districts a public policy question having to do with the matter of non-contributory old age pensions. The question now to be determined is as to whether or not the majority referred to in section 22 is a majority of all the ballots cast at the last election in a given senatorial or representative district, or a majority of all the votes cast on the public policy question as to non-contributory old age pensions.

It is the fundamental rule in statutory construction that the intention of the Legislature, as shown by the language used, the object intended to be accomplished and other circumstances, should be determined and carried into effect. In other words, the statute itself furnishes the best means for its own exposition. *Moore v. Stoddard*, 206 Mass. 395, 399.

But where, after a consideration of the language of the entire statute, there remains a doubt as to its meaning, reference may be had to extrinsic matters. Its meaning may frequently be ascertained by resort to the history of its passage through the Legislature. *Browne v. Turner*, 174 Mass. 150. For the purpose of interpreting the legislative will, re-

sort may be had to the history of the statute as found in the journals of the two legislative bodies, and also to the original bill with the amendments noted thereon.

Such an examination of the legislative history of the law in question has been made in this case. Article XIX of the Bill of Rights of the Constitution of this Commonwealth provides that the people have a right to give instructions to their representatives, and, pursuant to this, the Legislature, in 1913, enacted a law providing for the submission to the voters on official ballots of questions of public policy. This law is now found in G. L., c. 53, §§ 18 to 22, inclusive, referred to above. The records show that at the beginning of the legislative session in 1913 the Massachusetts State Branch of the American Federation of Labor filed a bill providing for the submission to the voters on official ballots of questions of public policy. This bill was printed as House Bill No. 366. As filed, the section in question read as follows:—

“No vote under the provisions of this act shall be regarded as an instruction under article nineteen of the bill of rights of the constitution of the commonwealth, unless it receives a majority of all the ballots cast at that election.”

When the bill was passed upon by the House committee on bills in the third reading that committee recommended an amendment of the section by substituting the following language:—

“No vote under the provisions of this act shall be regarded as an instruction under article nineteen of the bill of rights of the constitution of the commonwealth, unless the question submitted receives a majority of all the votes cast *thereon* at that election.”

On March 17th the amendment was accepted and the bill was passed to be engrossed and sent up to the Senate for concurrence.

On June 10th the bill was passed to be engrossed in the Senate in concurrence, but with an amendment in the section now being considered by striking out the word “*thereon*.” The bill was then sent down to the House for concurrence on this amendment. On June 11th the House refused to concur. On June 12th the Senate insisted upon its stand, and later that same day the House receded from its position and concurred with the Senate, and the bill went forward with the word “*thereon*” stricken out, and finally, on June 16th, was signed by the Governor and became law.

This examination of the history and passage of the act through the Legislature makes manifest the intention of the Legislature, namely, that the majority required by G. L., c. 53, § 22 (St. 1913, c. 819, § 4), means, in the case before us, a majority of all the ballots cast in a given senatorial or representative district, and not a majority of the votes cast on the single matter, to wit, the public policy question of non-contributory old age pensions.

Yours very truly,
JAY R. BENTON, *Attorney General*.

Notaries Public — Justices of the Peace — Powers and Duties.

The powers and duties of notaries public and justices of the peace are collected and summarized.

FEB. 9, 1925.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN:— You have requested my opinion as to the general powers and duties of notaries public and justices of the peace.

The powers and duties of justices of the peace may conveniently be listed in the following groups:

1. *Taking of Oaths and Acknowledgments.*— By G. L., c. 222, § 1, justices of the peace are authorized, unless otherwise expressly provided, to administer oaths or affirmations in all cases in which an oath or affirmation is required, and to take acknowledgment of deeds and other instruments. By G. L., c. 4, § 6, cl. 6th, it is further established as a rule of construction that “wherever any writing is required to be sworn to or acknowledged, such oath or acknowledgment may be taken before a justice of the peace.” There are in addition many provisions in the statutes for the taking of oaths or acknowledgments in particular cases. Thus, of the acknowledgment of deeds, G. L., c. 183, § 30; of arbitration agreements, G. L., c. 251, § 2; of assignments of corporate shares sold for non-payment of assessments, G. L., c. 158, § 31; of the records of notaries public and bank officers who participate in opening a safe deposit box for non-payment of rent, G. L., c. 158, § 17; of a certificate of witnesses to an entry to foreclose a mortgage, G. L., c. 244, § 2; or of the certificate of a limited partnership, G. L., c. 109, § 5.

Similar provisions relate to the administering of oaths to the clerk of a religious society (G. L., c. 67, § 15); to town officers (G. L., c. 41, §§ 16, 20, 29, 107); to railroad, street railway and steamboat police (G. L., c. 159, § 91); or to persons who are to determine disputed claims relating to impounded animals (G. L., c. 49, §§ 35 and 36). Undoubtedly an elaborate search of the statutes and of regulations made pursuant to statutory authority would disclose numerous other particular provisions relative to the taking of oaths and acknowledgments, which are also covered by the general provisions first noted above. It is perhaps common knowledge, for example, that both State and Federal income tax returns are required to be sworn to.

2. *Judicial Powers and Duties.*— The appointment by the Governor, with the advice and consent of the Council, of justices of the peace to be trial justices in certain named towns, and the special powers of such justices, are provided for in G. L., c. 219. By section 1 of that chapter all justices of the peace not so designated and commissioned are prohibited from the exercise of judicial power and from the receiving of complaints or the issuing of warrants, with certain exceptions which will be mentioned below.

A justice of the peace who is a clerk or assistant clerk of a district court is given by G. L., c. 218, § 35, certain powers relative to the receiving of complaints and issuing of warrants and summonses, and under G. L., c. 218, § 36 (amended by St. 1924, c. 58), a justice of the peace residing in a town within the district of a district court, and in which town the clerk of such court does not reside, may be designated and commissioned to exercise similar powers, and to take bail in criminal cases arising within the judicial district. Such designated justices may also issue summonses and other processes for witnesses in criminal cases,

and processes for parties and witnesses in certain juvenile cases. G. L., c. 218, § 37. They are given general powers as to search warrants by G. L., c. 176, § 1, and there are also numerous particular provisions respecting issuance of warrants, such as, for example, to search for certain drugs (G. L., c. 94, § 214); to abate certain nuisances under the direction of a board of health (G. L., c. 111, § 131); to permit the examination of gas meters (G. L., c. 164, § 116); for the removal of persons affected with contagious diseases, etc. (G. L., c. 111, § 96); to secure infected articles, etc. (G. L., c. 111, § 99); or to impress places for the storage thereof (G. L., c. 111, § 100).

A board of three justices may sit to determine the amount due for redemption of land taken upon execution (G. L., c. 236, § 34). Under certain circumstances any justice of the peace may issue a writ of habeas corpus (G. L., c. 248, § 2). Any justice may issue summonses for witnesses (G. L., c. 233, § 1); and in any case where the justice is authorized to examine witnesses, he may, in case of failure to attend, issue warrants to compel attendance and to answer for contempt (G. L., c. 233, §§ 5, 6). Any justice may take depositions in causes pending within or without the Commonwealth (G. L., c. 233, §§ 26, 45). Two justices may sit to take depositions to perpetuate testimony (G. L., c. 233, § 46).

3. *As Peace Officers.* — By G. L., c. 220, § 3, justices of the peace are given authority to suppress and make arrests in cases of affrays, riots, assaults and batteries and may command the assistance of other persons in so doing. In G. L., c. 269, § 1 *et seq.*, this power is expressly extended to cases where twelve or more persons, being armed, or thirty or more persons, whether armed or not, are “unlawfully, riotously or tumultuously assembled in a city or town”; and by G. L., c. 269, § 3, a fine of not over \$300 may be imposed upon an officer who neglects his duty in such cases. It is to be noted that these powers are carefully limited to certain extraordinary cases, and furnish no justification for officiousness in cases of ordinary confusion or peaceful assemblage, as, for example, may arise following an accident upon the highway.

4. *Relative to Meetings of Corporations, Associations, etc.* — In certain cases justices of the peace are given powers to call — and sometimes to preside over — town meetings (G. L., c. 39, §§ 11, 12 and 14); stockholders’ meetings (G. L., c. 155, § 15; G. L., c. 158, § 36); meetings for the organization of fire districts (G. L., c. 48, § 62); meetings of private way or bridge proprietors (G. L., c. 84, § 12); of religious societies, etc. (G. L., c. 67, §§ 12, 22, 23, 29 and 42); of proprietors of wharves, etc. (G. L., c. 179, § 1); or of proprietors of general fields (G. L., c. 179, § 19).

5. *Certain Miscellaneous Powers and Duties.* — Under G. L., c. 207, §§ 38 and 39, certain justices of the peace are or may be authorized to solemnize marriages. The nomination of a guardian of a minor may be made before a justice of the peace, G. L., c. 201, § 2. Justices may inspect druggists’ records and liquor sales, G. L., c. 138, § 32 (amended by St. 1923, c. 233, § 5). They may require the exhibition of hawkers’ and pedlars’ licenses, G. L., c. 101, § 27.

Powers and duties of notaries public may be classified, in comparison with those of justices of the peace, as follows.

1. *Taking of Oaths and Acknowledgments.* — The general provisions relative to this subject (G. L., c. 4, § 6, cl. 6th, and G. L., c. 222, § 1) give to notaries the same powers as are given to justices to administer oaths

or affirmations and take acknowledgments of deeds and other writings; and the same is true of G. L., c. 183, § 30, relative to the acknowledgment of deeds, etc. It will perhaps not be profitable to endeavor to collect here the statutes referring to the taking of oaths in particular cases. While undoubtedly there are some instances where oaths can only be administered by a justice or by a notary, respectively, because of the way in which the law has developed, to a large extent the field is the same as to both officers. One instance where apparently only a notary can take the required affidavit is G. L., c. 233, § 77, relating to copies of bank records for use in evidence.

2. *Judicial Powers and Duties.*—The notary is not in any sense a judicial officer. Recently, however, by St. 1923, c. 263, the power to issue subpoenas for witnesses has been conferred upon notaries.

3. *As Peace Officers.*—The notary has no such duties as pertain to the justice of the peace in this respect.

4. *Relative to Meetings of Corporations, Associations, etc.*—Neither do the various provisions mentioned above relative to the calling of meetings of corporations, etc., apply to notaries.

5. *Miscellaneous Powers and Duties.*—Nominations of guardians of minors may be made before a notary as well as before a justice. G. L., c. 201, § 2. Certain notices to non-resident owners of dangerous structures may be served by a notary, G. L., c. 143, § 11. The notary has certain duties with relation to the opening of safe deposit boxes for non-payment of rent, G. L., c. 158, § 17.

6. *Protest of Commercial Paper.*—This important function, in which justices have no part, is governed partly by statute and partly by the common law. G. L. c. 107, § 176, confers upon notaries the power to make protests; and there are numerous other sections relating thereto. Keen's Manual for Notaries and Justices (1903), c. 3, sets out at length many features of these duties which cannot well be stated in a small space. Reference is made to this manual with the caution necessarily arising in view of the possibility of changes or developments since the date of its publication.

7. *Marine Protests.*—Another power which does not pertain to justices of the peace relates to the noting and extending of marine protests. See Keen's Manual for Notaries and Justices, c. 4. Such a protest "has been described as a declaration in writing, drawn up and attested by a notary public, by the master of a merchant ship, his mate and part of the ship's crew, after a voyage in which the ship has suffered in her hull, rigging or cargo, to show that such damage did not happen through any neglect or misconduct on their part." Keen's Manual, p. 90.

Summarizing from the above, it will be seen that both notaries and justices participate at large in the power to take oaths and acknowledgments, and that from this point on their duties in general diverge, the justice of the peace being a minor judicial officer with very limited and circumscribed powers, and the notary public being an administrative or executive officer charged largely with duties pertaining to commercial transactions. Neither officer has any broad or general class of powers and duties of which the boundaries are not ascertainable with fair ease or which should reasonably furnish any warrant for meddlesomeness *colore officii* in the private affairs of others.

Your very truly,

JAY R. BENTON, *Attorney General.*

Commissioners for Massachusetts in Other States and Foreign Countries.

The duties of commissioners for Massachusetts in other States and foreign countries may be performed by persons other than the commissioners, and their appointment is not absolutely necessary.

FEB. 10, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR: — You have referred to me two petitions for appointment as commissioner for Massachusetts in a foreign country, one from Ireland and one from a correspondent in Washington, who, however, desires the commission for Mexico. Your letter states in part: —

“Without regard to the qualifications of the applicants, your opinion is requested as to whether there is at present any general need for the appointment of such commissioners which cannot be otherwise supplied without inconvenience or hardship to the public.”

G. L., c. 222, defines the powers of a commissioner. Section 6 of said chapter reads as follows: —

“A commissioner may, in his state, territory, district, dependency or country, administer oaths and take depositions, affidavits and acknowledgments of deeds and other instruments, to be used or recorded in this commonwealth, and the proof of such deeds, if the grantor refuses to acknowledge the same, all of which shall be certified by him under his official seal.”

G. L., c. 183, § 30, provides: —

“The acknowledgment of a deed or other written instrument required to be acknowledged shall be by one or more of the grantors or by the attorney executing it. The officer before whom the acknowledgment is made shall endorse upon or annex to the instrument a certificate thereof. Such acknowledgment may be made —

(c) If without the United States or any dependency thereof, before a justice of the peace, notary, magistrate or commissioner as above provided, or before an ambassador, minister, consul, vice consul, charge d'affairs or consular officer or agent of the United States accredited to the country where the acknowledgment is made; if made before an ambassador or other official of the United States, it shall be certified by him under his seal of office.”

So far as the acknowledgment of deeds and other instruments requiring acknowledgment is concerned, there are a number of others besides commissioners who may perform that service.

G. L., c. 233, § 41, reads as follows:

“The deposition of a person without the commonwealth may be taken under a commission issued to one or more competent persons in another state or country by the court in which the cause is pending, or it may be taken before a commissioner appointed by the governor for that purpose, and in either case the deposition may be used in the same manner and subject to the same conditions and objections as if it had been taken in the commonwealth.”

In order to take testimony outside the Commonwealth a commissioner appointed by this State is not necessary, as it is apparent that the court may direct this commission to any competent person.

Therefore, it does not appear to be necessary to appoint a commissioner in any State or foreign country in order that deeds or other instruments may be properly acknowledged or testimony taken. No information has come to this department that there is any general need for the appointment of such commissioners at Cavan, Ireland, or Mexico City, Mexico.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Election Laws — Returns of Candidates.

Where nothing has been "contributed, expended or promised" for political expenses by a candidate for election, a statement to that effect in his return must contain those or synonymous terms.

FEB. 10, 1925.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You request to be advised as to the construction of that portion of G. L., c. 55, § 16, which relates to statements required to be filed with you by candidates for public office, and you refer to that part of section 16 which requires a candidate to file with you, "if nothing has been contributed, expended or promised by him, a statement to that effect."

You ask, first, whether your department may, in such a statement, accept the phrase "nothing contributed, expended or promised," and no other. You will note that the section above referred to uses, not only the foregoing words, but also the words "a statement to that effect." I advise you, therefore, that, while it is not strictly necessary for a candidate to use those precise words in making his return, he must use terms that are synonymous.

You also ask whether such statements as "nothing paid or promised" and "nothing paid, nothing promised" can be accepted as a sufficient return. I advise you that a return in that form has in it nothing that is synonymous with "contribute." Such a return does not disclose whether a candidate contributed or not, and is, therefore, insufficient. I am of the opinion that the word "paid" may be accepted as synonymous with "expended."

Yours very truly,

JAY R. BENTON, *Attorney General*.

Education — Teachers — State Aid.

Towns are not entitled to reimbursement, under G. L., c. 70, § 1, for salaries paid teachers, except as to salaries paid only for teaching and for teaching subjects authorized by G. L., c. 71, § 1.

FEB. 10, 1925.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You ask my opinion as to whether certain persons may be regarded as "teachers" for the purpose of determining the amounts to be paid as State aid to towns, under G. L., c. 70, § 1, as amended.

G. L., c. 70, § 1, provides for part reimbursement to towns "for

salaries paid to teachers, supervisors, principals, assistant superintendents and superintendents for services in the public day schools. . . .”

The persons specified by you are as follows:—

“1. Nurses employed under G. L., c. 71, § 53, but who give some time to instructing classes in ‘home nursing’ and give all children instruction in hygiene.

2. In high schools, — librarians, who give some instruction to pupils in the use of books and other reference material.

3. In high schools, — deans of girls, who give full or part time to matters of guidance and discipline of high school girls.

4. Physical directors employed as teachers of physical education to give instruction in ‘indoor and outdoor games and athletic exercises,’ this instruction being required by G. L., c. 71, § 1, as amended by St. 1921, c. 360.

5. Coaches of baseball, basketball and football.

6. ‘Teacher-clerks’ — persons who do clerical work or administrative work for principals and teach part time or substitute in place of teachers who may be absent.”

It is provided by G. L., c. 71, § 1 (St. 1921, c. 360), that certain specified subjects shall be taught and that such other subjects may be taught as the school committee considers expedient.

In the first place, then, no one should be considered as a “teacher” within G. L., c. 70, § 1, who does not teach a subject which is specified in G. L., c. 71, § 1, or which the school committee of the town in question, acting under G. L., c. 71, § 1, has deemed it expedient to make a subject to be taught.

In the second place, the provision contained in G. L., c. 70, § 1, is for part reimbursement for “salaries paid to teachers.” A town would therefore not be entitled to reimbursement for any payments unless such payment constituted “salary,” and unless, also, such salary was paid for teaching and not wholly or in part for something else.

Inasmuch as the answers to the specific questions which you ask may depend upon facts which I have not before me, I prefer not to attempt to answer them; but I have stated the rules which I think should govern, and the application of these rules to the facts, when ascertained, will probably not be difficult. Very likely in applying the rules to the facts it will be found that G. L., c. 70, § 1, covers payments to the persons referred to in questions numbered 3, 4 and 5, and not to the persons described in questions numbered 1, 2 and 6.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Opinions of the Justices.

The Governor and Council are authorized by the Constitution to require the opinions of the justices of the Supreme Judicial Court only upon matters then pending before the Governor and Council and in relation to the performance of their official duties.

FEB. 14, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR: — You ask my advice concerning a communication to you suggesting that the Governor and Council require the opinion of the justices

of the Supreme Judicial Court on the question whether the Federal statute commonly called the "Maternity Act" is constitutional.

Mass. Const., c. III, art. II, provides:—

"Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices . . . upon important questions of law, and upon solemn occasions."

Unless there is both an important question of law and a solemn occasion such an opinion cannot be required. The words "upon solemn occasions" are defined in *Opinion of the Justices*, 126 Mass. 557, 566, as meaning "when such questions of law are necessary to be determined by the body making the inquiry, in the exercise of the legislative or executive power intrusted to it by the Constitution and laws of the Commonwealth." It was said in *Opinion of the Justices*, 122 Mass. 600, 601, 602, that the object of this constitutional provision was "to enable the Senate, the House of Representatives, or the Governor and Council, to obtain the advice of the justices upon any important question of law which the body making the inquiry has occasion to consider in the exercise of the legislative or executive powers intrusted to them respectively." The inquiry by either the legislative or the executive branch of the government must relate to the performance of official duties in regard to a matter then pending before it. *Opinion of the Justices*, 148 Mass. 623, 626; 186 Mass. 603, 608; 190 Mass. 611, 612; 208 Mass. 614; 211 Mass. 630; 217 Mass. 607, 611-613. In *Opinion of the Justices*, 214 Mass. 602, the justices declined to answer a question propounded by the Governor regarding the constitutionality of a bill then actually before him for his approval.

It does not appear that the matter to which the communication relates is in any way now pending before the Governor and Council. It does not appear that there is even any pending or proposed legislation with respect to it. I must advise you, therefore, that, in my opinion, the Governor and Council at the present time have no right to request the opinion of the justices of the Supreme Judicial Court upon the constitutionality of the Federal Maternity Act.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Exemption of Veteran Organizations from License Fees.

A statute exempting veteran organizations from paying a fee for licenses to keep billiard, pool or sippio tables or bowling alleys, while requiring a license fee of other keepers, would be unconstitutional because of its discrimination in favor of a certain class of citizens.

FEB. 18, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:—I acknowledge receipt of your communication wherein you request me to consider House Bill No. 1016, entitled "An Act exempting certain veteran organizations from license fees for keeping billiard, pool or sippio tables or bowling alleys."

This bill seeks to change existing law by exempting incorporated organizations of veterans of any war in which the United States has been engaged from paying a fee for licenses to keep billiard, pool or sippio

tables or bowling alleys if and so long as said tables or bowling alleys are used exclusively by members of said organizations and their bona fide guests. The bill provides that all other keepers of billiard, pool or sippio tables and bowling alleys and other undertakings therein mentioned shall pay a license fee of not less than two dollars for each license.

The case of *Commonwealth v. Hana*, 195 Mass. 262, 266, 267, shows clearly that the proposed bill is unconstitutional. In that case a statute for the licensing of hawkers and pedlars, which exempted from the payment of a license fee residents of a city or town who paid taxes there on their stock in trade and were qualified to vote, persons seventy years of age or upwards, and former soldiers and sailors resident in the Commonwealth, was held to be unconstitutional. In so holding the court said:—

“Even before the adoption of the Fourteenth Amendment it was a settled principle of constitutional law that statutes in regard to the transaction of business must operate equally upon all citizens who desire to engage in the business, and that there shall be no arbitrary discrimination between different classes of citizens. Under the Fourteenth Amendment, all persons are entitled to the equal protection of the laws. In several States such a discrimination in the granting of licenses in favor of soldiers and sailors has come before the courts, and in all of them, so far as we are aware, the provision has been held unconstitutional. *State v. Shedroi*, 75 Vt. 277. *State v. Garbroski*, 111 Iowa, 496. *State v. Whitcom*, 122 Wis. 110. See also *In re Keymer*, 148 N. Y. 219; *Brown v. Russell*, 166 Mass. 14.

These cases and others show that a discrimination, founded on the residence of the applicant for a license or the amount of tax paid by him, cannot be sustained under the constitution. . . . We see no justifiable ground, under the Constitution, for a discrimination in favor of residents of a city or town who pay taxes there on their stock in trade, and who are qualified to vote there, nor of those who are seventy years of age or upwards. As the discrimination in favor of former soldiers and sailors was not referred to in argument, it is unnecessary to pass upon it; but as we have already seen, a similar discrimination has been held unconstitutional in other States.”

This opinion has since been cited on several occasions. It has never been overruled or modified. It is, in my opinion, a controlling authority to show that the discrimination which the bill makes in favor of a certain class of citizens is one which is forbidden by the Fourteenth Amendment of the Constitution of the United States, and that the bill, if enacted, would be unconstitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Surplus Bonus Funds returned to Cities and Towns—Use for a Library Building.

A town cannot legally vote to hold the surplus bonus funds received under St. 1924, c. 480, as a fund for the erection of a library building, under G. L., c. 44, § 8, par. (7), in the absence of any evidence that said library building is intended as a memorial to soldiers, sailors and marines.

FEB. 24, 1925.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR:— You request my opinion as to whether or not G. L., c. 44, § 8, par. (7), makes it legal for a town to vote to hold the surplus bonus as a fund for the erection of a library building.

St. 1924, c. 480, provides for the return to the cities and towns of certain surplus funds collected to provide suitable recognition of those residents of Massachusetts who served in the army and navy of the United States during the war with Germany. This act expressly provides that “any sum received by a city or town on account of such payment shall be held as a special fund to be appropriated only for the purpose of paying indebtedness or for purposes for which the city or town may borrow money as specified in sections seven and eight of chapter forty-four of the General Laws.”

G. L., c. 44, § 8, provides:—

“Cities and towns may incur debt, outside the limit of indebtedness prescribed in section ten, for the following purposes and payable within the periods hereinafter specified:

(7) For acquiring land or constructing buildings or other structures, including the cost of original equipment, as memorials to soldiers, sailors and marines, twenty years; but the indebtedness so incurred shall not exceed one half of one per cent of the last preceding assessed valuation of the city or town.”

It is to be noted that this paragraph applies only to “memorials to soldiers, sailors and marines.” Accordingly, in the absence of any evidence that the library building in question is intended as a memorial to soldiers, sailors and marines, it is my opinion that it would be illegal for a town to vote to hold such surplus bonus as a fund for the erection of a library building under paragraph (7), *supra*.

Inasmuch as your inquiry is limited to this paragraph it is unnecessary for me to consider whether or not such fund might be used for the erection of a library building under any other paragraph of G. L., c. 44, §§ 7 and 8.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Vehicle with Its Load weighing more than Fourteen Tons—Permit to travel on a Public Way—Maximum Load—Construction of Statutes.

A permit is required in each instance for a vehicle, which with its load weighs more than fourteen tons, to travel on a public way.

The permit need not, but may, specify the ways over which such vehicle shall travel.

The Division of Highways may, by rule, establish a maximum weight of load at less than fourteen tons but not at more than fourteen tons.

Mere verbal changes in the revision of a statute do not alter its meaning. The meaning of words in a statute must be determined from the context, the general intention of the Legislature and the purpose to be accomplished.

The construction placed upon a statute through many years by the administrative officers may be taken into consideration in construing the act.

FEB. 26, 1925.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR: — You request my opinion on the following questions: —

“(a) Can a continuing permit to travel on any public way be granted to a vehicle which with its load weighs more than fourteen tons?

(b) Should the vehicle have a permit for each load which with the weight of the vehicle weighs more than fourteen tons?

(c) Should the permit specify the ways over which a vehicle which with its load weighs more than fourteen tons shall travel?”

G. L., c. 85, § 30, as amended by St. 1922, c. 526, provides, in part: —

“ . . . nor shall any vehicle travel or object be moved on any public way which with its load weighs more than fourteen tons, without a permit from the board or officer having charge of such way. . . . Such permit may limit the time within which it shall be in force and the ways which may be used and may contain any provisions or conditions necessary for the protection of such ways from injury.”

That act was formerly St. 1913, c. 803, §§ 1 and 3, and as then enacted provided that no such vehicle or object should be moved over a highway “without first obtaining” a permit. The word “first” was retained in the amendments of 1917 and 1918 (see Gen. St. 1917, c. 344, pt. 5, § 39, and Gen. St. 1918, c. 116, § 1) but was omitted in the General Laws. It is well settled, however, that mere verbal changes in the revision of a statute do not alter its meaning, and that the Legislature will not be presumed to have intended to alter the law unless the language plainly requires that construction. *Commonwealth v. New York Central & Hudson River R.R. Co.*, 206 Mass. 417, 419; *Great Barrington v. Gibbons*, 199 Mass. 527, 529; *Tilton v. Tilton*, 196 Mass. 562, 564; *Savage v. Shaw*, 195 Mass. 571; *Electric Welding Co. v. Prince*, 195 Mass. 242, 259. The language of G. L., c. 85, § 30, does not require a construction that the Legislature intended to alter the law, and I am therefore of the opinion that the words “without a permit,” in G. L., c. 85, § 30, should be construed as if the language were “without first obtaining a permit.”

The meaning of the words “without a permit” or “without first obtaining a permit” and “such permit may limit the time within which it shall be in force” must be determined from the context, the general intention of the Legislature and the purpose to be accomplished. *Commonwealth v. Nickerson*, 236 Mass. 281, 290; *Hammond v. Hyde Park*, 195 Mass. 29, 30; *Chapin v. Lowell*, 194 Mass. 486, 488; *Toupin v. Peabody*, 162 Mass. 473, 476; *Sweetser v. Emerson*, 236 Fed. 161, 162.

The purpose of the act was manifestly to protect the highways against vehicles or objects which with their loads weighed more than fourteen tons. The Legislature, however, recognized that it would be necessary at times to move over the highways objects weighing more than fourteen tons, which could not be taken apart, and authorized the issuing of permits to move such loads. In each case, however, the problem for the board or officer granting such permits is to determine whether such a

permit is necessary. This clearly involves a consideration of the facts in each case, and is not consistent with a suggestion that continuing permits may be granted generally for excessive loads for a period of time. The phrase "without first obtaining a permit" indicates that a permit is required for each specific load and that a general or continuing permit may not be given. Furthermore, the board authorized to issue permits has since the act was first enacted in 1913 construed the statute as requiring a permit for each specific load, and has regarded itself as without power to issue general or continuing permits. The construction placed upon the statute through many years by those charged with the enforcement of the law may be taken into consideration in construing the act. *Tyler v. Treasurer and Receiver General*, 226 Mass. 306, 310; *Burrage v. County of Bristol*, 210 Mass. 299, 301.

In my opinion, therefore, a permit is required for each load and I accordingly answer question (a) in the negative and question (b) in the affirmative. With respect to question (c), the statute does not require that the permit specify the ways over which the vehicle shall travel, but the board or officer granting such permit may, in his discretion, so specify.

You further request my opinion upon the following questions: —

"(a) Under St. 1924, c. 457, has the Division of Highways authority to establish a maximum weight of load greater or less than that fixed by G. L., c. 85, § 30?

(b) Has said Division authority to establish by rule the condition that a permit may be granted by the Division or by the authorities having charge of public ways to a vehicle to carry a load on a specified date over specified ways that weighs more than the limit prescribed by the rule for the maximum weight of the vehicle and load?

(c) Will these rules have precedence over the provision regulating maximum weight of loads and issuing of permits for heavier loads under G. L., c. 85, § 30?"

This act provides, in part: —

"The division after a public hearing may make, and may alter, rescind or add to, rules and regulations for the reasonable and proper control and regulation of the transportation by motor vehicle of personal property over the ways of this commonwealth, except ways under the control of the metropolitan district commission. Said rules and regulations shall cover, among other matters which the division may deem necessary or desirable, . . . the establishment of the maximum weight of loads per commercial motor vehicle. . . . Said rules and regulations and any changes therein shall be subject to approval, and shall take effect, in the manner provided by section six of chapter sixteen."

The act makes no specific reference to G. L., c. 85, § 30, and is not inconsistent with it. It therefore does not, either specifically or by implication, repeal the latter statute. Both being in full force and effect, St. 1924, c. 457, must be read in the light of G. L., c. 85, § 30, and must be so construed as to be consistent with the latter statute. So construed, it follows that the Division of Highways has no authority to establish by rule a maximum weight of load greater than fourteen tons. The Division may, however, subject to the provisions of St. 1924, c. 457, establish a maximum load less than fourteen tons.

My answer to question (a), therefore, is that the Division, pursuant to the terms of the act, may establish a maximum weight of vehicle and load less, but not greater, than that fixed by G. L., c. 85, § 30. My answer to question (b) is in the affirmative, provided the rule is not made to apply to vehicles or objects which with their loads weigh more than fourteen tons. My answer to question (c) is in the negative with respect to the regulation of, and permits for, vehicles and objects which with their loads weigh more than fourteen tons, and in the affirmative with respect to such vehicles and loads weighing less than fourteen tons.

Very truly yours,

JAY R. BENTON, *Attorney General*.

State Hospital — Temporary Release of Patient on Visit — Authority of Superintendent.

While a patient committed for observation under G. L., c. 123, § 77, as amended by St. 1924, c. 19, cannot be discharged by the superintendent of the institution unless he is found to be sane, nevertheless, such superintendent may grant a leave of absence to any patient, including those committed for observation, by virtue of and in compliance with the provisions of G. L., c. 123, § 88.

MARCH 2, 1925.

DR. GEORGE M. KLINE, *Commissioner of Mental Diseases*.

DEAR SIR: — You request my opinion as to the authority of a superintendent of a State hospital to release temporarily on visit a patient who has been committed by order of court for observation.

G. L., c. 123, § 77, as amended by St. 1924, c. 19, provides, in part, as follows: —

“If a person is found by two physicians qualified as provided in section fifty-three to be in such mental condition that his commitment to an institution for the insane is necessary for his proper care or observation, he may be committed by any judge mentioned in section fifty, to a state hospital or to the McLean hospital, for a period of thirty-five days pending the determination of his insanity; provided, that such commitments shall be made to Gardner state colony only when legally authorized by the department. Within thirty days after such commitment the superintendent of the institution to which the person has been committed shall discharge him if he is not insane, and shall notify the judge who committed him, or if he is insane he shall report the patient’s mental condition to the judge with the recommendation that he shall be committed as an insane person, or discharged to the care of his guardian, relatives or friends if he is harmless and can properly be cared for by them. Within the said thirty-five days, the committing judge may authorize a discharge as aforesaid, or he may commit the patient to any institution for the insane as an insane person if, in his opinion, such commitment is necessary. If, in the opinion of the judge, additional medical testimony as to the mental condition of the alleged insane person is desirable, he may appoint a physician to examine and report thereon.”

Under this section it is evident that the superintendent of the hospital only has authority to discharge the patient if he is found not to be insane. On the other hand, if the patient is found to be insane, the committing judge alone may authorize a discharge as provided in said

section. But a discharge is plainly to be distinguished from a release or leave of absence.

G. L., c. 123, § 88, provides as follows:

“The superintendent or manager of any institution, after the examination required by section ninety-four has been made, may permit any inmate thereof temporarily to leave such institution in charge of his guardian, relatives, friends, or by himself, for a period not exceeding twelve months, and may receive him when returned by any such guardian, relative, friend, or upon his own application, within such period, without any further order of commitment, but no patient committed under section one hundred and one shall be permitted to temporarily leave the state hospital without the approval of the governor and council, nor shall such permission terminate or in any way affect the original order of commitment. The superintendent or manager may require as a condition of such leave of absence, that the person in whose charge the patient is permitted to leave the institution shall make reports to him of the patient's condition. Any such superintendent, manager, guardian, relative or friend may terminate such leave of absence at any time and authorize the arrest and return of the patient. The officers mentioned in section ninety-five shall cause such a patient to be arrested and returned upon the request of any such superintendent, manager, guardian, relative or friend. Any patient, unless he has been committed under section one hundred and one, who has not returned to the institution at the expiration of twelve months shall be deemed to be discharged therefrom.”

Under this section the superintendent of the institution is vested with power to permit any inmate thereof temporarily to leave on visit in charge of his guardian, relatives, friends or by himself for a period not exceeding twelve months, and may terminate such leave of absence at any time and authorize the arrest and return of the patient. It is expressly provided that such permission to leave shall not “terminate or in any way affect the original order of commitment.” Any patient, with the single exception noted in the above section, who has not returned to the institution at the expiration of twelve months “shall be deemed to be discharged therefrom.”

I am accordingly of the opinion that while a patient committed for observation under said section 77, cannot be discharged by the superintendent of the institution unless he is found to be sane, nevertheless, such superintendent may grant a leave of absence to any patient, including those committed for observation, by virtue of and in compliance with the provisions of said section 88.

Yours very truly.

JAY R. BENTON, *Attorney General.*

Department of Mental Diseases — Records of Psychiatric Examinations.

The Department of Mental Diseases is not required to furnish results of psychiatric examinations had under G. L., c. 127, §§ 16 and 17, as amended by St. 1924, c. 309, to any person other than the person designated therein.

MARCH 2, 1925.

Dr. GEORGE M. KLINE, *Commissioner of Mental Diseases.*

DEAR SIR: — You state that county officers, State departments and private social agencies have requested the Department of Mental Diseases

to furnish them with copies or abstracts of the case histories which have been compiled in compliance with St. 1924, c. 309. You request my opinion as to whether the department is required to give this information or whether the persons making such requests should be referred to the departments to which these records are forwarded.

St. 1924, c. 309, § 1, amended G. L., c. 127, § 16, by requiring that the keepers and masters of jails and houses of correction should cause a psychiatric examination of certain inmates to be made by a psychiatrist appointed by the Commissioner of Mental Diseases, in addition to the physical examination provided for by G. L., c. 127, § 16.

St. 1924, c. 309, § 2, amended G. L., c. 127, § 17, by substituting a new section, which provides, in part, as follows:—

“Specifications governing the manner and time of such physical examinations and such psychiatric examinations shall be respectively promulgated by the departments of public health and mental diseases. Said departments shall respectively prescribe the medical and psychiatric records to be kept, shall require such laboratory and other diagnostic aids to be used as in their judgment are expedient, and shall forward to the commissioner (of correction) statements of the results of all such examinations, together with recommendations relative thereto, and the psychiatrists making such examination shall from time to time furnish such other information as the commissioner (of correction) may request.”

The remaining portion of the section relates to the authority of the Commissioner of Correction to secure and to require information relative to offences committed by prisoners, their past history and environment, and to make record of examinations and investigations.

As pertaining to the Department of Mental Diseases, “the case histories, which have been compiled in compliance with St. 1924, c. 309,” are case histories relating to psychiatric examinations, from which the Department of Mental Diseases is required to forward to the Commissioner of Correction statements of their results. Neither St. 1924, c. 309, G. L., c. 127, nor any law brought to my attention, contains any provision requiring the Department of Mental Diseases to keep, file or record these case histories of examinations which the keepers and masters of jails and houses of correction have caused to be made. The duty of the Department of Mental Diseases is to forward to the Commissioner of Correction statements of the results of such examinations, together with recommendations.

As it is apparent that there is no expressed intention that these histories, as obtained by the Department of Mental Diseases, are for the use of the public (II Op. Atty. Gen. 381), and that they are preserved and retained, if at all, only for the information, convenience and proper administration of the Department of Mental Diseases (III Op. Atty. Gen. 136 and 351; Attorney General’s Report, 1923, p. 33), I am of the opinion that it is not required by St. 1924, c. 309, G. L., c. 127, c. 4, § 7, cl. 26th, or c. 66, §§ 3, 10, to give this information other than to the Commissioner of Correction.

Yours very truly,
JAY R. BENTON, *Attorney General.*

Small Loans — Unlawful Charges — Waiver of Statutory Protection — Attempted Evasion of the Statute.

A borrower cannot by contract deprive himself of the right given by G. L., c. 140, § 90, to discharge the debt by tender of principal with interest at 18%.

G. L., c. 140, §§ 96-114, relating to loans of \$300 or less, cannot be evaded by paying \$301 to a borrower who desires to borrow less than \$300 with the understanding that he will at once pay back the excess.

MARCH 2, 1925.

Hon. JOSEPH C. ALLEN, *Commissioner of Banks.*

DEAR SIR: — You request my opinion as to whether G. L., c. 140, § 90, providing, in substance, for the discharge of a loan of less than \$1,000 by tender of the principal with interest at 18%, is applicable in the case of a note containing a provision to the effect that the maker, "in consideration of the loan, waives any and all benefit or relief from any law now in force or hereafter to be passed against the collection of the full amount of both principal and interest of this note."

In my opinion, a contract by the borrower to waive the provisions of said section 90 is against public policy and he is not thereby debarred from discharging his debt in the manner provided for by the statute. The very purpose of the statute is to provide borrowers with a means of relief from the results of improvident contracts. To hold that a borrower might contract to waive the benefit of the statute would be to render the statute nugatory. There are many cases in which it has been held that a contract to waive the protection afforded by a statute is void. See *Equitable Life Assurance Society v. Clements*, 140 U. S. 226. See, also, cases cited in Paige on Contracts, § 730. Am. & Eng. Ency. Law, s. v. "Waiver," p. 1107.

It is true that unless the borrower makes a tender under G. L., c. 140, § 90, judgment will be entered upon the note (*Shawmut Commercial Paper Co. v. Brigham*, 211 Mass. 72); but this does not mean that the borrower can contract away his right to discharge his debt by tender under that statute. See *Shea v. Metropolitan Stock Exchange*, 168 Mass. 282, 284.

You also ask my opinion as to whether G. L., c. 140, §§ 96-114, regulating the business of making loans of \$300 or less at more than 12%, are applicable in the case of a lender who, in order to evade those statutory provisions, tells applicants for loans under \$300 that he will pay them \$301 and take their notes for that amount, and that they may at once repay the excess above what they require, and who puts the transaction through in that form.

In my opinion, the statutory provisions referred to are applicable to such transactions. I think that the court will look at the substance of the transaction and that the statutes cannot be evaded by so empty a form, adopted solely for the purpose of evading them.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Fish and Game — Artificial Ponds.

G. L., c. 130, § 59, forbidding the taking of a pickerel less than twelve inches in length, applies to artificial as well as to natural ponds.

MARCH 3, 1925.

Hon. W. A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You request my opinion as to whether the provisions of the General Laws controlling the open and closed seasons, catch limits, etc., on various kinds of fish (for instance, G. L., c. 130, § 59, as amended by St. 1923, c. 268, relating to pickerel) apply to ponds and reservoirs which have been created by the erection of dams at the outlets of smaller ponds and by dams constructed on unnavigable streams.

G. L., c. 130, § 59 (as amended by St. 1923, c. 268, § 2), reads as follows: —

“Whoever takes from the waters of the commonwealth a pickerel less than twelve inches in length or has in possession any such pickerel shall be punished by a fine of one dollar for each pickerel so taken or held in possession; and in prosecutions under this section the possession of pickerel less than twelve inches in length shall be prima facie evidence of such unlawful taking.”

In an opinion rendered by one of my predecessors (Attorney General's Report, 1922, p. 57) the words “waters of the Commonwealth,” as used in said section 59, were construed as meaning waters within the Commonwealth and not waters belonging to the Commonwealth. This seems to include ponds which have been wholly or in part artificially created quite as much as natural ponds. In section 32 of said chapter 130 these two kinds of ponds are classed together. The special rights given by sections 36 and 37 of said chapter seem to be confined to those who “enclose” the waters of an unnavigable stream “for the cultivation of useful fish.” See *Commonwealth v. Follett*, 164 Mass. 477; *Lynnfield v. Peabody*, 219 Mass. 322, 332.

I accordingly answer your question in the affirmative.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Interstate Rendition — Fugitive from Justice — Duty to deliver up Fugitive from Justice.

The duty to deliver up a fugitive from justice rests upon the Constitution and the laws of the United States.

It is the duty of the governor of an asylum State to deliver up the fugitive if he is the person demanded, if he was in the demanding State when the offence was committed, and if the papers are in proper form.

No discretion is vested in the governor of the asylum State.

A person is a fugitive from justice if he was in the demanding State at the time of the commission of the alleged offence and thereafter left the State.

The fugitive's motive in leaving the State is immaterial.

The governor of the asylum State cannot legally consider the question of guilt or innocence.

The governor of the asylum State cannot be compelled to honor a requisition.

MARCH 5, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR:— You have referred to me for my consideration the letter of the Governor of Texas in which she states her grounds for refusing to honor your requisition upon her for the interstate rendition of Albert P. Russell, charged by indictment with the crimes of desertion, non-support and abandonment of his wife and minor child.

At the hearing in Texas upon your requisition, as I am informed, Russell admitted that he was the person demanded and that he was in Massachusetts at the time of the alleged commission of the offences charged in the indictment. It was further admitted, I presume, that the papers accompanying your requisition are in proper form and duly authenticated, and that they properly charge a crime under the laws of this Commonwealth.

The ground for the denial of your requisition, as expressed in the letter of the Governor of Texas, is that the fugitive, in her opinion, is innocent of the crimes for which he was indicted in Massachusetts, and that he, therefore, and solely by reason of his supposed innocence, is not a fugitive from justice. I call to your attention the statutes and authorities which, in my opinion, govern the instant case and are binding upon the governor of every State.

U. S. Const., art. IV, § 1, provides:—

“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”

Section 2 of that article provides, in part:—

“A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.”

U. S. Const., art. VI, provides, in part:—

“This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.”

U. S. Rev. Sts., 1901, § 5278 (U. S. Comp. Sts., 1916, § 10126), provides, in part:—

“Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory *from whence the person so charged has fled*, it shall be the duty of the executive authority

of the State or Territory *to which such person has fled* to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

In *Lascelles v. Georgia*, 148 U. S. 537, 541, the Supreme Court of the United States said:—

"Upon these provisions of the organic and statutory law of the United States rest exclusively the right of one State to demand, and the obligation of the other State upon which the demand is made to surrender, a fugitive from justice."

It is thus manifest that the duty to deliver up fugitives from justice rests upon the Constitution and laws of the United States, which are the supreme law of the land, and that the decisions of the Supreme Court of the United States are absolutely controlling. That these provisions of the Constitution and laws of the United States apply to all crimes and offences punishable by the law of the demanding State is clear. *Kentucky v. Dennison*, 24 How. (U. S.) 66, 103, 106; *Lascelles v. Georgia*, 148 U. S. 537, 542. The United States Supreme Court has repeatedly and consistently held that it is the *duty* of the governor upon whom a demand is made for the return of a fugitive to deliver him to the appointed agent of the demanding State if the papers are in proper form and if the fugitive was in the demanding State at the time of the commission of the alleged offence, and that the governor of the demanding State has no discretion in the matter. *Hogan v. O'Neil*, 255 U. S. 52; *Biddinger v. Commissioner of Police*, 245 U. S. 128; *Drew v. Thaw*, 235 U. S. 432, 439; *Strassheim v. Daily*, 221 U. S. 280, 285; *Bassing v. Cady*, 208 U. S. 386; *McNichols v. Pease*, 207 U. S. 100, 108; *Appleyard v. Massachusetts*, 203 U. S. 222, 227; *Lascelles v. Georgia*, 148 U. S. 537, 542; *Kentucky v. Dennison*, 24 How. 66, 103.

In *Appleyard v. Massachusetts*, 203 U. S. 222, 227, the United States Supreme Court said:—

"A person *charged* by indictment or by affidavit before a magistrate with the commission within a State of a crime covered by its laws, and *who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—* becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. *Such is the command of the supreme law of the land, which may not be disregarded by any State.*"

In *McNichols v. Pease*, 207 U. S. 100, 108, the court said:—

"When the Executive authority of the State whose laws have been thus violated makes such a demand upon the Executive of the State in which the alleged fugitive is found as is indicated by the above section (5278) of the Revised Statutes—producing at the time of such demand a copy of the indictment, or an affidavit certified as authentic

and made before a magistrate charging the person demanded with a crime against the laws of the demanding State — it becomes, under the Constitution and laws of the United States, the duty of the Executive of the State where the fugitive is found to cause him to be arrested, surrendered and delivered to the appointed agent of the demanding State, to be taken to that State.”

In *Bassing v. Cady*, 208 U. S. 386, 392, the court said: —

“So far as the record shows it did not appear by proof that the accused was not in New York at the time the crime with which he was charged was committed. *If he was in New York at that time* (and it must be assumed upon the record that he was) *and thereafter left New York, no matter for what reason or under what belief, he was a fugitive from the justice of that State* within the meaning of the Constitution and laws of the United States. These views are in accord with the adjudged cases.”

In *Drew v. Thaw*, 235 U. S. 432, 439, the court said: —

“The Constitution says nothing about *habeas corpus* in this connection, but *peremptorily* requires that upon proper demand the person charged shall be delivered up to be removed to the State having jurisdiction of the crime. Article 4, § 2. *Pettibone v. Nichols*, 203 U. S. 192, 205. *There is no discretion allowed, no inquiry into motives. Kentucky v. Dennison*, 24 How. 66; *Pettibone v. Nichols*, 203 U. S. 192, 203.”

It thus appears that it is clearly established that a person is a fugitive from justice if he was in the demanding State at the time of the commission of the alleged offence and thereafter left the State, regardless of his motive for leaving. It is also conclusively established that, as a matter of law, the only issues before the governor of the asylum State are:

- (1) Are the papers accompanying the requisition in proper form?
- (2) Is the alleged fugitive the person demanded?
- (3) Was the fugitive in the demanding State at the time of the commission of the alleged offence?

If he determines these three questions in the affirmative, the foregoing authorities demonstrate that he has no discretion and that he has an absolute duty to honor the requisition and to surrender the fugitive to the demanding State.

In *Biddinger v. Commissioner of Police*, 245 U. S. 128, 134, the court said: —

“The appellant admits: That he was in the State of Illinois at the time it is charged that he committed the crimes for which he was indicted; that the indictments are in the form, and are certified as, required by law, and that he was found in the State of New York. *This satisfies the requirement of the statute* and by its terms *makes it the duty* of the Governor of New York to cause Biddinger to be arrested and given into the custody of the Illinois authorities.”

Applying the foregoing principles of law to your requisition for the return of Albert P. Russell to Massachusetts, it was admitted at the hearing in Texas that the papers accompanying your requisition were in proper form, that Albert P. Russell is the man sought, and that he was in Massachusetts at the time alleged in the indictment as the date

of the commission of the offences. All three requirements having been complied with, I respectfully submit that, as a matter of law, the Governor of Texas has no discretion in the matter and that it is her duty to honor your requisition. The question of the guilt or innocence of Russell is one with which the Governor of Texas has no legal right to be concerned, and is solely within the jurisdiction of the courts of Massachusetts.

As I read the letter of the Governor of Texas denying your requisition, her denial is based solely upon the ground that Russell is innocent of the crimes for which he has been indicted. It must be obvious that if governors of asylum States adopted a policy of denying requisitions upon such a ground, it would lead to a breakdown of interstate rendition and to the establishment of havens of refuge in the United States to which criminals might flee with the assurance that they were safe there, since the demanding State has no power to compel its witnesses to proceed to the asylum State for the purpose of proving the guilt of the fugitive. Such a policy would result also in setting up the governor of the asylum State as an extra-territorial court of the demanding State, a result which is unjustifiable in law and undesirable from the point of view of sound administration of justice.

It is well established that there is no power to compel the governor of an asylum State to honor the requisition of the governor of the demanding State if, contrary to his legal duty, he declines to do so. *Kentucky v. Dennison*, 24 How. 66, 109. But the very fact that the governor of the asylum State cannot be compelled to do his duty ought to make him exceedingly careful lest he fail to do that which the law says he must do. In *Kentucky v. Dennison*, *supra*, at page 109, the Supreme Court of the United States said: —

“The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union.”

And in *McNichols v. Pease*, 207 U. S. 100, 112, the court said: —

“We may repeat the thought expressed in *Appleyard's case* (203 U. S. 222), above cited, that a *faithful, vigorous enforcement* of the constitutional and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the States, and that ‘while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State.’ ”

The Governor of Texas states further in her letter to you that she believes that “ the prosecution was inspired by a desire upon the part

of his wife to collect some money rather than the mere enforcement of your criminal law." I assume without question that she did not thereby intend to impugn the good faith of Massachusetts or of its officials charged with the administration of criminal law. Permit me to assure you that no request or attempt to collect money from Russell was at any time made by any official of Massachusetts, and that no threat of prosecution if Russell failed to contribute to his wife's support was ever made by any official of this Commonwealth. The complaining witness at no time intimated to any official of the Commonwealth that she desired Russell prosecuted because of any ulterior motive. Permit me further to assure you that the Commonwealth of Massachusetts has at no time had, and does not now have, any motive or desire in this matter except to prosecute Russell for the crimes for which he was indicted.

In view of the foregoing principles of law and of a proper regard for the considerations of sound policy and proper administration of criminal law, and feeling that the Governor of Texas must agree with you that a haven of refuge to which criminals might flee without fear of being called upon to answer for their misdeeds ought not to be established anywhere in the United States, I suggest that you request her to reconsider her decision and to honor your requisition for the interstate rendition of Albert P. Russell.

Very respectfully yours,
JAY R. BENTON, *Attorney General*.

Constitutional Law — Public Ownership — Legislative Power to authorize a Grant of Land by a City to the Trustees of a College — Statutory Construction.

The Legislature may authorize the transfer of public land to the trustees of a college, upon adequate compensation.

MARCH 17, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have submitted to me for examination and report House Bill No. 1132, entitled "An Act authorizing the city of Worcester to grant to the Trustees of the College of the Holy Cross certain rights in certain land and waters of said city."

The object of this bill is to authorize the city of Worcester "to grant" to the Trustees of the College of the Holy Cross rights in the nature of easements for building purposes in connection with a stadium, in certain lands previously taken by the city under the provisions of St. 1900, c. 460.

The Legislature undoubtedly has the power to authorize the transfer of land and rights therein taken by eminent domain to private owners when such a change has taken place in conditions relative to the land that its public ownership is no longer essential to the purpose for which it was acquired. *Wright v. Walcott*, 238 Mass. 432. The Legislature may not, however, give or authorize the gift of public property for private purposes, though it may lease or sell it for such purposes upon receipt of adequate consideration. *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371; *Moore v. Sanford*, 151 Mass. 285.

The Legislature may transfer property and property rights taken by eminent domain from one administrative body to another or to the use of a public charitable trust, but since the enactment of Mass. Const. Amend. XLVI, § 2, the Legislature may not make or authorize "a

grant" of public property for the purpose of aiding any institution of learning "wherein any denominational doctrine is inculcated" nor to "any college, . . . institution, educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both."

The word "grant" has more than one meaning. It may apply to the mode of creating a title in an individual to lands of the sovereign and to the transfer of property of the sovereign to an individual, quite apart from any specific consideration furnished by the individual. This meaning was given to the word frequently in Colonial times, and is often used in this sense in the phrases "public grant" and "land grant." It is used with this meaning in Mass. Const. Amend. XLVI.

The word "grant" and the words "to grant," which are employed in the instant bill, have another well-recognized significance derived from common law usage, and mean the transfer by deed of any property. The word is used with this latter meaning in the instant bill.

The word "grant" when used in this latter sense may comprehend a transfer with or without compensation, but as employed by the Legislature in the instant bill it is assumed that it is employed in a narrow rather than in a generic sense, and that it authorizes the city to complete a transfer to the designated trustees upon adequate consideration. To interpret the word otherwise would make it necessary to say that the act was unconstitutional. The assumption is that the intention of the Legislature, in its use of words, is such as to render possible the interpretation of an act as constitutional. *Perkins v. Westwood*, 226 Mass. 268.

Assuming, then, that the bill gives to the city of Worcester authority to make proper transfer of the enumerated property rights, that is, one made upon adequate consideration, the act is, in my opinion, constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Prohibition of Resale of Reduced Fare Railroad Tickets.

A statute forbidding the resale of railroad commutation tickets under certain circumstances would be constitutional.

MARCH 17, 1925.

WILLIAM E. DORMAN, Esq., *Counsel to the Senate*.

DEAR SIR:—At the instance of the committee on bills in the third reading you request my opinion as to the constitutionality of House Bill No. 1099, entitled "An Act relative to the sale of certain tickets issued by railroad corporations."

The bill reads as follows:—

"Chapter one hundred and sixty of the General Laws is hereby amended by inserting after section one hundred and ninety-eight the following new section:

Section 198A. Whoever, except a person authorized so to do by the railroad company issuing the same, sells or offers for sale any railroad ticket or portion of such a ticket entitling the holder or any specified person or persons to passage wholly within the commonwealth on any railroad passenger train or trains, such ticket or portion of a ticket

having been put out by the railroad company issuing the same at a price less than the rate of a full one way fare for such passage under the tariff provisions then in force, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than one month, or both."

The Legislature has the power to make reduced rate tickets non-transferable. See *Bitterman v. Louisville & Nashville R.R. Co.*, 207 U. S. 205; Am. & Eng. Enc. L., vol. 28, p. 164.

It would seem, likewise, that the Legislature has the power to impose a penalty upon the transfer by resale of such tickets, if it finds that such a course is reasonably necessary in order to restrict the use of such tickets to the purposes for which they are intended.

As to twelve-trip commutation tickets between Boston and stations within a radius of fifteen miles, the railroads are required to issue these under the provisions of G. L., c. 160, § 190. These tickets are not intended to give the occasional traveler the means of riding at less than the rate fixed as proper for a single trip; and it would seem that the Legislature has ample power to restrain the use of these tickets to the purpose intended.

I understand that the tickets to which the bill applies are made redeemable under the tariff regulations.

Legislation similar to the bill here in question has frequently been held constitutional. *State v. Corbett*, 57 Minn. 345; *Burdick v. People*, 149 Ill. 600; *Commonwealth v. Wilson*, 14 Phila. 384; *Commonwealth v. Keary*, 198 Pa. 500; *Ex parte Hughes*, 50 Tex. Cr. R. 614; *Fry v. State*, 63 Ind. 552; see Black, Constitutional Law, p. 409; but see *People v. Warden of Prison*, 157 N. Y. 116.

In *People v. Steele*, 231 Ill. 340, where it was held that an act prohibiting the resale of theatre tickets at an advance price was unconstitutional, the court recognized the validity of *Burdick v. People*, 149 Ill. 600, saying, "but a railroad company has a franchise from the State, and the manner in which its business as a carrier shall be conducted is clearly under the control of the Legislature." In this Commonwealth the regulation of the resale price of theatre tickets is constitutional. See *Opinion of the Justices*, 247 Mass. 589.

Although the present bill is broad, in that it is not confined to those who engage in the business or practice of reselling, and also in that it applies to the resale of tickets already issued (these, however, as I understand, being redeemable under the tariff regulations), I am of the opinion that it is constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Election of City Officials — Proportional Representation.

A statute providing for the election of city officials in such a way as to permit the voters to express a choice between candidates in numerical order would violate no provision of the State Constitution.

House Committee on Election Laws.

MARCH 20, 1925.

GENTLEMEN:—You ask my opinion as to the constitutionality of Senate Bill No. 193, entitled "An Act to provide for the election of city officials by the method of proportional representation."

The purpose of this bill is to authorize any city which accepts the provisions of the act to elect the members of its legislative body, to be known as the council, from the city at large by the method of proportional representation, and to provide for the election also of the mayor and school committee in accordance with the provisions of the act. Briefly described, and without attempting to specify its details, the method is to permit the voters to express a choice between candidates in numerical order, and, in determining what candidates are elected, by successive counts to distribute the surplus over a determined quota received by an elected candidate or the votes received by an eliminated candidate among subsequent choices. In the report of George R. Nutter and Dora Emerson Wheeler, members of the Boston Charter Revision Commission (House Document No. 1220, 1924), the following statement is made concerning this system (Rep. pp. 22, 23) :

“Proportional representation seems to be a successful effort to overcome the defects of the plurality system, which has resulted in the practical disfranchisement of many electors and general indifference to if not actual disbelief in democratic institutions. This new system was first used in Denmark in 1855. It has spread slowly until now two hundred and fifty million people in every part of the world use it in one form or another. It has made a very modest entrance into American municipal elections. . . . The length of time during which it has been used and the present universality of its application are sufficient evidence of its soundness and practicability.

The plurality system aims at securing a majority. It gives no consideration to the minority and if, in any way, the actual majority can be split, the minority may secure all of the representation. Proportional representation, on the contrary, is the practical application of the principle that in the election of any representative body the majority of the voters should secure a majority of the places, but that the minority should be represented in proportion to their strength.”

The question whether the system of election by proportional representation is constitutional depends upon the provisions of our State Constitution; there is nothing in the Federal Constitution which is at all applicable.

The following provisions in the Constitution of Massachusetts should be considered. They appear in pt. 1st, art. IX; pt. 2nd, c. I, § I, art. IV; and Mass. Const. Amend. II and XIV.

These provisions are respectively as follows:

Mass. Const., pt. 1st, art. IX:

“All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.”

Mass. Const., pt. 2nd, c. I, § I, art. IV:—

“And further, full power and authority are hereby given and granted to the said general court, from time to time . . . to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for . . .”

Mass. Const. Amend. II:

“The general court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the constitution, as the general court shall deem necessary or expedient for the regulation and government thereof, and to prescribe the manner of calling and holding public meetings of the inhabitants, in wards or otherwise, for the election of officers under the constitution, and the manner of returning the votes given at such meetings. Provided, that no such government shall be erected or constituted in any town not containing twelve thousand inhabitants, nor unless it be with the consent, and on the application of a majority of the inhabitants of such town, present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose. And provided, also, that all by-laws, made by such municipal or city government, shall be subject, at all times, to be annulled by the general court.”

Mass Const. Amend. XIV:—

“In all elections of civil officers by the people of this commonwealth, whose election is provided for by the constitution, the person having the highest number of votes shall be deemed and declared to be elected.”

The 3d, 20th, 29th, 30th, 31st, 32nd, 38th, 40th, 45th, 61st and 68th Amendments, relating to qualifications of voters and regulations of the method of voting, have no important application to the present question.

The provision in article IX of the Declaration of Rights that “all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an *equal right* to elect officers” means clearly that there shall be no classes or distinctions between qualified voters as to the value of their votes at the polls. So long as each qualified voter has a right equal to that of other qualified voters to cast a ballot for the election of officers, there can be no infringement of this principle. See *Cole v. Tucker*, 164 Mass. 486; *Commonwealth v. Rogers*, 181 Mass. 184; *Graham v. Roberts*, 200 Mass. 152, 154, 155; Attorney General’s Report, 1922, p. 88. There seems, therefore, to be nothing in this provision to forbid the use of the method of proportional representation in elections.

The provisions in Mass. Const., pt. 2nd, c. I, § I, art. IV, and in Mass. Const. Amend. II, giving to the General Court the power to provide for the naming and settling of all civil officers within the Commonwealth whose election is not provided for by the Constitution, the power to constitute city governments and to prescribe the manner of holding public meetings for the election of officers under the Constitution, and the manner of returning the votes given at such meetings, give to the General Court a broad and general power to deal with the subject of municipal elections in any manner not contrary to the Constitution. See *Commonwealth v. Plaisted*, 148 Mass. 375, 385, *et seq.*; *Graham v. Roberts*, 200 Mass. 152, 154. The provision in Mass. Const. Amend. XIV, that in elections of civil officers whose election is provided for by the Constitution the person having the highest number of votes shall be elected, does not apply to officers of municipal governments. The inference from this article, if any is to be drawn, is, by application of the

principle *expressio unius est exclusio alterius*, that in elections of other officers the plurality system is not required.

The question which you ask has never come before our court, but there are decisions of other courts which should be referred to. It should be noted in this connection that there is a difference in the constitutions of the different States, some providing that every qualified voter shall have the right to vote for all officers to be elected and others providing simply that they shall have an equal right to vote. The Supreme Court of Rhode Island has said that an act providing for election by proportional representation violated a provision of the Rhode Island constitution to the effect that electors had the right to vote in the election of *all* civil officers. *Opinion of the Justices*, 21 R. I. 579. In *Wattles ex rel. Johnson v. Upjohn*, 211 Mich. 514, it was held that under the Michigan constitution a provision for the election of a city council by proportional representation was in violation of a clause in the State constitution that "in all elections every . . . (defining at length qualified voters) shall be an elector entitled to vote." In *People v. Elkus*, 59 Cal. App. 396, it was held that an act providing for proportional representation was in conflict with a provision of the constitution that the electorate "shall be entitled to vote at all elections." In Ohio the constitutionality of this system was sustained. *Reutener v. Cleveland*, 107 Ohio St. 117. I find nothing, however, in the Constitution of this Commonwealth with which the bill in question seems to be in conflict.

In my opinion, there is no constitutional objection to the use of the method of proportional representation in the election of city officials in the way proposed.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Governor and Council — Duties under the Constitution.

The duties of the Council, under the Constitution and the statutes, are to be performed in conjunction with the Governor, and consist in approving or disapproving his acts, or joining with him as an executive board.

When the Governor and Council act as an executive board, the Governor, as a member, may cast one vote; where the Governor acts with the advice and consent of the Council, each must act independently of the other and both must concur in order that action may be effective.

MARCH 24, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR: — You ask my opinion upon the following questions: —

"First. What, if any, inherent power or initiative has the Council, acting or attempting to act, independent of the Governor?

Second. To what extent may the Governor be directed or bound by vote of the Council when lawfully met in executive session?"

The broad and general scope of these questions makes it difficult to give a definite and precise opinion. I can hardly do more in reply than to outline the powers and duties of the Council in relation to the Governor as they are indicated by the Constitution and the statutes of the Commonwealth and interpreted by the opinions of the justices of our

Court. This general discussion, it should be noted, may not furnish a sufficient guide for the determination of any particular question which may hereafter arise.

The Executive Council is a body established by the Constitution "for advising the governor in the executive part of the government," and the Governor, with the Councillors, is authorized to "hold and keep a council, for the ordering and directing the affairs of the commonwealth, according to the laws of the land." Mass. Const., pt. 2nd, c. II, § III, art. I. Cf. c. II, § I, art. IV. The Council is required to keep a record of its resolutions and advice (c. II, § III, art. V).

The duties which under the Constitution the Executive Council has to perform are of two kinds. As is said in *Opinion of the Justices*, 190 Mass. 616, 618:—

"The Constitution recognizes two kinds of executive business which may come before the Council: one, that which is to be done by the Governor and Council acting together as an executive board, and the other, business to be done by the Governor, acting under the responsibility of his office as supreme executive magistrate, by and with the advice and consent of the Council."

As to other executive business the Governor may take the advice of the Council or not, as he chooses.

Generally, in describing the first kind of business the words "governor and council" are used in the Constitution, while in describing the latter kind of business the phrase used is "governor, by and with the advice and consent of the council," or some similar expression. Examples of the first kind may be found in Mass. Const., pt. 2nd, c. I, § II, art. III; c. I, § III, art. XI; c. II, § IV, art. II; c. III, art. II and V; c. VI, art. I and II; Amend. XVI. Examples of the second kind may be found in c. I, § I, art. IV; c. II, § I, art. V, VI, VIII, IX and XI; c. III, art. I; Amend. IV; Amend. XVII; Amend. XXV; Amend. XXXVII; Amend. LVIII.

It is difficult to define just the sort of business which is to be done by the Governor and Council as an executive board. The examination of records and the counting of votes, such as is provided for by Mass. Const., pt. 2nd, c. I, § II, art. III, Amend. XVI, and G. L., c. 54, §§ 115, 116 and 118, is a familiar instance. Mass. Const., pt. 2nd, c. II, § II, art. II, provides that "the governor . . . shall be president of the council, but shall have no vote in council." It has been intimated, however, that in cases where the Governor and Council act as an executive board the Governor, as a member of the board, may cast one vote. See *Sparhawk v. Sparhawk*, 116 Mass. 315, 317; *Opinion of the Justices*, 211 Mass. 632.

In the cases where the Governor is required to act with the advice and consent of the Council, the responsibility rests primarily on the Governor to determine what action, if any, should be taken, and the Council must thereupon express its approval or disapproval. Each must act independently of the other and both must concur in order that effective action may be taken. *Opinion of the Justices*, 190 Mass. 616; 210 Mass. 609; 211 Mass. 632; Attorney General's Report, 1921, p. 125.

Turning now more specifically to the questions which you have asked, it is said in *Opinion of the Justices*, 214 Mass. 602, 604:—

"Nowhere in the Constitution are any duties conferred upon the Council, except such as they are to perform in conjunction with the Governor, either approving or disapproving his acts or joining with him as an executive board."

Moreover, I find nothing in the statutes conferring additional powers and duties upon the Council alone. This, I think, is an answer to your first question as I understand it.

Your second question, I think, is answered by what I have already said. In those cases where action by the Governor with the advice and consent of the Council is required, the Council has the power by its disapproval to nullify the action of the Governor; while in cases where the Governor and Council act as an executive board, they are bound to act conjointly.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Insane Persons — Requirements for Commitment — Medical Certificates of Insanity.

But one medical certificate of insanity is required for the commitment of an insane person, either for observation or for permanent commitment.

A copy of the certificate, attested by the judge, should be delivered with the insane person to the superintendent of the institution to which such person shall have been committed, there to be kept on file with the order of commitment; and said superintendent should forthwith transmit to the Department of Mental Diseases copies of such certificate, of the order of commitment and of the statement required by G. L., c. 123, § 54.

MARCH 28, 1925.

Dr. GEORGE M. KLINE, *Commissioner of Mental Diseases*.

DEAR SIR: — You request my opinion as to the proper procedure in connection with medical certificates of insanity in the case of persons who were first committed for observation and then committed as insane at the end of the observation period.

G. L., c. 123, § 51, provides, in part as follows: —

"No person shall be committed to any institution for the insane designated under or described in section ten, except the Massachusetts school for the feeble-minded and the Wrentham state school, unless there has been filed with the judge a certificate in accordance with section fifty-three of the insanity of such person by two properly qualified physicians, nor without an order therefor, signed by a judge named in the preceding section stating that he finds that the person committed is insane and is a proper subject for treatment in a hospital for the insane."

G. L., c. 123, § 53, outlines the qualifications of physicians empowered to make certificates of insanity, and provides: —

". . . A copy of the certificate, attested by the judge, shall be delivered with the insane person to the superintendent of the institution to which the person shall have been committed, to be kept on file with the order of commitment, and said superintendent shall forthwith transmit to the department, copies of such certificate, of the statement required by the following section and of the order of commitment. Any

certificate bearing date more than ten days prior to the commitment of any person alleged to be insane shall be void, and no certificate shall be valid or received in evidence if signed by a physician, holding any office or appointment, other than that of consulting or advisory physician, in an institution for the insane to which such person is committed."

G. L., c. 123, § 77, as amended by St. 1924, c. 19, provides for the disposition of persons committed for observation as to their sanity when found by two physicians, qualified as provided in section 53, to be in such mental condition that commitment to an institution for the insane is necessary for their proper care or observation. This section provides, in part, as follows:—

"Within thirty days after such commitment the superintendent of the institution to which the person has been committed shall discharge him if he is not insane, and shall notify the judge who committed him, or if he is insane he shall report the patient's mental condition to the judge with the recommendation that he shall be committed as an insane person, or discharged to the care of his guardian, relatives or friends if he is harmless and can properly be cared for by them. Within the said thirty-five days, the committing judge may authorize a discharge as aforesaid, or he may commit the patient to any institution for the insane as an insane person if, in his opinion, such commitment is necessary. If, in the opinion of the judge, additional medical testimony as to the mental condition of the alleged insane person is desirable, he may appoint a physician to examine and report thereon."

Under these statutes it seems clear that but one medical certificate of insanity is required for the commitment of a person either for observation or for permanent commitment. All that seems required is that a copy of the certificate, attested by the judge, shall be delivered with the insane person to the superintendent of the institution to which such person shall have been committed, there to be kept on file with the order of commitment, and that said superintendent shall forthwith transmit to the Department of Mental Diseases copies of such certificate, of the order of commitment and of the statement required by G. L., c. 123, § 54. Accordingly, if this is done it would seem that the present requirements of the statute are fulfilled.

Yours very truly

JAY R. BENTON, *Attorney General*.

*General Appropriation Bill — Governor's Disapproval of Certain Items
— Vote by House.*

The Governor, in disapproving or reducing items in a general appropriation bill, is required to transmit his reason as to each item.

His act as to each such item is an independent act.

The House of Representatives is required to take a ye and nay vote on each item disapproved or reduced.

MARCH 31, 1925.

Hon. JOHN C. HULL, *Speaker of the House of Representatives*.

DEAR SIR:— You state that His Excellency the Governor has returned the general appropriation bill, having disapproved or reduced certain items therein, and you request my opinion whether the House of Representatives is authorized to vote on the several items disapproved or re-

duced by means of one yea and nay vote, unless a member asks for a division of the question as provided for in Rule 91 of the House, or whether a yea and nay vote is required on each specific item.

Mass. Const. Amend. LXIII, § 5, provides:—

“The governor may disapprove or reduce items or parts of items in any bill appropriating money. So much of such bill as he approves shall upon his signing the same become law. As to each item disapproved or reduced, he shall transmit to the house in which the bill originated his reason for such disapproval or reduction, and the procedure shall then be the same as in the case of a bill disapproved as a whole. In case he shall fail so to transmit his reasons for such disapproval or reduction within five days after the bill shall have been presented to him, such items shall have the force of law unless the general court by adjournment shall prevent such transmission, in which case they shall not be law.”

This section requires the Governor to transmit as to *each* item disapproved or reduced his reason for such disapproval or reduction. His act as to each such item is consequently an independent act which, in my opinion, requires separate action by the House. Moreover, the requirement that the “procedure shall then be the same as in the case of a bill disapproved as a whole” is part of the same sentence which requires the Governor to transmit his reason as to each item. This sentence should be read and construed as a whole, in the light of the entire section. So read and construed, I am of the opinion that the House is required to take a yea and nay vote on each specific item disapproved or reduced.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Trust Companies—Sale of Stock for Non-Payment of an Assessment.

Under G. L., c. 172, § 25, stock cannot be sold for non-payment of an assessment within less than three months from the time of giving notice to the stockholder.

APRIL 2, 1925.

Hon. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR:—You ask my opinion as to whether, under G. L., c. 172, § 25, the stock held by a stockholder in a trust company may be sold for non-payment of an assessment at the end of three months from the date when the Commissioner has given notice to the trust company, or whether the directors must wait for three months from the time that notice has been given to the stockholder before making the sale.

In my opinion, the statute must be construed as giving the stockholder three months from the date on which he received notice of an assessment before his stock can be sold for non-payment of such assessment.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Teachers' Retirement Association — Reemployment of Retired Teacher.

A retired teacher cannot be reemployed as a teacher, but is not ineligible for employment in some other capacity, providing the employer does not pay any part of the pension received by such retired teacher (G. L., c. 32, § 91).

APRIL 6, 1925.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You ask my opinion upon the following questions: —

“Can a retired member of the Teachers' Retirement Association sixty years of age or over be employed in the public schools of Massachusetts —

1. As a regular teacher or as a permanent substitute on an annual salary basis?

2. As a temporary teacher or substitute receiving salary on a per diem basis?

3. As a teacher in the evening schools?

4. In any capacity, such as clerk, clerical assistant or janitor in a school or in a school department?”

The words used in G. L., c. 32, § 10, are “retired from service in the public schools.”

I think it is a fair inference from these words that a teacher so “retired” shall not be re-employed as a regular teacher on an annual salary basis.

In my opinion, however, the words above quoted should be construed as meaning retired from the kind of service being performed, *i.e.*, service as a “teacher,” in the sense in which that word is used in the statutory provisions for retirement. Apparently a temporary substitute receiving no salary would not be eligible to membership in the association (G. L., c. 32, § 6); and so would not be a “teacher” within the meaning of the statute. Nor does a teacher in the evening schools come within the statute, for “public school” is defined in section 6 as a “day school.” Also, the kinds of employment referred to in question 4 are not of the sort referred to in the statute.

Another statutory provision which might bear upon the questions which you ask is G. L., c. 32, § 91, which reads as follows: —

“No person while receiving a pension or an annuity from the commonwealth, or from any county, city or town, except teachers who on March thirty-first, nineteen hundred and sixteen, were receiving annuities not exceeding one hundred and eighty dollars per annum, shall, after the date of the first payment of such annuity or pension, be paid for any service rendered to the commonwealth, county, city or town which pays such pension or annuity, except for jury service or for service rendered in an emergency under section sixty-eight, sixty-nine or eighty-three, or for service in a public office to which he has been elected by the direct vote of the people.”

This section refers to employment of any nature; and I do not think that it is intended to permit a teacher who has been retired from service in the public schools, under section 10, to be reemployed as a regular teacher, even on the assumption that such retired teacher is not receiving an annuity in excess of \$180.

But it does not seem that this section 91 prevents the employment of a retired teacher in any of the capacities referred to in questions 2, 3

and 4, for the reason that the employment to which you presumably refer in these questions is an employment by a city or town, whereas the annuity fund is made up from assessments on members (G. L., c. 32, § 9, cl. 2), and the pension fund from appropriations by the General Court (G. L., c. 32, § 9, cl. 3). If the employment were by the Commonwealth, or if the annuity or pension fund were paid in part by the employing city or town, no teacher whose annuity exceeded \$180 could then be employed. See V Op. Atty. Gen. 250.

I accordingly answer question 1 in the negative, and questions 2, 3 and 4 in the affirmative.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Right of Petition — Fee for filing Bill or Resolve.

The right to petition the Legislature for redress of grievances, under article XIX of the Declaration of Rights, does not extend to the initiating of legislation by the filing of a bill or resolve.

A reasonable fee may be imposed by the Legislature for the filing of a bill or resolve, in certain cases.

APRIL 9, 1925.

Committees on Rules, Sitting Concurrently.

GENTLEMEN: — You request my opinion as to the constitutionality, if enacted into law, of a bill entitled "An Act providing that petitioners for legislation shall pay a filing fee," which provides: —

"Chapter three of the General Laws is hereby amended by inserting after section four the following new section: — *Section 4A.* Except as hereinafter provided, every petition to the General Court seeking legislation which is accompanied by a bill or resolve shall also be accompanied by a fee of two dollars, which shall be paid by the petitioner, and turned into the treasury of the commonwealth by the clerk of the branch receiving the same. Said fee shall be in addition to any other fee or deposit required under this chapter. This section shall not apply to a report required by law or to a petition by any body politic or any board or officer thereof in relation exclusively to the affairs of such body politic, and the decision of the clerk of the branch wherein said petition is filed as to whether said petition is a report required by law or relates exclusively to the affairs of such body politic shall be final."

The language of article XIX of the Declaration of Rights in the Constitution of the Commonwealth is as follows: —

"The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

The right of petition, which this provision secures, is of considerable antiquity. Prior to the seventeenth century, however, its exercise was "practically restricted for many centuries to petitions for the redress of personal and local grievances, and the remedies sought by petitioners were such as courts of equity and private acts of Parliament have since been accustomed to provide." See 1 May, Const. History, p. 410; Broom, Const. Law, p. 509. Statutes regulating the disposal and mode

of considering these petitions were enacted as early as the time of Edward I. See Broom, *Op. Cit.* p. 508, *n.* The later rise of the practice of petitioning upon political subjects met with repressive measures upon the part of Charles II and his Parliament. In 1661 the statute of 13 Charles II, c. 5, after reciting that tumultuous and disorderly petitioning upon public matters had been a great means of national disturbances, forbade the procuring of more than twenty names to a petition "for alteration of matters established by law in church or state" unless with the consent of certain county officers; and forbade any one to repair to the King or Parliament to present any petition accompanied by more than ten other persons. Except for these restrictions, however, the right was to be enjoyed as theretofore. In 1679 a proclamation was also issued forbidding the signing of petitions to the King for the assembling of Parliament. See May, *Op. Cit.* p. 411; Broom, *Op. Cit.* pp. 510, 511.

In 1688 seven bishops who had petitioned to be excused from complying with the terms of an alleged illegal order of James II were tried for libel and acquitted. *Case of the Seven Bishops*, 3 Mod. 212; *Trial of the Seven Bishops*, 12 How. St. Trials, 183. Subsequently, in that same year, the statute 1 W. & M. St. II, c. 2, "An Act for declaring the rights and liberties of the subject and settling the succession of the Crown," after reciting among the wrongs done by James, his "committing and prosecuting divers worthy prelates, for humbly petitioning" as above, declared: "5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal." This provision is the original forerunner of article XIX of the Massachusetts Declaration of Rights, of the corresponding provision in the First Amendment to the Constitution of the United States, and of the numerous similar provisions in other State constitutions.

Since 1688, it has been deemed established that petitioning is not in itself illegal (see Broom, *Op. Cit.* p. 512), but for a century thereafter there was a marked reluctance of Parliament to receive or give attention to petitions of which it disapproved, and in 1781 Lord Mansfield held that the statute of 13 Charles II, c. 5, was not repealed by 1 W. & M. St. II, c. 2. Douglas, 590, 592; Broom, *Op. Cit.* 513; Cooley's Blackstone, vol. 1, 2nd ed., p. 143, *n.* In 1819, also, the statute of 60 George III, c. 6, instituted elaborate regulations of petitioning, to continue in force for five years. In more recent times, however, petitions upon general legislative and political matters have been freely received so long as respectfully worded and complying with prescribed forms. See Broom, *Op. Cit.* p. 513; May, *Parliamentary Practice*, 13th ed., pp. 610-613. The actual presentation of the petition must now be made by a member (May, *Parliamentary Practice*, 13th ed., p. 614), but a member is not liable to an action by a petitioner for declining so to present (*Chaffers v. Goldsmid*, 1894, 1 Q.B. 186).

The provisions of chapter 20 of the Laws of the Province of Massachusetts Bay of 1735-6 were as follows:—

"Whereas persons are frequently put to great cost and charge in making answers to causeless petitions preferred to the general court of this province; for remedy whereof,—

Be it enacted by His Excellency the Governour, Council and Representatives in General Court assembled, and by the authority of the same,

SECT. 1. That for the future, when any petition or complaint exhibited to the general court shall be dismissed as vexatious or causeless,

the respondent or adverse party shall be entitled to have and receive, of the petitioner or complainant, all such reasonable costs and damages as he or they have sustained in attending or making answer to such petition or complaint.

And be it further enacted by the authority aforesaid,

SECT. 2. That no petition shall be received into the court, except the same be preferred within the space of fourteen days from the first sitting of said court, unless the cause upon which the petition is founded arose within the sitting of said court.

SECT. 3. This act to continue and be in force for five years from the publication thereof, and from thence to the end of the next session of the general court, and no longer."

This statute was continued in force at least until November 1, 1785. Province Laws 1779-80, c. 18.

To summarize from the foregoing, it would seem that when the constitutional guaranty was adopted, the right of petition was understood to be susceptible of reasonable regulation to prevent abuses, and more particularly to prevent breaches of the peace. See, also, Rawle on the Constitution, 2nd ed., p. 124. *Cf. Commonwealth v. Porter*, 1 Gray, 476, 477. Such a conclusion would come within the scope of the generalization by the court in *Capen v. Foster*, 12 Pick. 485, 488, that —

"In all cases, where the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner, in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself."

The last sentence of this passage is a reminder, however, that the enunciation of the constitutional guaranty was undoubtedly intended to protect the right from invasion under the pretext of regulation.

I find no suggestion of authority, however, for the proposition that the right to petition includes any right to institute or participate in any way in the actual process of legislation. The "natural right" of petition, to which reference has often been made (see *United States v. Cruikshank*, 92 U. S. 542, 551-2; Story on the Constitution, 4th ed., pp. 619, 620; Cooley, Const. Lim., 7th ed., pp. 497-498), can hardly be thought to extend so far. Thus, while I have found no instance of any fee imposed upon the presenting of petitions which merely apprised the body petitioned to of the opinions and wishes of the petitioners upon some public or private matter, it does appear that in the standing orders of the House of Commons from 1685 to 1822 it was provided that, —

"No Bill, or Clause, for the particular interest or benefit of any person or persons, county or counties, corporation or corporations, or body or bodies of people, be read a second time unless fees be paid for the same."

Manual of the Practice of Parliament (1829), p. viii. So, also, there appears to have been in effect since 1700 an elaborate schedule of fees to

be paid by the sponsors of private bills at various stages of progress. *Id.* pp. xlix-liii. See, also, a similar schedule for the House of Lords, dated 1824. *Id.* lxxxix.

This practice respecting fees for private bills persists to the present day. See May, *Parliamentary Practice*, 13th ed., p. 671. It is to be noted that the line of division between private and public bills rested upon their subject-matter (see Manual, *supra*, p. 2; May, *Parliamentary Practice*, 13th ed., pp. 657-667); and that while a private bill might be founded upon the petition of private sponsors, pursuant to the standing orders, public bills could be instituted only upon the individual responsibility of members. Manual, *supra*, p. 6; May, *Parliamentary Practice*, 13th ed., pp. 379-383. This precedent for the charging of fees is even more significant when it is recalled that the right to petition for the redress of those private grievances which would be the subject of private bills was, as has been seen above, the older and better established aspect of the right of petition. It thus clearly appears that participation in the initiating of legislation by the filing of bills was not deemed a feature of the right to petition, but was a privilege wholly denied to the subjects in respect of so-called public bills, and extended to private persons with respect of the so-called private bills upon the payment of substantial fees.

The present bill relates to a situation almost precisely similar to that which for nearly a century before the adoption of the Constitution prevailed with respect of private bills in Parliament. It levies a moderate fee upon the privilege of filing with a petition a bill or resolve as a step towards the enactment of specific legislation. The filing of such a bill or resolve is a matter well within the power of the Legislature to regulate, both under the general authority of Mass. Const., pt. 2nd, c. I, § I, art. IV (see *Stoughton v. Baker*, 4 Mass. 522, 529; *Commonwealth v. Alger*, 7 Cush. 53, 101), and under its inherent power to make rules for the governance of its proceedings. A distinction is made between a bill filed by a private person and a report required by law or a petition by any body politic, or any board or officer thereof in relation exclusively to the affairs of such body politic; which cannot be thought to be unreasonable.

It is not necessary and I do not now undertake to determine whether a fee can constitutionally be imposed upon the exercise merely of the right of petition as that right is properly understood. The present bill imposes a charge, not upon the right to file a petition alone, but upon the exercise of what is solely a privilege extended by the Legislature of filing with a petition a bill or resolve intended to be the first step towards the enacting of specific legislation.

In my opinion, the proposed bill, if enacted, would be constitutional.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Protection of Reservations of Ways not laid out — Damages.

A statute authorizing cities and towns to provide for the reservation for public use of ways not laid out, allowing landowners to recover damages for property taken, except damages for injury to any improvement constructed after the vote to reserve, and providing that the city or town may abandon the reservation, would be constitutional.

APRIL 11, 1925.

To the Honorable House of Representatives.

GENTLEMEN:—By order of the House of Representatives, dated March 23, 1925, my opinion is requested as to the constitutionality of the bill set out in House Document No. 504 of the current year, accompanying the petition of Philip Nichols, chairman of the committee on legislation of the Massachusetts Federation of Planning Boards, entitled "An Act to further protect locations reserved for public ways." This bill amends chapter 41 of the General Laws by inserting after section 79 four new sections and by revising section 81.

G. L., c. 41, §§ 73-79, inclusive, authorize the appointment of boards of survey in cities and towns, provide for the preparation and filing of plans by such boards or subject to their approval for the laying out of ways, and forbid the construction of ways by public authority except in accordance with such plans. G. L., c. 41, § 80, and G. L., c. 82, § 37, provide for the establishment of building lines. G. L., c. 41, § 81, permits the recovery of damages sustained in certain cases.

The general scheme of the proposed new sections is to enable cities and towns by vote to provide for the reservation for public use of ways not already laid out as public ways, shown on plans prepared and filed by the board of survey or the planning board of such cities and towns, with elaborate provisions for notice and hearing, and to authorize the recovery of damages for property taken by such reservation. It is provided that damages shall not be recovered for injury caused by the laying out of such a way to any structure or improvement on land included therein constructed after the recording of such vote, that any person whose property has been taken by such reservation may recover the damages caused thereby by petition for the assessment thereof under G. L., c. 79, but that thereafter at any time before entry of judgment the city or town may abandon the reservation of that part of the location which included the petitioner's land, and the petitioner shall have judgment only for his costs and the damages sustained by the temporary restriction upon his land, and that any other person whose property has been taken by an abandonment of the reservation may recover his damages in the same way. It is also provided that in cities and towns which have accepted the provisions of G. L., c. 41, § 80, or G. L., c. 82, § 37, the plans may include exterior building lines. The changes made in G. L., c. 41, § 81, are such as are required by the introduction of the new provisions proposed by the bill.

Statutes providing for the protection of plans for the laying out of public streets, by declaring that, when the projected streets were actually constructed, the owners of the land should not be compensated for buildings and other improvements erected within the limits of the projected streets after the date of the filing of the plan, were commonly enacted in the early years of the last century and for many years received general acquiescence, but later came to be held unconstitutional by the courts. *Moale v. Baltimore*, 5 Md. 314; *Baltimore v. Hook*, 62 Md. 371; *Forster v. Scott*, 136 N. Y. 577; *People v. Priest*, 206 N. Y. 274; *Kittinger v. Rossman*, 12 Del. Ch. 276; *State v. Carragan*, 36 N. J. L. 52. A similar statute in Massachusetts was held to be unconstitutional in *Edwards v. Bruorton*, 184 Mass. 529.

Evidently for the purpose of protecting the constitutional rights of landowners recognized by these cases, provision is made in the pending

bill for the payment of compensation for property taken by virtue of its provisions. The provision made for compensation to any person whose property has been taken by reservation for public use seems to fulfil every constitutional requirement. As to every person whose property is included in the reservation a regulation of its use is imposed upon the owner in the nature of an easement which constitutes a taking of his property. *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348; *Lexington v. Suburban Land Co.*, 235 Mass. 108; cf. *Opinion of the Justices*, 234 Mass. 597, 604-611. Compensation for the damages caused by such taking may be recovered in the way usually provided therefor. The measure of the damages according to the ordinary rule will be the diminution in the market value of the property caused by the taking. *Tyler v. Hudson*, 147 Mass. 609; *Boston Chamber of Commerce v. Boston*, 195 Mass. 338, 346-347; *Beals v. Brookline*, 245 Mass. 20; *Southern Pacific R.R. Co. v. San Francisco Savings Union*, 146 Cal. 290.

Provision is made giving to the city or town the right to abandon the reservation of a location after damages have been awarded against it, but before judgment. Such a provision, while not customary in Massachusetts, seems to have no element of unconstitutionality. There are in the decisions of our court instances in which under particular statutes an abandonment of a taking has been held to defeat a right to recover damages, although damages had already been awarded. *New Bedford v. County Commissioners*, 9 Gray, 346; *Corey v. Wrentham*, 164 Mass. 18. This rule has been commonly followed in other jurisdictions. *Garrison v. New York*, 21 Wall. 196; *Schreiber v. Chicago & Evanston R.R. Co.*, 115 Ill. 340; *Matter of Commissioners of Washington Park*, 56 N. Y. 144; *Nichols on Eminent Domain*, 2nd ed., § 417.

It is provided in section 79C (lines 91-95, inclusive) that "any person whose property has been taken by the action of any city or town in abandoning the reservation of the whole or any part of a way under this section may recover the damages thereby caused." It is a little difficult to understand how property can be taken by abandoning a reservation, i.e., an easement in land created by the act of reservation. The intention seems to be to provide recompense for such loss as may be occasioned to persons the taking of whose property according to the original plan causes no damage, but damage is sustained when the plan is modified by the abandonment. It might therefore be well to substitute the words "who has suffered loss" in place of the words "whose property has been taken," in the clause quoted. See *Munroe v. Woburn*, 220 Mass. 116; *Main v. County of Plymouth*, 223 Mass. 66.

For the reasons which I have given, it is my opinion that there is nothing unconstitutional in the proposed act.

Very truly yours,

JAY R. BENTON, Attorney General.

Constitutional Law — Municipal Corporation — Water furnished without Charge to a Private Concern.

A bill providing that the city of Brockton may furnish, without charge, to the Sprague Neighborhood Center, a private corporation, a quantity of city water, to be used in a swimming pool, would, if enacted, be unconstitutional, as an expenditure of public money for an undertaking which is not exclusively under public control, under the provisions of Mass. Const. Amend. XLVI, § 2.

APRIL 11, 1925.

House Committee on Bills in the Third Reading.

GENTLEMEN: — You request my opinion as to the constitutionality of House Bill No. 1260, entitled “An Act to enable the city of Brockton to furnish water to the Sprague Neighborhood Center without charge.”

This bill provides that the city of Brockton is authorized to furnish to the Sprague Neighborhood Center, at the east side swimming pool, a quantity of city water each year without charge, said quantity not to exceed five hundred dollars in value in any one year, computed on the rates prevailing for city water in said city in the year in which such water is furnished.

The answer to your question depends upon the nature of the Sprague Neighborhood Center aforesaid. If it is a private organization not exclusively under public control, I am of the opinion that the bill is unconstitutional.

Mass. Const. Amend. XLVI, § 2, forbids, among other things, the use of public credit, public property or public funds for the purpose of founding, maintaining or aiding “any . . . infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both.”

In *Lowell v. Boston*, 111 Mass. 454, after the great fire of 1872 which destroyed all the buildings in an important part of the city, it was decided that a statute authorizing the city to borrow money on bonds and lend it on mortgages to the owners of land whose buildings had been burned was unconstitutional, although the lending of such money would undoubtedly have promoted building and the transaction of business in the devastated area. The court said, at page 461: —

“The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.”

This decision has governed all later decisions upon kindred questions in this Commonwealth. *Opinion of the Justices*, 155 Mass. 598; *Mead v. Acton*, 139 Mass. 341; *Kingman v. Brockton*, 153 Mass. 255; *Boston v. Treasurer and Receiver General*, 237 Mass. 403. The rule is the same in practically all jurisdictions in the United States.

In *Whittaker v. Salem*, 216 Mass. 483, it was held that a school committee had no power to vote a gratuity to the principal of a school to be paid during a leave of absence granted for illness resulting from overwork. In that case the court said, at pages 484-485: —

"However meritorious the project may appear to be either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it."

See *Opinion of the Justices*, 204 Mass. 607; *Opinion of the Justices*, 211 Mass. 624; *Loan Association v. Topeka*, 20 Wall. 655.

In an opinion of the Attorney General to the Senate committee on bills in the third reading, dated April 20, 1922, it was said:—

"Public money cannot be spent for any purpose for which it would be unconstitutional to levy a tax. Taxes are levied in order to raise money for public purposes. They are collected by force if need be. The Legislature cannot appropriate, or authorize cities and towns to expend, public money for a private purpose. To do so would take the property of the taxpayer in violation of the rights guaranteed to him not only by the Constitution of this Commonwealth but also by the Fourteenth Amendment."

The law of this Commonwealth plainly prevents the expenditure of public money for any educational, charitable or religious undertaking which is not exclusively under public control. In the records of the Department of Corporations and Taxation it appears that the Sprague Neighborhood Center, Inc., of Brockton, is a private corporation organized in 1921 under G. L., c. 180, which provides for the formation of corporations for charitable and certain other purposes, and accordingly it is not a public institution under public control, within the meaning of the Constitution and laws of this Commonwealth. I am therefore of the opinion that House Bill No. 1260 would be unconstitutional, if enacted.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Tax Sales — Nature of Title acquired.

An act which provides that a purchaser of certain lands at a tax sale shall acquire an "absolute" title does not render the act unconstitutional, as the determination of the validity of the title is still left open to review by the courts.

APRIL 13, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have submitted to me for examination and report House Bill No. 1236, entitled "An Act relative to the title acquired at sales of low valued lands taken or purchased by a city or town for non-payment of taxes or of any land so taken or purchased prior to July first, nineteen hundred and fifteen."

The object of this bill is, by amendment of existing statutes, to facilitate the acquisition of unencumbered titles by the purchasers at tax sales of two classes of lands. The classes of lands to which the bill is applicable are (1) lands taken or purchased by cities and towns prior to 1915 upon which taxes are still due, and (2) lands of "low value" taken or purchased by a city or town, for which special provision with regard to tax procedure and sale is provided by G. L., c. 60, §§ 79-81.

Although the object of the bill is attained by providing that the title of the purchaser at a tax sale of these classes of lands shall be "absolute" by virtue of the deed given by the tax collector, instead of becoming "absolute" after a decree of a court upon a petition for the

foreclosure of the right of redemption, the bill is not in such terms as to violate the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. The effect of the bill is that of a statute of limitations upon the right of redemption, for the exercise of which opportunity has been given under other provisions of the statute, before the sales provided for in the sections of this bill. The imposition of such limitations has been held to be within the power of a Legislature. *Wheeler v. Jackson*, 137 U. S. 245, 257; *Saranac Land & Timber Co. v. Comptroller of New York*, 177 U. S. 318; *Alexander v. Gordon*, 101 Fed. 91.

The term "absolute," as applied to the title taken by the purchaser at the tax sale, is used in relation to the estate acquired by the purchaser and has the effect of defining it as a fee simple or a title without encumbrances. The term "absolute" is not here used in such a sense as to give to the deed by which the estate is taken the nature of *conclusive* evidence of the validity of the purchaser's title. To give to the deed such *conclusive* effect would be an unconstitutional exercise of legislative authority. *Turner v. New York*, 168 U. S. 90; *Callanan v. Hurley*, 93 U. S. 387. The purchaser, under the terms of this bill, takes his title by virtue of the collector's deed, and the deed which by this bill the Legislature intends shall pass the title is, in its contemplation, a valid deed, valid both as to form and as to all essential prerequisites which are conditions precedent for its execution. The determination of such validity, when questioned, is still left by the bill within the province of the judiciary, and may be passed upon by the courts whenever the question of the validity of such a deed is presented to them by proper proceedings. By the terms of this bill the Legislature does not withdraw from the courts either their power to pass upon essential questions of law and fact necessarily involved in their passing judgment upon the ultimate question of the ownership of the land resulting from the statutory tax procedure, or the decision of the ultimate question itself as to the ownership of the land.

In my opinion, the bill is constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

State Retirement System — Pensions for Veterans — "Compensation."

The word "compensation," as used in G. L., c. 32, § 57, providing for retirement of veterans from active service at one-half the regular rate of compensation, upon certain conditions, means compensation actually paid in cash, and does not include additional benefits received, such as boarding and housing.

St. 1922, c. 341, § 2, providing for the addition of \$5 per week, in certain instances, as a non-cash allowance in addition to salary, does not alter the meaning of the word "compensation" as used in G. L., c. 32, § 57.

APRIL 23, 1925.

MR. FRANK H. PUTNAM, *Director of Personnel and Standardization, Commission on Administration and Finance*.

DEAR SIR:—you ask my opinion whether the meaning of the word "compensation," as used in G. L., c. 32, §§ 49-60, and particularly in section 57, is affected by St. 1922, c. 341, § 2, amending section 3 of said chapter 32.

Chapter 32 relates to the subject of retirement systems and pensions. It contains provisions instituting retirement systems for employees in the service of the State, in the service of counties and in the service of cities and towns, and a retirement system for teachers. It contains also provisions for pensions to different classes of persons.

G. L., c. 32, § 3, as amended by St. 1922, c. 341, § 2, relates to the State retirement system and defines certain duties of the Board of Retirement under that system. It provides, in part: —

“It (the board of retirement) shall determine the percentage of wages or salary that employees shall contribute to the fund, subject to the minimum and maximum percentages, and may classify employees for the purposes of the system and establish different rates of contribution for different classes within the prescribed limits. It (the board of retirement) shall add to the cash payment for regular services, in cases where an employee of a state institution receives a non-cash allowance to cover compensation in the form of full or complete boarding and housing in accordance with the practice in such state institution, an amount at the rate of five dollars per week, which amount added to said cash payment shall be the basis upon which annuity contributions shall be made; and the foregoing provision shall also apply in computing pensions based upon prior service.”

G. L., c. 32, §§ 49-60, relate to pensions for veterans.

Section 57 is as follows: —

“A veteran who has been in the service of the commonwealth, or of any county, city, town or district thereof, for a total period of ten years, may, upon petition to the retiring authority, be retired, in the discretion of said authority, from active service, at one half the regular rate of compensation paid to him at the time of retirement, and payable from the same source, if he is found by said authority to have become incapacitated for active service; provided, that he has a total income, from all sources, not exceeding five hundred dollars.”

It appears from your communication and from information otherwise submitted that a veteran of the Spanish War, not a member of the Retirement Association, in the service of the Commonwealth at the State Farm, is eligible for retirement under G. L., c. 32, § 57, and that the employee has been receiving benefits from the Commonwealth in the nature of boarding and housing without charge, in addition to the regular salary or compensation paid to him. You ask me to advise you whether in retiring such employee under G. L., c. 32, § 57, the compensation there mentioned means the compensation actually paid him in cash, or whether it means that amount plus the five dollars per week as a non-cash allowance referred to in St. 1922, c. 341, § 2.

Rulings of the Attorney General prior to the amendment of 1922 have held that the word “compensation,” as used in the statute now appearing in G. L., c. 32, §§ 49-60, is limited to salaries and does not include such privileges as board and lodging. III Op. Atty. Gen. 128, 141. See Attorney General’s Report, 1922, p. 193. G. L., c. 32, § 3, as amended by St. 1922, c. 341, § 2, prescribes certain rules to be followed by the Board of Retirement in computing annuity contributions and pensions based upon prior service as a part of the State retirement system. It does not purport to affect the provisions contained in G. L., c.

32, §§ 49-60. The State retirement system and the system of pensions to veterans are entirely distinct. V Op. Atty. Gen. 634.

It is my opinion that the meaning of the word "compensation," as used in sections 49 to 60, and particularly in section 57, is not affected by the 1922 statute, and that it is to be interpreted in accordance with the prior rulings which I have referred to as including nothing but compensation actually paid in cash. See Attorney General's Report, 1922, p. 249.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Insurance — Brokers' License Fees — Partnership and Corporation Licenses — Veteran's Exemption.

The amount of the fee charged for an insurance broker's license to a partnership or corporation is not to be diminished because a partner or an officer is a veteran.

APRIL 23, 1925.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You have asked my opinion upon the following questions relative to the exemption claimed by veterans from the payment of fees for licenses as insurance brokers, particularly in connection with partnership and corporation licenses, under the provisions of G. L., c. 175:—

"1. May the Commissioner lawfully issue an insurance broker's license to a partnership, under section 173, without requiring payment of the fee prescribed by section 14 by any member of the partnership who is a veteran described in section 167A?

2. May the Commissioner lawfully issue an insurance broker's license to a corporation, under section 174, without the payment of the fee prescribed by said section 14 by any officer of the corporation who is a veteran described in said section 167A?

3. Does the exemption granted by said section 167A apply only to individual brokers' licenses issued under sections 166 and 167 of said chapter 175?"

The material provisions of chapter 175 are as follows:—

"SECTION 166. The commissioner may, upon the payment of the fee prescribed by section fourteen, issue to any suitable person . . . a license to act as an insurance broker . . .

SECTION 167. The commissioner may . . . issue . . . licenses which limit the authority of the licensee . . . but in other respects the granting of such licenses . . . shall be governed by the laws relating to insurance brokers.

SECTION 14. He (the commissioner) shall collect . . . fees as follows: . . . for each license . . . to an insurance broker under section one hundred and sixty-six, twenty-five dollars; . . . to a special insurance broker under section one hundred and sixty-eight, twenty-five dollars; . . . to a partnership under section one hundred and seventy-three or to a corporation under section one hundred and seventy-four, the fees hereinbefore prescribed for like licenses issued to individuals under said

section . . . one hundred and sixty-six . . . for each . . . partner or officer to be covered by the license. . . .

SECTION 167A. No fee for a license issued under section one hundred and sixty-six or one hundred and sixty-seven shall be required of any soldier . . .

PARTNERSHIPS.

SECTION 173. The licenses described in sections . . . one hundred and sixty-six, one hundred and sixty-seven . . . may, upon payment of the fees prescribed by section fourteen, be issued to partnerships on the conditions specified in and subject to said sections, except as otherwise provided herein. . . .

CORPORATIONS.

SECTION 174. The licenses described in sections . . . one hundred and sixty-six, one hundred and sixty-seven . . . may, upon payment of the fees prescribed by section fourteen, be issued to any corporation . . . Such license, together with the corporation and officers of the corporation named in the license, shall be subject to said sections, except as otherwise provided herein."

The substance of section 167A was formerly incorporated in section 166, and read: "No fee for a license issued hereunder." By the amendment made by St. 1924, c. 450, it has been taken out of section 166 and made to apply to both sections 166 and 167, reading: "No fee for a license issued under sections 166 and 167." The exemption is not specifically referred to elsewhere in the statute, and there is nothing in section 167A to indicate that it is intended to apply to any other licenses than those issued under sections 166 and 167. A partnership license, provided for in section 173, is not issued "under" section 166 or 167, though provision is made that licenses described in those sections may be granted to partnerships; the partnership license is issued "under" or by authority of section 173. The license, when issued, is not the license of any individual and cannot be used for the prosecution of the business of any individual. The fee which is to be paid under section 14 is a single fee for the license of a partnership; though its amount is determined by the number of individuals included in the firm, the fee is not assessed upon the individuals as such. Much the same considerations apply to the licenses of corporations under section 174. A veteran who is a member of such a partnership, or an officer of such a corporation, is not required himself, in his individual capacity, to pay a fee, and derives no individual benefit peculiar to himself from the particular license which determines with the cessation of the firm's life or the ending of the corporation's existence, in the case of a corporation license.

There is nothing in the nature of the relation of a member of a firm to a partnership nor of a corporate officer to a corporation which would necessarily indicate an intent on the part of the Legislature, in framing such a section as 173, to reduce the amount of the fee required from the partnership or corporation because one of the partners or officers was a "veteran."

A situation possibly involving some apparent hardship is presented when, as I am informed has been the case in certain instances which have been brought to your attention, all the members of the partner-

ship are veterans, but there is nothing in the language of the statute which indicates an intention on the part of the Legislature to differentiate between partnerships by reason of the status as veterans or civilians of the individual members of a firm.

I am of the opinion that the amount of the fee for the issuance of a broker's license to a partnership or a corporation, under G. L., c. 175, § 14, is not to be diminished from the prescribed amount because one or more of the partners, in the first instance, or one or more of the officers of the corporation, in the second, may be a "veteran." This answers the first and the second of your questions, and the third I answer in the affirmative. I do not pass upon the question of whether St. 1925, c. 124, when in force, will in this respect affect the construction of G. L., c. 175, § 14.

Very truly yours,
JAY R. BENTON, *Attorney General.*

Registrar of Motor Vehicles — "Subsequent Conviction."

A defendant cannot be held to have been "subsequently convicted" unless the offence which is the basis of the later conviction was committed after the offence for which he was previously convicted. A person who violates several provisions of G. L., c. 90, § 24, as amended, all arising out of substantially the same act, cannot be held to have been subsequently convicted of any of the violations, even though the convictions occur at different times.

APRIL 23, 1925.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR: — You state that a person was in a district court charged on three counts with violation of three offences enumerated in G. L., c. 90, § 24, as amended; that the three charges arose out of one drive; that he was acquitted on one count and found guilty on the second count and fined, and found guilty on the third count and sentenced to imprisonment; that he paid the fine imposed on the second count and appealed from the judgment of the court on the third count; and that subsequently there was a final conviction on the third count in the Superior Court. You request my opinion as to whether the conviction upon the third count is a "subsequent conviction," within the meaning of G. L., c. 90, § 24, as amended, which would prohibit the Registrar of Motor Vehicles from restoring the license of the defendant until one year after the date of that conviction.

The pertinent provisions of G. L., c. 90, § 24, as amended by St. 1924, c. 183, and by St. 1925, c. 201, § 3, are as follows: —

" . . . A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event and shall, unless the court or magistrate recommends otherwise, revoke immediately the license of the person so convicted, and no appeal from the judgment shall operate to stay the revocation of the license. . . . The registrar . . . after an investigation or upon hearing may issue a new license to a person convicted in any court; provided, that no new license shall be issued by the registrar . . . to any person convicted of violating any other provision of this section until sixty days after the date of final conviction, if for a first offence, or one year after the date of any subsequent conviction . . ."

The question is whether a defendant who almost simultaneously commits several violations of law, all arising out of substantially the same act, and who is finally convicted at different times of the offences charged is "subsequently convicted" within the purview of the statute.

The Supreme Judicial Court of this Commonwealth has held that where a statute requires a more severe penalty for a second or subsequent conviction, the offence upon which the defendant is subsequently convicted, to justify the imposition of the greater penalty, must have been committed after the commission of the prior offence. *Stevens v. Commonwealth*, 4 Met. 360; *Commonwealth v. Daley*, 4 Gray, 209; *Commonwealth v. Mott*, 21 Pick. 492; *Commonwealth v. Richardson*, 175 Mass. 202, and cases there cited. In *Graham v. West Virginia*, 224 U. S. 616, 623, this view was clearly intimated. It is supported by decisions in other States. *People v. Butler*, 3 Cowen (N. Y.), 347; *Wood v. People*, 53 N. Y. 511; *Commonwealth v. McDermott*, 224 Penn. 363; *Morgan v. Commonwealth*, 170 Ky. 400; *Brown v. Commonwealth*, 100 Ky. 127; *Huyser v. Commonwealth*, 25 Ky. Law Rep. 608; *Rand v. Commonwealth*, 9 Gratt. (Va.) 738; *Long v. State*, 36 Tex. 6; *Kinney v. State*, 45 Tex. Crim. Rep. 500.

In *Stevens v. Commonwealth*, 4 Met. 360, 364, the court, in considering a statute which required that a defendant convicted of three distinct larcenies be punished as a common and notorious thief, held that a defendant who by one act, done at one time, stole the property of three different persons and was indicted in three counts for larceny and convicted, was not guilty of three distinct larcenies.

In *Commonwealth v. Mott*, 21 Pick. 492, and in *Commonwealth v. Daley*, 4 Gray, 209, the court held that where the statute provided for a greater penalty upon a second conviction, it was incumbent upon the Commonwealth to prove that the second offence was committed subsequently to the prior conviction.

In *Commonwealth v. Richardson*, 175 Mass. 202, 207, doubt was cast upon the doctrine that to warrant the imposition of the greater penalty the second offence must have been committed after the prior conviction as well as after the commission of the prior offence, but the court apparently approved of the view that the second offence must have been committed subsequently to the commission of the prior offence.

In view of the foregoing authorities it seems clear that in Massachusetts a defendant cannot be held to have been "subsequently convicted" unless the offence which is the basis of his subsequent conviction was committed after the commission of the offence for which he was previously convicted. I am of the opinion that a person who almost simultaneously violates several provisions of G. L., c. 90, § 24, as amended, all arising out of substantially the same act, cannot be held to have been subsequently convicted of any of the violations, even though the convictions occur at different periods of time.

In my opinion, therefore, the conviction of the person referred to upon the third count of the complaint was not a subsequent conviction within the meaning of the act.

You further state that the defendant loaned his license to another person merely for the purpose of misleading the inspector as to who had been driving the car, and you inquire whether that act constituted a violation of law. In view of the fact that the defendant was finally convicted of "loaning his license to operate motor vehicles to be used

by another person," I do not deem it proper to undertake to review the judgment of the court.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Constitutional Law — Taxation — National Banks.

An act relative to taxation of banks and trust companies, subsequently enacted as St. 1925, c. 343, is constitutional.

MAY 1, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:—You have submitted to me for examination and report House Bill No. 1250, entitled "An Act relative to taxation of banks and trust companies."

Among the alternative methods of taxing national banking associations which are now authorized by U. S. Rev. Sts. § 5219 (as amended by Act of March 4, 1923), is the taxation of "the income of such associations." If this method is adopted the following conditions must, by the terms of that statute, be complied with:—

"(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing state upon the net income of mercantile, manufacturing and business corporations doing business within its limits."

The purpose of the present bill is to levy upon the income of national banking associations a tax which shall comply with the conditions prescribed by Federal authority; to subject to a similar tax the income of certain other banks, banking associations or trust companies therein referred to; and to harmonize this comprehensive and to some extent novel plan of taxation with other and related provisions of the tax law.

I have examined this bill with the care which its importance merits. Much of it has to do with administrative provisions, and with bringing the general body of the taxation statutes into alignment with the fundamental changes which it effects. These subordinate provisions do not seem to be deficient in form or substance, at least if the general scheme and main provisions of the bill are valid.

As to the dominant features of the statute, it is to be borne in mind that there has been as yet no judicial exposition of the amendments by which U. S. Rev. Sts. § 5219, has been brought into its present form; and that the problem of taxing the income of national banks and at the same time preserving the system of taxation of corporations hitherto existing in this Commonwealth is rendered more difficult by the fact that the tax imposed by G. L., c. 63, §§ 32 and 39, is measured in part by income and in part by the value of the corporate excess. I have observed and weighed some aspects of this bill which might give rise to differences of opinion. It would perhaps be difficult to draft a bill which should meet the ends for which this legislation is intended and which at the same time should avoid from its inception all reasonable doubts. Viewing the bill as a whole, however, and in the light of its history (as to which see House Documents No. 1441 of 1923 and No. 233 of 1925), I am of the opinion that, if enacted, it will be held constitutional.

Yours very truly,
JAY R. BENTON, *Attorney General*.

Counties — Financial Year — Payments by Treasurer.

A county treasurer, after the close of a financial year, may pay bills as to which there has been a "special appropriation." He may not pay bills due in connection with the general annual appropriation for the past financial year.

MAY 7, 1925.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:— You have requested my opinion upon the following matter:—

"In order that the Director of Accounts may be guided in the approval of county treasurers' books, I would especially ask your opinion as to whether a county treasurer may, after the closing of the books on January 10 of any year as required by statute, pay bills chargeable to the various accounts that were not submitted on or before January 10 as required by statute.

The question might be made specific by inquiring whether a bill which was legally incurred but not presented can be paid in a subsequent year and charged to the appropriation made for that year; or if bills can be so paid in cases where there were insufficient funds to meet them if presented.

I would like to be advised whether such bills can be held and paid from an appropriation specifically made for the carrying on of the work of the county for the succeeding year."

G. L., c. 35, § 16, provides:—

"The financial year of each county shall be the calendar year, but the treasurer shall, until January tenth, enter in his books the items for the payment of bills incurred and salaries earned during the previous year. Immediately after January first, he shall pay to every officer in his county any salary balance remaining due."

As was said in an opinion of one of my predecessors in office given to the Director of Accounts on July 30, 1920—

"The section provides, in effect, that on the tenth day of January the county treasurer shall close his books for the preceding year. . . . This provision merely establishes rules of bookkeeping and does not make the validity of any claim against the county commissioners contingent upon presentation before the books are closed, although . . . the validity of a claim may not carry authority to pay it. . . . But the county treasurer has no authority to pay even a valid claim unless money has been appropriated therefor."

G. L., c. 35, § 29, provides:—

"The expenditure of money by the several counties shall be in accordance with annual appropriations of the general court, specifying as separate appropriations the several items of expenditure, as prescribed by the director of accounts. At the closing of the county treasurer's books on January tenth, the balance to the credit of each annual appropriation shall become a part of the general unappropriated balance in the county treasury; but no special appropriation shall lapse until the work for which it was made has been completed, the bills paid and the account closed."

At the close of a financial year nothing remains of the general appropriations of the previous year, as such, because by the terms of section 29 "the balance to the credit of each annual appropriation shall become a part of the general unappropriated balance in the county treasury." The only class of bills whose payment is authorized from this unappropriated balance is that relating to payments named in section 34, which concern expenditures for liabilities incurred after December 31st of any year and before the regular appropriations for the next succeeding year have been made by the Legislature. A valid bill for an expenditure incurred during such a period may be paid from the unappropriated balance after the books are closed on January 10th, if the annual appropriation has not then been made by the General Court.

As to that class of valid bills due in connection with matters for which there has been a "special appropriation," the treasurer's duty is plain. By section 29 the special appropriation is not to lapse at the close of the financial year and is available for the payment of all bills relative to the work covered by the appropriation, irrespective of the date of their presentation, and the county treasurer may pay such bills from the special appropriation to which they may be properly allocated.

When, however, bills rendered for payment after the close of the financial year are for money due in connection with matters covered by the general annual appropriations, there appears to be no fund from which the treasurer can pay them, in the absence of a special item for expenditure in the annual appropriations specifically providing for the payment of outstanding bills relating to liability incurred before the beginning of the current year.

The customary form in which bills for the appropriation of money for the general expenditures of the counties are made provides,—"The following sums are hereby appropriated for the counties hereinafter specified for the year . . .," and the current year is designated. It is also customary for the Legislature to insert in such bills an item of expenditure of the general annual appropriation in the following words: "For miscellaneous and contingent expenses of the current year, . . ."

Bills contracted for previous years cannot be paid out of funds appropriated for the current year, and so designated. The expense involved in their payment is an expense of the year in which they were contracted, not of the subsequent year in which they are presented for payment. It is now a common practice for the Legislature to insert in appropriation bills for the counties a clause reading as follows: "For bills of the previous year for miscellaneous and contingent expenses, . . ." Such a provision provides for outstanding bills in a convenient manner and makes unnecessary a practice, which you inform me has existed, of paying bills of previous years from an appropriation designated for "miscellaneous and contingent expenses of the current year," a practice not warranted as a matter of law.

The word "contingent" itself commonly implies the idea of futurity, and as used in legislative acts in relation to expenses, either alone or coupled with the word "miscellaneous," has a well-recognized meaning and refers to minor disbursements incidental to the carrying out of general projects which cannot well be foreseen. When so used its reference is to future, not to past, expenses, unless expressly stated in the enactment to be applicable to liabilities previously incurred. *People v. Village of Yonkers*, 39 Barb. (N. Y.) 266; *Dunwoody v. United*

States, 22 Ct. Claims, 269, 280; *School District No. 3 v. Western Tube Co.*, 13 Wy. 304; *Mander v. Coleman*, 95 N. Y. Sup. 696.

In my opinion, with the exception of the two classes referred to above, bills not presented to a county treasurer until after the closing of his books for the financial year may not be paid from an appropriation specifically made for carrying on the work of the county for the succeeding year.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Public Warehousemen — Revocation of License on Discontinuance of Business.

When a public warehouseman discontinues business and cannot be located, his license may be revoked. The Secretary of the Commonwealth may proceed on the bond to recover the expense of publishing notice of revocation.

MAY 15, 1925.

MR. WILLIAM L. REED, *Executive Secretary*.

DEAR SIR: — In regard to the discontinuance of business by certain public warehousemen licensed under the provisions of G. L., c. 105, you request, by direction of His Excellency the Governor, my opinion on the following questions: —

“1. Where the principal discontinues business and cannot be located, may the Governor and Council revoke his license?

2. If the answer to question 1 is ‘Yes,’ may the Secretary of the Commonwealth thereafter be directed by the Governor to give public notice of such termination of the license, and may the Secretary of the Commonwealth proceed, under section 3 of said chapter 105, to recover on the bond of said warehouseman for the expense of the publication required?”

I answer question 1 in the affirmative. G. L., c. 105, § 1, provides for the licensing of “suitable persons, or corporations established under the laws of, and having their places of business within, the commonwealth, to be public warehousemen.” The words of the original act (St. 1860, c. 206) were, — “may license in any city or town in the Commonwealth.” G. L., c. 105, § 6, provides for publication of a discontinuance of a license in a newspaper published “in the county or town where the warehouse is located.” It seems clear, therefore, that where a licensee has discontinued his business at the place where he has maintained it, and cannot be located, the licensing power has authority to revoke the license.

As to the first part of your second question, it is expressly provided by G. L., c. 105, § 6, that the Secretary of the Commonwealth publish notice of the discontinuance of a license. This section reads as follows —

“The state secretary shall, at the expense of each warehouseman, give notice of his license and qualification, of the amount of the bond given by him and also of the discontinuance of his license by publishing the same for not less than ten days in one or more newspapers, if any, published in the county or town where the warehouse is located; otherwise, in one or more newspapers published in Boston.”

The second part of your second question I also answer in the affirmative. Section 6, above quoted, provides that the publication shall be at

the expense of the warehouseman. This provision imposes upon a warehouseman who has applied for and received a license a duty to pay such expense. The bond given to the Commonwealth by warehousemen, under section 1 of said chapter, is "for the faithful performance of their duties."

Yours very truly,

JAY R. BENTON, *Attorney General*.

Metropolitan District Commission—Authority to construct Cottage Farm Bridge.

The authority given to the Metropolitan District Commission by St. 1921, c. 497, to construct the Cottage Farm Bridge is not subject to the approval of the Division of Waterways and Public Lands.

MAY 15, 1925.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:—You request my opinion as to whether the construction by the Metropolitan District Commission of the Cottage Farm Bridge, so called, under St. 1921, c. 497, as amended by St. 1924, c. 416, requires the approval of the Division of Waterways and Public Lands.

I answer in the negative. St. 1921, c. 497, § 1, provides that the Metropolitan District Commission "is hereby authorized and directed . . . to construct" the bridge in question. There is nothing in the act or in the amendment of 1924 which in any way limits or qualifies the authorization and direction as above quoted.

It has been suggested that the authorization and direction given to the Metropolitan District Commission by the 1921 statute, though absolute in terms, is nevertheless subject to the provisions of G. L., c. 91, § 20, which section reads as follows:

"Whoever is authorized by the general court to build over tide waters a bridge, wharf, pier or dam, to fill flats or drive piles below high water mark, or to build any structures in the Connecticut river, or in the non-tidal part of the Merrimack river, or to build or extend any structure or to do any other work mentioned in the preceding section in, over or upon the waters of any great pond, shall not commence such work until he has given written notice thereof to the division and submitted plans of any proposed structure, the flats to be filled, and the manner in which the work is to be performed, and the same has been approved in writing by the division, which may alter such plans and prescribe any direction, limits and manner of doing the work consistent with the legislative grant. Such works shall be supervised by the division."

In my opinion, however, this section is inapplicable. The Charles River Basin is not, as I understand it, in fact tide water. Furthermore, the Legislature directed that the Charles River Dam should be "sufficiently high to hold back all tides" (St. 1903, c. 465, § 3). Apart from this, moreover, it seems that section 20, above quoted, would not be held to apply to the Metropolitan District Commission, a public agency, authorized and directed by the statute to do the work in question. *Attorney General v. City of Cambridge*, 119 Mass. 518; *Teasdale v. Newell & Snowling Construction Co.* 192 Mass. 440.

Yours very truly,

JAY R. BENTON, *Attorney General*.

*Registrar of Motor Vehicles—Revocation of Registration or License.
—“Improper Person.”*

The Registrar of Motor Vehicles may suspend or revoke any certificate or license issued under G. L., c. 90, for any cause which he deems sufficient.

He may not invoke this power in an arbitrary or unreasonable manner or in bad faith.

In determining whether a license or certificate should be suspended or revoked, the Registrar is not limited to a consideration of the violation of motor vehicle laws or of the right of the public to use public ways in safety.

MAY 22, 1925.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR:—You request my opinion as to whether the Registrar of Motor Vehicles has the power to suspend or revoke any certificate of registration or license issued to a person who, in the Registrar's opinion, is an improper person to hold such certificate or license by reason of the use by such person of a motor vehicle in the commission of crimes other than the violation of motor vehicle laws.

G. L., c. 90, § 22, provides, in part:—

“The registrar may suspend or revoke any certificate of registration or any license issued under this chapter, after due hearing, *for any cause which he may deem sufficient*, and he may suspend the license of any operator or chauffeur or the certificate of registration of any motor cycle in his discretion and without a hearing, and may order the license or registration certificate to be delivered to him, whenever he has reason to believe that the holder thereof is an improper or incompetent person to operate motor vehicles, or is operating improperly or so as to endanger the public; . . .”

The Registrar thus, by the specific terms of the statute, has the power to suspend or revoke any certificate or license issued under chapter 90 *for any cause which he deems sufficient*. He may not invoke this power in an arbitrary or unreasonable manner or in bad faith, but within these limits the power is unlimited.

In the case of *Glass v. State Board of Public Roads*, 44 R. I. 54, one of the issues was whether the power of the board to revoke licenses under a statute similar to ours (see General Laws of Rhode Island, 1923, c. 98, §§ 5 and 6) was confined to cases where the right of the public to use the highway in safety was involved. The Supreme Court of Rhode Island said:—

“We do not think that the power of the Board is thus limited. The intent of the act is to secure the safety of the public in the use of the public highways, and also, we think, to protect the public by preventing the use of the automobile for purposes and in ways that are injurious to the community. The use of the automobile today by the criminal class is a menace to the community. By its use the commission of crime is made easier and the apprehension of the criminal more difficult. It is conceded that if the automobile is used in the commission of crime the license of the operator may properly be revoked. . . . We think that a thief should not be permitted to operate an automobile, for as long as his character remains unchanged, the danger of his making unlawful

use of the automobile is such that the privilege should be denied to him. . . . We think the Board is warranted in revoking or refusing to grant a license whenever in good faith and in the exercise of a reasonable discretion they find that the probable use of the automobile by the licensee would be a detriment to the public safety, welfare or morals."

While that opinion is not binding upon administrative officers in Massachusetts or upon our courts, I am of the opinion that the view therein expressed is sound and would be approved by our courts. In my opinion, therefore, the Registrar, in determining whether a license or certificate of registration should be suspended or revoked, is not limited merely to a consideration of the violation of motor vehicle laws or of the right of the public to use public ways in safety.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Interstate Rendition—Desertion, Abandonment and Non-Support Cases—Cost—Results of Prosecution.

The average cost of requisition in desertion, non-support and abandonment cases was \$110.45. No defendant was acquitted.

Families of fugitives were directly benefited in more than eighty per cent of the cases.

Poor relief by communities has been saved. Deterrent effect upon potential offenders.

MAY 27, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have requested me to advise you as to the approximate cost of interstate rendition for the crimes of desertion, abandonment or non-support, the final disposition of such cases and the extent to which the families of fugitives have been benefited by such proceedings. For this purpose I have analyzed 69 requisitions which were issued by Your Excellency and by your predecessor, Honorable Channing H. Cox, during the preceding six months.

Requisitions were issued upon the governors of 13 States; 33 upon New York, 9 upon Pennsylvania, 6 upon Florida, 4 upon California, 4 upon New Jersey, 4 upon Illinois, 2 upon Vermont, 2 upon Maine, and one upon each of the following States, — Connecticut, Ohio, Alabama, Tennessee and Texas. All of the requisitions, with the exception of that upon the governor of Texas, were honored.

The total cost of the interstate rendition proceedings in the 69 cases was \$7,621.29, or an average cost of \$110.45 for each case. In no case was a defendant acquitted. Seven defendants were committed to houses of correction for terms ranging from three to nine months. Three defendants, after being placed upon probation and ordered to make payments to their families, fled from the Commonwealth and have not since been apprehended. One defendant was committed to the Boston State Hospital for observation but escaped therefrom and has not been apprehended.

In the remaining 58 cases the families of the fugitives were directly benefited. In at least 13 of the 58 cases a reconciliation was effected and the defendants are now living with and supporting their families. In the remaining 45 of the 58 cases where the families were directly benefited, and in some of the 13 cases where a reconciliation has been effected,

the court ordered the defendant to make weekly payments to the probation officer for the support of the family, or to the family directly, of amounts ranging from \$3 to \$30 per week, the average order being from \$10 to \$12 per week. In 10 cases bonds or bank accounts averaging \$1,000 each were filed or deposited with the probation officer to insure the enforcement of the court's order relative to payments. In the counties of Suffolk and Middlesex, wherever possible and desirable from the viewpoint of the welfare of the family, the defendants, in addition, have been ordered to pay all of the expenses of the interstate rendition proceedings. Such expenses were fully paid, or are being paid, in 27 cases.

Aside from the foregoing benefits there are two additional benefits to the community derived from such proceedings. One is the saving to the community of poor relief, which, in many cases, until the apprehension and return of the fugitive was given by the community to the family of the fugitive. The second benefit is the deterrent effect upon would-be or potential family deserters. The fact that the various district attorneys endeavor to secure the return from various parts of the country of men who abandon or fail to support their families, undoubtedly deters other persons from committing the same crime.

It seems to me that the analysis of the expenses in the 69 cases and of the results derived from the proceedings in those cases fully justifies the issuance of requisitions for such crimes. Manifestly, district attorneys should exercise a sound judgment as to the cases in which they request Your Excellency to issue requisitions upon the governors of other States. Unless the facts indicate that a direct benefit will be obtained from the return of a fugitive, or unless there has been a default or a wilful defiance of an order of the court, district attorneys, in my opinion, should not request requisitions where the expense involved is substantial.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Board of Registration in Optometry — Registered Optometrist — Students — Examination.

The term "registered optometrist," as used in G. L., c. 112, § 68, applies only to optometrists registered in Massachusetts.

Under G. L., c. 112, § 67, the Board of Registration in Optometry may properly rule that only those students studying under an optometrist duly registered in Massachusetts are entitled to receive the student certificate of fact referred to in section 68, and to be examined as provided in said section.

MAY 27, 1925.

MR. WILLIAM F. CRAIG, *Director of Registration.*

DEAR SIR: — You request my opinion as to whether a person studying under a registered optometrist of another State is eligible to take an examination in this Commonwealth for registration as an optometrist, and whether or not the Board of Registration in Optometry has a right to rule that only those students studying under a registered optometrist holding a license in Massachusetts are so eligible.

The law of this Commonwealth containing the requirements for examination and registration of optometrists is found in G. L., c. 112, § 68, the relevant portion of which is as follows: —

"Every applicant for examination shall present satisfactory evidence, in the form of affidavits properly sworn to, that he is over twenty-one, of good moral character, that he has studied the subjects herein prescribed for at least three years in a registered optometrist's office or has graduated from a school of optometry, approved by the board, . . . Students entering upon the study of optometry in a registered optometrist's office shall file with the board an application for, and upon payment of one dollar shall receive, a student certificate of fact, and only students so registered shall be entitled to take an examination for registration without attendance at a school of optometry as hereinbefore required."

The answer to your question depends upon the meaning of the words "registered optometrist," as used in the above section. It is significant that the Legislature has laid down certain requirements for registered optometrists, among which are—that every registered optometrist shall, annually, before February first, pay to the board a license fee of two dollars (§ 69), and shall cause his certificate of registration to be recorded in the office of the clerk of the town where he principally carries on the practice of optometry; and if he removes his principal office from one town to another in the Commonwealth, he shall, before engaging in practice in such other town, notify the board in writing of the place where he is to engage in practice and obtain from the clerk of the town where his certificate is recorded a certified copy thereof and file the same with the clerk of such other town (§ 70). Every registered optometrist is further required to display his certificate of registration in a conspicuous place in the principal office wherein he practices optometry, and shall, whenever so required, exhibit it to the board or its authorized representative; and whenever practicing optometry outside of or away from his principal office or place of business, he is required to deliver to each customer or person fitted with glasses by him a memorandum of purchase, containing his signature, home post office address and the number of his certificate of registration (§ 70).

Obviously, these strict requirements cannot apply to or be demanded of optometrists registered in other States but not in this Commonwealth. Such optometrists are outside the supervision and control of the Massachusetts Board of Registration in Optometry. There is no definite standard available to said board by which the qualifications of such an optometrist can be measured or controlled. If, however, a candidate for examination is a graduate from a school of optometry, the statute expressly sets forth the conditions under which such graduate may be examined in this Commonwealth, namely, that such school must be approved by the board, must maintain a course of study of not less than two years, with a minimum requirement of one thousand attendance hours, and further, that the applicant must have graduated from a high school approved by the board, or have had a preliminary education equivalent to at least four years in a public high school, or submit to a preliminary examination by the board.

Even a person to whom a certificate of registration has been issued after examination by a board of registration in optometry in any other State cannot be given a certificate of registration in this Commonwealth without examination, unless, in the opinion of the board, the requirements for registration in such State are equivalent to those of this

Commonwealth, and provided further, that such State accords a like privilege to holders of certificates of registration issued in this Commonwealth, and that the applicant has not previously failed to pass the examination required in this Commonwealth (§ 68).

In view of these strict rules regulating in the public interest the practice of optometry in this Commonwealth, and in the absence of express language to the contrary, it is my opinion that the Legislature intended the term "registered optometrist," as used in this connection, to apply only to optometrists registered in Massachusetts under the laws thereof.

G. L., c. 112, § 67, authorizes the Board of Registration in Optometry to make necessary rules and regulations to carry into effect the statutes relating to optometry, namely, G. L., c. 13, §§ 16-18, and G. L., c. 112, §§ 66-73, inclusive. Under this authority and in view of the language of the statutes above referred to, it is my opinion that said board has a right to rule that only those students studying under an optometrist duly registered in Massachusetts are entitled to receive the student certificate of fact referred to in section 68, and to be examined as provided in said section.

Yours very truly,
JAY R. BENTON, *Attorney General*.

Insurance — Contracts made in a Foreign State.

The provisions of G. L., c. 175, §§ 99, 152 and 157, as amended, are not applicable to foreign insurance companies with relation to contracts made by them in another State in conformity to the laws of the foreign jurisdiction.

JUNE 2, 1925.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You have requested my opinion regarding the construction and application of certain sections of G. L., c. 175, as amended, in relation to two matters connected with the business of foreign insurance companies, as follows:—

"Two matters have come to my attention involving the application and construction of these provisions:—

I. A certain foreign company is duly licensed to transact the business specified in the sixth clause of section 47 of said chapter 175 but is not licensed to transact business under the twelfth clause. It has issued in its home state a policy of burglary insurance to a resident of this state, covering property located here, which was delivered direct to the insured. The contract was made in the home state and not in this Commonwealth through a duly licensed resident agent.

II. A certain foreign company duly licensed to transact fire insurance issues a policy of fire insurance in its home state to a resident of Massachusetts covering property situated here. The policy is not in the standard form prescribed by said section 99. The contract was consummated in the home state and not here through a duly licensed resident agent.

I respectfully request your opinion upon the following questions:—

1. Do the facts stated in I disclose a failure of the company to comply with said section 152?

2. Do the facts stated in I or II disclose a failure of the Company to comply with said section 157?

3. Do the facts stated in II disclose a failure of the company to comply with said section 99?

4. Does the provision of said section 152, forbidding a foreign company from transacting a class of business not specified in its license, apply only to the making of contracts in this Commonwealth, or does said provision prohibit a duly licensed foreign company, as a condition of its license, from making in another state a contract of insurance on property or interests in this Commonwealth of a class which it is not licensed to transact in this Commonwealth?

5. Does said section 157 apply only to contracts of insurance of the classes specified in the license of a foreign company, or does said section 157 prohibit a duly licensed foreign company, as a condition of its license, from making in another state a contract of insurance with a resident of this Commonwealth on property or interest therein of a class which it is not licensed to transact in this Commonwealth?

6. Does said section 99 apply only to contracts of fire insurance made in this Commonwealth on property or interests therein, or does said section 99 prohibit a duly licensed foreign company, as a condition of its license, from using a fire policy not in the form prescribed by said section 99 in respect to contracts of fire insurance made in another state on property or interests in this Commonwealth?"

I assume from your statements that, as a matter of fact, in each of the two instances which you have set forth the contract of insurance was made outside the Commonwealth, no action in connection therewith being performed here, in a State wherein the insuring company had its principal place of business, and that the contract was not illegal under the laws of such State.

It is well settled that although the States have broad powers to impose conditions upon foreign insurance companies who seek to do business within their borders, no State may enact statutes which forbid or penalize the making of contracts of insurance outside its own territory, even if the insured be one of its own citizens or the subject-matter of the contract be within its own confines. Statutes which directly or indirectly seek to prohibit or penalize the formation of such contracts have been held uniformly to be within the prohibition of the Fourteenth Amendment of the Constitution of the United States. *Stone v. Old Colony St. Ry. Co.*, 212 Mass. 459; *Allgeyer v. Louisiana*, 165 U. S. 578; *New York Life Ins. Co. v. Dodge*, 246 U. S. 357; *Stone v. Penn Yan etc. Ry.*, 197 N. Y. 279; *State v. Conn. Mut. Life Ins. Co.*, 106 Tenn. 282; *Hyatt v. Blackwell Lumber Co.*, 31 Ida. 452.

To construe the foregoing sections of G. L., c. 175, as amended, as applicable to the acts of foreign insurance companies in making contracts with citizens of this Commonwealth in other States, would be unwarranted. See III Op. Atty. Gen. 222.

I answer the first three questions contained in your communication in the negative.

I answer the fourth question to the effect that G. L., c. 175, § 152, as amended, does not prohibit a licensed foreign insurance company, as a condition of its license, from making in another State a contract of insurance on property or interests in this Commonwealth of a kind as to which it is not licensed to transact business in Massachusetts.

P.D. 12.

I answer your fifth question to the effect that G. L., c. 175, § 157, as amended, applies to contracts of insurance of the kinds specified in the license of a foreign insurance company made within the Commonwealth.

I answer your sixth question to the effect that G. L., c. 175, § 99, applies only to contracts of fire insurance made in this Commonwealth.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Metropolitan District Commission — Town of Clinton — Cost of Water — Pipe Line Rental.

Under St. 1923, c. 348, the town of Clinton may take, without charge, water from any available pipe line leading from the Wachusett Reservoir.

No charge may be made for use of a pipe line which would indirectly be, or result in making, a charge for water.

Cost of water is in part determined by computing various items of expenditure necessary to conserve and make water available. Included in such items are interest upon capital investment, depreciation and cost of operation and maintenance.

The Commission may not charge an annual rental for use of a pipe line.

The Town of Clinton should pay expenses incurred as a result of the use of a pipe line by it which would not otherwise have been incurred.

JUNE 8, 1925.

Metropolitan District Commission.

GENTLEMEN:— You request my opinion as to whether, under the provisions of St. 1923, c. 348, the Commission may charge the town of Clinton, in the form of an annual rental or in any other way, for the use of a pipe line which now runs to the Lancaster Mills in Clinton and through which water is delivered to the mills, in compliance with St. 1895, c. 488, § 4. You have orally stated to me that this pipe line is an available pipe line, within the meaning of St. 1923, c. 348. You further state that the Commission voted to authorize the town to use that pipe line on certain conditions, one of which was the payment of an annual rental by the town for the use of the pipe line.

St. 1923, c. 348, provides, in part:—

“The town of Clinton is hereby authorized to take water . . . from the Wachusett reservoir, or *from any available pipe line* or other structure leading from said reservoir upon such terms and conditions as may be mutually agreed upon by the metropolitan district commission and the town of Clinton, but such terms shall not include any charge for water used or to be used under this act; and the town of Clinton may enter upon the lands of the commonwealth at such place or places or in such manner as may be approved by the metropolitan district commission for the purpose of constructing and maintaining thereon pipes or pipe lines or other structures for the purpose of conveying such water; provided, that for all damages caused to the commonwealth by all such work or construction the town of Clinton shall pay to the commonwealth such compensation as may be agreed upon between the said town and the said commission, . . .”

By the express terms of that act the town of Clinton is authorized to take water from any available pipe line leading from the Wachusett Reservoir (and you have stated that the pipe line in question is so available), and no charge may be made for water used or to be used under the act. It is clear that no charge may be made for the use of a pipe line which would indirectly be, or result in making, a charge for water so used. The cost of water is in part determined by computing the various items of expenditure necessary to conserve and make water available, and included in such items are interest upon capital investment, depreciation and cost of operation and maintenance.

The pipe line to the Lancaster Mills is part of the capital investment, and the interest upon that investment and the cost of maintaining that pipe line are included in the cost of water and in the charge made for water. If, therefore, an annual rental should be charged for the use of the pipe line, the result would be that a charge, though small, would be made for water. In my opinion, therefore, a charge merely for the use of the pipe line in the form of an annual rental or in any other form would be in violation of the provisions of St. 1923, c. 348.

Expenses incurred by the Commission as a result of the use of the pipe line by the town of Clinton, which would not have been incurred if the town did not use the pipe line, do not enter into the cost of water taken under the act.

I am of the opinion that the Commission may lawfully insist that all such expenses be paid by the town of Clinton.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Duplicate Licenses — Clerks of Towns.

Clerks of towns issuing dupliciate licenses under St. 1925, c. 295, have no authority to retain any portion of the fees paid for such duplicates.

JUNE 8, 1925.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:—You request my opinion whether, under St. 1925, c. 295, § 9, clerks of towns may retain twenty-five cents for each duplicate license issued by them under section 10 of that act.

Section 8 of the act provides for various forms of licenses and for the fees therefor. Section 9 provides:—

“The clerk of the town where the license is issued may retain twenty-five cents from each *such* license fee.”

Section 10 provides, in part:—

“Whoever loses or by mistake or accident destroys his license may, . . . upon payment of a fee of fifty cents, receive a duplicate license . . .”

I am of the opinion that section 9 applies exclusively to the licenses issued under section 8 and to the fees charged for such licenses, and that duplicate licenses issued under section 10 and the fees charged therefor do not come within the scope of section 9. In my opinion, therefore, clerks of towns issuing duplicate licenses have no authority to retain any portion of the fees paid for such duplicates.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Employment by the Commonwealth of a Broker to negotiate a Sale of a Portion of the Commonwealth Flats.

The power granted to the Division of Waterways and Public Lands by G. L., c. 91, § 2, to dispose of the lands known as the Commonwealth flats, includes by necessary implication the power to employ a real estate broker for the purpose of negotiating a sale, and to pay him compensation.

JUNE 13, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR:— You ask me to report concerning a letter addressed to Your Excellency by the chairman of the committee on state activities, Massachusetts Real Estate Exchange. The writer of the letter asks you to ask me for a ruling as to whether the Commonwealth can pay a commission to real estate brokers for making sales of land in South Boston belonging to the Commonwealth. I interpret your communication enclosing this letter as a request for an opinion from me on that subject.

G. L., c. 91, § 2, provides, in part:—

“ . . . It (the Division of Waterways and Public Lands of the Department of Public Works) may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth flats, may lease any portion thereof with or without improvements thereon, may regulate the taking of material from the harbor and fix the lines thereon for filling said lands. All conveyances and contracts, and all leases for more than five years, made under this section shall be subject to the approval of the governor and council.”

It was said by the court in *Cotting v. Commonwealth*, 205 Mass. 523, 526, that the authority of the Board of Harbor and Land Commissioners relative to the subject of contracts for sale of the Commonwealth flats is very broad. It is my opinion that the power granted to the Division by G. L., c. 91, § 2, includes by necessary implication the power to employ a real estate broker for the purpose of negotiating such a sale, and to pay him compensation when, in the opinion of the Division, such employment is necessary or proper for the purpose of effecting an advantageous sale. See *Armstrong v. Village of Fort Edward*, 159 N. Y. 315; *Mayor, etc., of New York, v. Sands*, 105 N. Y. 210. Of course, the Division is not required in any case to employ such a broker, and may with entire propriety adopt a rule that it will not do so.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Police Commissioner for the City of Boston—Powers—Rules and Regulations—Hackney Carriage Stands.

The Police Commissioner for the City of Boston may grant hackney carriage stands in public streets against the protest of abutting owners or lessees, but such use of public streets must not infringe the right of abutting owners to have reasonable access to their premises.

An abutting owner or lessee cannot lawfully demand that hackney carriage stands be granted to specified persons, but he may provide

cabs for the reasonable accommodation of guests or customers, subject to the right of the public to the full enjoyment of the public easement.

JUNE 23, 1925.

Hon. HERBERT A. WILSON, *Police Commissioner for the City of Boston.*

DEAR SIR:— You ask my opinion on the following two questions:—

“Can the Police Commissioner grant to applicants stands in the public streets, for hackney carriage stands, in front of or adjacent to property where the owners or lessees object to the same?

Can the owner or lessee specify the particular cab owner or company which shall operate from the special hackney carriage stand granted adjacent to his premises?”

G. L., c. 40, § 22, authorizes cities and towns to regulate the use of carriages and vehicles. The section is as follows:—

“Except as otherwise provided in section eighteen of chapter ninety, a city or town may make ordinances or by-laws, or the board of aldermen or the selectmen may make rules and orders, for the regulation of carriages and vehicles used therein, with penalties for the violation thereof not exceeding twenty dollars for each offence; and may annually receive one dollar for each license granted to a person to use any such carriage or vehicle therein. Such rules and orders shall not take effect until they have been published at least once in a newspaper published in the city, town or county.”

This provision is a reenactment of a statute first passed in 1847 (St. 1847, c. 224). Section 1 of that act was as follows:—

“The mayor and aldermen of any city in this Commonwealth shall have power, from time to time, to make and adopt such rules and orders, as to them shall appear necessary and expedient, for the due regulation, in such city, of omnibuses, stages, hackney coaches, wagons, carts, drays, and all other carriages and vehicles whatsoever, used or employed wholly, or in part, in such city, whether by prescribing their routes and places of standing, or in any other manner whatsoever, and whether such carriages and other vehicles, as aforesaid, are used for burden or pleasure, or for the conveyance of passengers or freight, or otherwise, and whether with or without horse or other animal power: *provided*, that nothing contained in this act shall be construed to abridge or impair the rights of cities to make such by-laws and regulations, touching the subjects above provided for, as they now possess by virtue of their charters or the amendments thereof.”

The Police Commissioner for the City of Boston has all the powers conferred upon the board of aldermen of a city by said section 22. See St. 1878, c. 244; Revised Ordinances of the City of Boston, 1882, c. 24, § 3, and 1885, c. 26, § 1; St. 1885, c. 323, § 2; St. 1906, c. 291, § 10.

Rule 58 of the rules and regulations of the Boston Police Department, established by the Police Commissioner, relating to hackney carriages, contains the following provisions:—

“3. The Police Commissioner may assign to any person or corporation licensed to set up and use a hackney carriage a place as a special

stand for such licensed carriage, and the owner of more than one licensed carriage may keep any one of his licensed carriages on a stand assigned to him when it is not occupied by another licensed carriage owned by him. No such special stand shall be assigned or granted to any person who is not the owner of such licensed carriage. Permits for special stands will be issued as distinct from licenses of owners or drivers and may be revoked, suspended or transferred without affecting the validity of such licenses.

4. The Police Commissioner will designate certain places to be used as public stands by hackney carriages, not exceeding at any one time the number specified for each place. Owners or drivers of carriages shall not trespass upon special stands to which they have not been assigned, and owners or drivers of carriages who have special stands shall not trespass upon public stands; nor shall more than two carriages owned by the same person be upon a public stand at the same time to the exclusion of a hackney carriage owned by another person.

The Police Commissioner reserves to himself the right to take away, change, modify or reassign any and all privileges in and to both special and public stands at his discretion."

Under the statute set out above and its successive reenactments rules and regulations prescribing licenses, stands and routes for hackney carriages have in several cases been held to be valid. *Commonwealth v. Stodder*, 2 Cush. 562; *Commonwealth v. Gage*, 114 Mass. 328; *Commonwealth v. Matthews*, 122 Mass. 60; *Commonwealth v. Page*, 155 Mass. 227; *Commonwealth v. Morrison*, 197 Mass. 199, 204. In *Commonwealth v. Matthews*, *supra*, a regulation passed by the board of mayor and aldermen of the city of Boston providing that no person having charge of any hackney carriage shall stand with it to solicit passengers in any place other than the place assigned to it was held to be valid, and the defendant was convicted of violating the regulation.

It is a well-recognized principle in this Commonwealth, as stated in *Allen v. Boston*, 159 Mass. 324, 335, that—

"The owner of the land over which a highway is laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public. This right of the owner may grow less and less as the public needs increase. But at all times he retains all that is not needed for public uses, subject, however, to municipal or police regulations."

See also *King v. Norcross*, 196 Mass. 373, 374; *Opinion of the Justices*, 208 Mass. 603, 605; *Lexington v. Suburban Land Co.*, 235 Mass. 108. It is also well settled that the owner of premises bounding on a public street has a right of access to and from the street, subject only to legitimate public regulation. *Robbins v. Borman*, 1 Pick. 122; *Tucker v. Tower*, 9 Pick. 109; *Brayton v. Fall River*, 113 Mass. 218; *French v. Connecticut River Lumber Co.*, 145 Mass. 261; *Opinion of the Justices*, 208 Mass. 603, 605; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 301-303; *Dillon on Municipal Corporations*, 5th ed., § 1016. "Whether carriage stands can be authorized against the protest of an abutting owner may be open to doubt." *Commonwealth v. Morrison*, 197 Mass. 199, 204.

In other States it has been held that a license granted by public authorities will not justify a hackman in obstructing access to abutting property. *McCaffrey v. Smith*, 41 Hun. (N. Y.) 117; *Branahan v. Hotel*

Co., 39 Ohio St. 333; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 300, 304. But see *Pennsylvania Co. v. Chicago*, 181 Ill. 289.

With respect to your first question, I call your attention directly to the doubt expressed by the Supreme Judicial Court in *Commonwealth v. Morrison, supra*, and while there is question whether I ought to resolve the doubt, I believe that you are entitled to my judgment in the matter, which is, that you have power to grant carriage stands against the objection of abutting owners or lessees. The rights of abutting owners are not, in their nature, paramount to the rights of the general public to use the streets in legitimate ways and for legitimate purposes, but such use of public streets by hackney stands must not be unnecessarily or unduly obstructive and must not infringe upon the right of abutting owners to have reasonable access to and from the sidewalk and the public street.

All exercise of power by public authorities and all use of rights by private individuals in the matters now under consideration must be carried on in a reasonable manner, not only in reference to the interest of the public but also in reference to the rights of landowners.

By your second question I presume you mean to ask whether the abutting owner or lessee can lawfully insist that a hackney carriage stand be granted to a certain cab owner or company. The authority to issue licenses and assign stands for licensed carriages is lodged by statute in the Police Commissioner. The right of an abutting owner or lessee to access to and from the street, subject to public regulation, does not carry with it the right to demand that hackney carriage stands be granted to specific third persons. In giving this ruling it is also necessary to point out that, in my opinion, an owner or lessee of premises abutting upon a public highway, particularly where, as under our general law, he owns the fee in the street adjoining his land, has a right to make special provision for the reasonable accommodation of his guests or customers by providing cabs for their use, whenever the public does not have occasion to exercise its easement to its full extent. *Willard Hotel Co. v. District of Columbia*, 23 App. D. C. 272; *People ex rel. Thompson v. Brookfield*, 6 App. Div. (N. Y.) 398.

The primary purpose of a highway is the passing and repassing of the public, which is entitled, so far as needed, to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose. See *Commonwealth v. Morrison, supra*.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Insurance — Admission of Foreign Life Insurance Companies — Net Value of Policies.

Outstanding loans to policy holders may not be deducted from the amount of the liability of a life insurance company upon its contracts, in determining the net value of all its policies, under G. L., c. 175, § 153.

JUNE 25, 1925.

Hon. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR: — You have asked my opinion upon the following questions relative to the admission of a foreign insurance company to do business in the Commonwealth under G. L., c. 175, as amended: —

"1. May the Commissioner, in determining the net value of its policies for the purpose of section 153, deduct the amount of outstanding loans against such policies?

2. Do the words 'net value of policies' mean the value calculated under section 9 without any deductions?"

Section 153 of G. L., c. 175, reads as follows:—

"Conditions of admission of foreign life companies. A company organized under the laws of any other of the United States for the transaction of life insurance may be admitted to do business in this commonwealth, upon complying with section one hundred and fifty-one, if it has the requisite funds of a life company and, in the opinion of the commissioner, is in sound financial condition and has policies in force upon not less than one thousand lives in the United States for an aggregate amount of not less than one million dollars. Any such company organized under the laws of a state or government other than one of the United States may be so admitted if, in addition to fulfilling the above requirements, it complies with section one hundred and fifty-five and if it shall have and keep on deposit or in the hands of trustees, as provided in said section one hundred and fifty-five and in section one hundred and fifty-six, in exclusive trust for the security of its contracts with policy holders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than two hundred thousand dollars."

The words "net value of policies" are declared in section 1 to have the following meaning as used in the chapter "unless the context otherwise requires or a different meaning is specifically prescribed":

"The liability of a company upon its insurance contracts, other than accrued claims, computed by rules of valuation established by sections nine to twelve, inclusive."

Sections 9 to 12 establish a mode of computation which the Commissioner is bound to follow in determining the net value of policies. I Op. Atty. Gen. 269. He is required to use the methods of computation therein set forth, and cannot modify the results of such computations by making any deductions therefrom not authorized by the terms of the statute. No provision is made by these sections for the deduction from the figures arrived at by the prescribed computations of the amount of outstanding loans to policy holders, nor are such loans mentioned in these sections or elsewhere in the chapter as a credit to be allowed to the insurance company in the establishment of its financial condition.

There is nothing in the context of section 153 nor in its prescribed terms to indicate that the words "net value of all its policies" do not have the same meaning as is given to "net value of policies" by the definition in section 1.

I accordingly answer your first question in the negative, and your second question to the effect that the words "net value of policies" mean, as stated in section 1, "the liability of a company upon its insurance contracts, other than accrued claims, computed by rules of valuation established by sections nine to twelve, inclusive," without any deductions from the figures so reached other than those which are specifically provided for by sections 9 to 12.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Hours of Labor — "Overtime Employment" — Legal Holiday.

The words "overtime employment," as used in G. L., c. 149, § 56, as amended by St. 1921, c. 280, limiting the hours of labor of women and children in factories, requiring the posting of a printed notice giving a schedule of the hours for each week, and regulating overtime employment, mean employment at any time not included in the notice.

The hours of labor may include a part of Saturday afternoon, if so designated.

JUNE 29, 1925.

Hon. E. LEROY SWEETSER, *Commissioner of Labor and Industries.*

DEAR SIR: — You request my opinion as to the interpretation of the words "overtime employment," as used in G. L., c. 149, § 56. You state that the question has arisen on account of the practice in certain textile mills, when a legal holiday occurs in the course of a week on a day other than Saturday, of including in the printed notice stating the hours of employment, required by section 56, a part of Saturday afternoon, although it is customary with them to close at noon on Saturdays, the hours of employment so stated, however, not exceeding the nine hours a day and forty-eight hours a week limit for the employment of women provided by section 56.

The pertinent provisions of G. L., c. 149, § 56, as amended by St. 1921, c. 280, are as follows: —

"No child and no woman shall be employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, . . . more than nine hours in any one day . . . ; and in no case shall the hours of labor exceed forty-eight in a week, . . . Every employer, except those hereinafter designated, shall post in a conspicuous place in every room where such persons are employed a printed notice stating the number of hours' work required of them on each day of the week, the hours of beginning and stopping work, and the hours when the time allowed for meals begins and ends, or, in case of mercantile establishments and of establishments exempted from sections ninety-nine and one hundred, the time, if any, allowed for meals. The employment of any such person at any time other than as stated in said printed notice shall be deemed a violation of this section unless it appears that such employment was to make up time lost on a previous day of the same week in consequence of the stopping of machinery upon which such person was employed or dependent for employment; but no stopping of machinery for less than thirty consecutive minutes shall justify such overtime employment, nor shall such overtime employment be authorized until a written report of the day and hour of its occurrence and its duration is sent to the department, nor shall such overtime employment be authorized because of the stopping of machinery for the celebration of any holiday. . . ."

In my opinion, the words "overtime employment," as used in said section, mean employment at any time not included in the printed notice. No such overtime employment is permitted because of the stopping of machinery for the celebration of any holiday. But there is nothing in section 56 to prevent the inclusion in the printed notice of a part of Saturday afternoon if the total number of hours in any one day does not exceed nine and the hours of labor for the week do not exceed

forty-eight. So long as the hours of employment specified are not prohibited by other statutory provisions I see nothing in section 56 making it unlawful to include them in the printed notice, whatever the reason for such inclusion may be. *Cf. Commonwealth v. Riley*, 210 Mass. 387, 391-393.

Very truly yours,

JAY R. BENTON, *Attorney General*.

License to operate a Motor Vehicle — "Final Conviction."

The term "final conviction" does not apply to the judgment and sentence of a district court when the defendant has filed an appeal therefrom.

JUNE 30, 1925.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR: — You state that on June 10, 1924, a person pleaded guilty to a charge of operating a motor vehicle while under the influence of intoxicating liquor; that he was sentenced to imprisonment for a term of one month, from which sentence he appealed; and that on February 16, 1925, he was fined \$100 in the Superior Court. You inquire whether the period within which no new license may be issued runs from June 10, 1924, or from February 16, 1925.

G. L., c. 90, § 24, as amended, provides, in part: —

"The registrar . . . after an investigation or upon hearing may issue a new license to a person convicted in any court; provided, that no new license shall be issued by the registrar to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence."

It is clear that the term "final conviction" does not apply to the judgment and sentence of the district court when the defendant has filed an appeal therefrom and has had his case disposed of in the Superior Court. In my opinion, therefore, the period within which a new license may not be issued under the facts stated begins to run on February 16, 1925.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Towns — Union Superintendent — Salary — State Reimbursement.

The "valuation" of the several towns was last determined on or before April 1, 1925, under G. L., c. 4, § 7, cl. 35, and G. L., c. 58, §§ 9 and 10, as amended by St. 1921, c. 379, §§ 1 and 2. Accordingly, at the end of the school year on June 30, 1925, the valuation fixed on April 1, 1925, should be used as the basis for distribution of reimbursement authorized by G. L., c. 71, § 65.

JUNE 30, 1925.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR: — You request my opinion on the following question with respect to reimbursement to towns that have unitedly employed a superintendent of schools: —

"Will those towns whose valuation was established by the General Court in 1925 receive aid under the distribution for the school year end-

ing June 30, 1925, or should the valuation for the previous three years be used as a basis for such distribution?"

G. L., c. 71, § 61, authorizes the union of towns for employment of a superintendent. Section 63 outlines the organization and duties of joint school committees of such unions. The salary of union superintendents is fixed by section 64. The Commonwealth grants reimbursement for a part of the salary and expenses of such superintendent, as provided by section 65, which is as follows:—

"When the chairman and secretary of the joint committee certify to the state auditor, on oath, that the towns unitedly have employed a superintendent of schools for the year ending on June thirtieth, and have complied with section sixty-three, a warrant shall, upon the approval of the department, be drawn upon the state treasurer for the payment of two thirds of the sum of the following amounts: (1) the amount paid to the superintendent as salary not including any such amount in excess of twenty-five hundred dollars, and (2) the amount reimbursed to the superintendent for traveling expenses not including any such amount in excess of four hundred dollars. The amount stated in the warrant shall be apportioned and distributed among the towns forming the union in proportion to the amounts expended by them for the salary and traveling expenses of the superintendent; provided, that the amount apportioned to any town whose valuation then exceeds three million five hundred thousand or to any town whose valuation exceeded two million five hundred thousand at the time of its entry into a union, shall be retained by the commonwealth."

G. L., c. 4, § 7, cl. 35th, defines "valuation" as follows:—

"In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears:

Thirty-fifth, 'Valuation', as applied to a town, shall mean the valuation of such town as determined by the last preceding apportionment made for the purposes of the state tax."

The equalization and apportionment upon the several towns of the state tax is provided for by G. L., c. 58, §§ 9 and 10, as amended by St. 1921, c. 379, §§ 1 and 2. Section 9, as amended, reads as follows:—

"In nineteen hundred and twenty-two and in every third year thereafter, the commissioner shall, on or before April first report to the general court an equalization and apportionment upon the several towns, of the number of polls, the amount of property, and the proportion of every one thousand dollars of state or county tax, including polls at one tenth of a mill each, which should be assessed upon each town."

Accordingly, the "valuation" of the several towns was last determined on or before April 1, 1925. It follows that at the ending of the school year on June 30, 1925, the valuation of the various towns was already fixed. I am therefore of the opinion that such valuation should be used as the basis for distribution of reimbursement authorized by G. L., c. 71, § 65.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Savings Banks — Investment in Municipal Bonds.

Bonds for municipal purposes, which are not direct obligations of the municipalities which purport to issue them, are not lawful investments for savings banks.

JULY 1, 1925.

Hon. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR:— You have requested my opinion as to whether a certain issue of bonds, called "water works bonds," of the city of San Antonio, Texas, are a legal investment for the savings banks of this Commonwealth. I assume from your letter and accompanying documents that the bonds in question are legal, duly authorized and properly issued, and that they are for the purpose of enabling the city of San Antonio to acquire a water works and to supply water to its citizens.

G. L., c. 168, § 54, as amended by St. 1925, c. 209, § 3, provides "that deposits and the income derived therefrom held by savings banks shall be invested only as follows":—

"(f) In the legally authorized bonds for municipal purposes or in refunding bonds issued to take up at maturity bonds which have been issued for other than municipal purposes, but on which the interest has been fully paid, of any city of any state of the United States, other than a territory or dependency thereof, which was incorporated as such at least twenty-five years prior to the date of such investment, which has at such date more than one hundred thousand inhabitants, established in the same manner as is provided in subdivision (e) of this clause, and whose net indebtedness does not exceed seven per cent of the valuation of the taxable property therein, to be ascertained as provided in said subdivision (e)."

Subdivision (e) reads:—

"... as established by the last national or state census, or city census certified to by the city clerk or treasurer of said city and taken in the same manner as a national or state census, preceding such date, and whose net indebtedness does not exceed five per cent of the valuation of the taxable property therein, to be ascertained by the last preceding valuation of property therein for the assessment of taxes."

Each of the bonds in question purports, in the wording of its first paragraph, to be a contract on the part of the city of San Antonio to pay to the holder the face value of the bond, and interest, but further provisions of the instrument provide:—

"This bond shall never be a debt of said city but solely a charge upon said water plant and system . . . The holder hereof shall never have the right to demand payment of this obligation out of any funds raised or to be raised by taxation."

The only obligation resting upon the city by the terms of these bonds is to pay money due on the bond to the holder from a fund to be set aside from the revenues to be derived from the operation of the water works for the purposes of such payment. The terms of the trust deed given by the city to the St. Louis Union Trust Company for the benefit of the bondholders also disclose the fact that no direct obligation for the payment of principal or interest of these bonds rests upon the city, and that the holder's security is limited to a mortgage upon the physical

property of the water works, the management of the water works by a board of trustees, and certain agreements by the city as to the levy, collection and application of the revenues of the water works to the payment of the principal and interest of the bonds.

While these bonds may be correctly described, in a sense, as legally authorized for municipal purposes, I am of the opinion that they do not come within the meaning of those words as used by the Legislature in this section of the statute in designating bonds for investment. The reference in subdivision (e) above noted, relative to the mode of ascertaining the net indebtedness of municipalities making bond issues, plainly indicates an intent on the part of the Legislature that the securities referred to should be the direct obligations of the municipalities issuing them, so that the investor might have the right of recourse to the municipalities themselves and be secured therein by the taxable value of their property. Section 54, read as a whole, emphasizes the intent of the Legislature in this regard.

I am of the opinion that the bonds referred to in your letter are not legal for investment by savings banks in this Commonwealth.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Printing for Military Purposes.

Printing for military purposes must be done under the supervision of the Division of Personnel and Standardization.

JULY 7, 1925.

Commission on Administration and Finance.

GENTLEMEN:—You request my opinion as to whether printing ordered by the Adjutant General is subject to the supervision of the Division of Personnel and Standardization.

G. L., c. 7, as amended by St. 1923, c. 362, § 1, provides that your board shall, subject to the approval of the Governor and Council, make rules, regulations and orders which shall regulate and govern the purchasing, delivering, handling of and contracting for supplies, equipment and other property “except when they are for legislative or military purposes.”

G. L., c. 5, § 1, as amended by St. 1923, c. 362, § 5, and by St. 1923, c. 493, provides that the Division of Personnel and Standardization shall supervise the State printing and that the Commission on Administration and Finance shall, subject to the approval of the Governor and Council, make such contract or contracts for the printing and binding for the several departments as it deems advisable, but that these provisions shall not apply to legislative printing or to certain publications required to be issued by the Secretary of the Commonwealth. Military printing or printing for military purposes is not specifically exempted, nor, in view of the fact that this section specifically provides for printing, can printing be regarded as included in the items described in G. L., c. 7, as amended by St. 1923, c. 362, § 1. The provisions of G. L., c. 5, § 1, as amended, embrace all State printing which is not specifically excluded.

I am accordingly of the opinion that the printing for military purposes must be done under the supervision of the Division of Personnel and Standardization.

The opinion of the Attorney General given you under date of January 25, 1923, was rendered under St. 1922, c. 545, §§ 10 and 11, some months

P.D. 12.

prior to the enactment of St. 1923, c. 362. In so far as printing is concerned the former opinion is no longer applicable. The view therein expressed relative to the authority of the Adjutant General to furnish paper for printing applies also to the present provisions of law.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Insurance — Form of Policy — Incontestability.

The form of an intermediate policy which is to supersede an industrial policy upon conversion by the insured does not conform to the requirements of the statutes if it contains terms relative to incontestability which do not conform to the provisions of G. L., c. 175, § 132, as amended.

JULY 8, 1925.

MR. ARTHUR E. LINNELL, *Acting Commissioner of Insurance.*

DEAR SIR: — You have requested my opinion relative to the authority of the Commissioner of Insurance as regards his approval of a certain form of endowment life insurance policy, called an intermediate policy, which you have submitted for my inspection.

Your letter reads as follows: —

“An insurance company has submitted to this department for approval a policy form which provides that ‘This Policy shall be incontestable from its date.’ The policy is an intermediate policy for \$500, the premiums upon which are payable annually, semi-annually or quarterly and is issued to a person insured under an industrial policy containing a provision for its conversion into an intermediate policy at the attained age of the insured. The new or intermediate policy is to be issued on a new application.

Your opinion is respectfully requested as to whether the Commissioner may lawfully approve this form of intermediate policy, so called, to be issued under the circumstances above set forth.”

You state in your letter that the intermediate policy is issued by the insurance company writing it to “a person insured under an industrial policy containing a provision for its conversion into an intermediate policy,” and you have submitted to me for examination the form of the industrial policy which you refer to.

The industrial policy, which is for the same principal sum as the intermediate policy, five hundred dollars, provides for the payment of a weekly premium, and contains this clause: —

“CONVERSION INTO AN INTERMEDIATE ENDOWMENT POLICY AT
AGE EIGHTEEN.

At any time within six months after the anniversary of this Policy next preceding the eighteenth birthday of the insured, provided the Policy be then in full force and effect, and there has been no default in the payment of premiums and no payment has been made on account of disability as herein provided, the Policy upon its surrender may be converted into an Intermediate Thirty-three-Year Endowment Policy for the amount of Five Hundred Dollars, payable on the anniversary of this Policy next preceding the fifty-first birthday of the Insured, if the Insured be then living, or at the prior death of the Insured; such Intermediate Endowment Policy to be non-forfeitable from its date and

to be subject to the payment of an annual premium of \$12.00, which may be paid in semi-annual instalments of \$6.24 each or quarter-annual instalments of \$3.18 each, at the election of the Insured."

It also contains this provision:—

"Incontestability.—After this Policy shall have been in force, during the lifetime of the Insured, for one full year from its date, it shall be incontestable, except for non-payment of premium, but if the age of the Insured be misstated, the amount payable under this Policy shall be such as the premium would have purchased at the correct age."

The intermediate policy recites in its first clause:—

"In Settlement Under Industrial Policy No. . . . , heretofore issued on the life of the person hereinafter designated as the Insured, and pursuant to an agreement therein contained, and in consideration of the Application for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby endows and insures the person herein designated as the Insured, for the amount named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract."

It contains the following provision:—

"Incontestability.—This Policy shall be incontestable from its date, except for non-payment of premium, but if the age of the Insured be misstated the amount or amounts payable under this Policy shall be such as the premium would have purchased at the correct age."

The policy and application indicate that the premiums are to be paid annually, semi-annually or quarterly.

The provisions of the statutes applicable to the approval of the form of the intermediate policy are as follows:—

G. L., c. 175, § 132, as amended:

"No policy of life or endowment insurance and no annuity or pure endowment policy shall be issued or delivered in the commonwealth until a copy of the form thereof has been on file for thirty days with the commissioner, unless before the expiration of said thirty days he shall have approved the form of the policy in writing; nor if the commissioner notifies the company in writing, within said thirty days, that in his opinion the form of the policy does not comply with the laws of the commonwealth, specifying his reasons therefor, provided that such action of the commissioner shall be subject to review by the supreme judicial court; nor shall such policy, except policies of industrial insurance, on which the premiums are payable monthly or oftener, and except annuity or pure endowment policies, whether or not they embody an agreement to refund to the estate of the holder upon his death or to a specified payee any sum not exceeding the premiums paid thereon with interest, be so issued or delivered unless it contains in substance the following:

2. A provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue except for non-payment of premiums or violation

of the conditions of the policy relating to military or naval service in time of war and except, if the company so elects, for the purpose of contesting claims for total and permanent disability benefits or additional benefits specifically granted in case of death by accident.

The form of the intermediate policy submitted to me does not contain the substance of section 132 relative to incontestability, but instead sets forth that it is incontestable from its date.

The intermediate policy is not a policy of industrial insurance on which the premiums are payable monthly or oftener, and therefore does not fall within the exception to the application of section 132 contained therein, given to such an industrial policy.

The fact that the first policy of insurance, which provides for conversion into the intermediate policy at the election of the insured, is itself an industrial policy on which the premiums are payable weekly, does not operate to change the character of the intermediate policy so as to bring it within the statutory exception. The intermediate policy is a new policy, not a continuation of the one first issued to the insured. It is issued upon a new application and upon the surrender of the one first issued. Moreover, its premiums are to be paid not less often than quarterly.

In my judgment, the provision in question is not a compliance with the requirements of the statute. It may be argued that the requirements are contained in substance, and are stated in terms more favorable to the insured or his beneficiary than are set forth in the statute. By an amendment passed in 1921 the Commissioner was authorized to pass upon the question whether or not terms are more favorable. You will note, however, that while our Supreme Court, in 1908, in the case of *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, ruled that no departure from the exact requirements of the statute should be permitted in any policy unless it was too plain for doubt that the substitution was in every way as advantageous and as desirable to the insured as the prescribed provision, nevertheless it found against a provision in a certain policy that it "shall be incontestable, except for non-payment of premiums, from its date." It was held that such a provision was not a compliance with the requirements of the statute, and in addition that it was not in accordance with public policy. For this latter proposition they referred to the case of *Reagan v. Union Mutual Life Ins. Co.*, 189 Mass. 555. These cases, in my opinion, preclude you from approving the instant policy.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Notary Public — Citizenship by Marriage.

An applicant for appointment to the office of notary public, born in Ireland, is an American citizen if his father was dead when his mother married a citizen of the United States during his minority and he became a permanent resident of the United States, provided his mother did not again change her citizenship during his minority. Prior to 1922, an alien woman who married an American citizen became an American citizen herself, and the naturalization of the parent carried with it the naturalization of minor children dwelling in the United States.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR: — You have referred to me an application for appointment to the office of notary public, and request my opinion as to whether the claim to citizenship set forth by the applicant is valid. In his application the applicant gives his date of birth as August 12, 1899, and his place of birth as Cork, Ireland. He bases his claim to United States citizenship on the ground that his mother married his stepfather, who was and is a citizen of the United States, the marriage taking place in 1905 when the applicant was a minor.

Prior to 1922, an alien woman who married an American citizen and who might lawfully become naturalized thereby became an American citizen herself, and the naturalization of the parent carried with it the naturalization of minor children dwelling in the United States. It does not appear, first, whether or not the father of the applicant was living at the time of the marriage of his mother to the stepfather, or, second, whether the applicant came to the United States and became a permanent resident here during his minority. If the applicant's father was living at the time of the mother's second marriage, the citizenship of the applicant would follow that of his own father; but if the father was deceased at the time of said marriage and the applicant became a permanent resident of the United States during his minority, he undoubtedly became an American citizen by virtue of the marriage of his mother to an American citizen, provided she did not again change her citizenship during the remaining period of the applicant's minority.

Very truly yours,

JAY R. BENTON, *Attorney General.*

State Retirement Association — Interest.

Interest may not be allowed on money paid in by a member of the State Retirement Association for any period after the date of cessation of employment.

JULY 27, 1925.

Board of Retirement.

GENTLEMEN: — You request my opinion as to whether, if a member of the State Retirement Association resigns from his employment between interest dates, as fixed by G. L., c. 32, § 1, before becoming entitled to a pension, but does not withdraw his payments until a subsequent interest date, there is authority for paying interest figured under the statute up to such subsequent interest date.

The provision in regard to refunding payments in case of resignation is contained in G. L., c. 32, § 5 (2) A (a), and reads as follows: —

“Should a member of the association enter a position in the service of the commonwealth not covered by sections one to five, inclusive, or cease to be an employee of the commonwealth for any cause other than death, or for the purpose of entering the service of the public schools as defined in section six, before becoming entitled to a pension, there shall be refunded to him all the money paid in by him under section four (2) A, with such interest as shall have been earned thereon.”

In view of the provision that the interest to be paid shall be “such interest as shall have been earned thereon,” there is, in my opinion, no

authority for paying interest covering any period subsequent to the date of cessation of employment. Accordingly, I answer your question in the negative.

Very truly yours,
JAY R. BENTON, *Attorney General*.

*Notaries Public — Women — Re-registration — Mass. Const. Amend.
LXIX.*

Women notaries public are required to re-register when their names are changed. Until the Legislature has established a fee for such re-registration none can be required.

JULY 30, 1925.

MR. WILLIAM L. REED, *Executive Secretary*.

DEAR SIR: — Your letter of July 24th reads as follows: —

“On April 13, 1925, your department advised me informally that Mass. Const. Amend. LXIX § 2, which relates to the change of name by a woman holding certain commissions, is now in effect, and that, pending action by the Legislature, such a woman may re-register as therein provided, without payment of a fee.

Acting under authority of His Excellency the Governor and the Council, I respectfully request your opinion thereon, with special regard to the limitations of the amendment as applying to various commissions which may be held by women.”

Mass. Const. Amend. LXIX, which is now in force, reads as follows: —

“SECTION 1. No person shall be deemed to be ineligible to hold state, county or municipal office by reason of sex.

SECTION 2. Article IV of the articles of amendment of the constitution of the commonwealth, as amended by article LVII of said amendments, is hereby further amended by striking out the words ‘Change of name shall render the commission void, but shall not prevent reappointment under the new name,’ and inserting in place thereof the following words: — Upon the change of name of any woman, she shall re-register under her new name and shall pay such fee therefor as shall be established by the general court.”

The only office to which section 2 of the amendment relates is that of a notary public. Its provisions are not applicable to women holding other offices or commissions.

Since the adoption of the amendment by the voters at the election in November, 1924, the Legislature has not voted with relation to the establishment of a fee for re-registration. I am of the opinion that the failure of the Legislature to establish the fee does not prevent the amendment from taking effect as to its main purpose. In view of the mandatory language of the amendment, I am of the opinion that it is self-executing so far as to require the re-registration of a woman notary public upon a change being made in her name, and that in the absence of legislative action establishing a fee for such re-registration under her new name, she cannot be required to pay one.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Police Commissioner for the City of Boston — Powers — Removal of Police Officer.

The removal of a police officer in the city of Boston is subject to the requirements of G. L., c. 31, § 44, whereby he is entitled to a public hearing.

The trial board established by St. 1906, c. 291, § 10, is a merely advisory board whose function is to report its findings to the Commissioner for final disposition.

AUG. 4, 1925.

HON. HERBERT A. WILSON, *Police Commissioner for the City of Boston.*

DEAR SIR:— You ask my opinion on the following two questions:—

“1st. Is it within my power to dismiss a police officer under G. L., c. 31, without a hearing, thereby imposing the duty upon him of requesting a *public* hearing within the period specified under the statute?

2d. Am I obliged to grant a *public* hearing to one whom I have dismissed after a hearing and finding of ‘guilty’ before a trial board, and with which finding I am in accord?”

These questions involve the construction of St. 1906, c. 291, § 10, and of G. L., c. 31, § 44, which are respectively as follows:—

St. 1906, c. 291, § 10:

“The police commissioner shall have authority to appoint, establish and organize the police of said city and to make all needful rules and regulations for its efficiency. He shall from time to time appoint a trial board, to be composed of three captains of police, to hear the evidence in such complaints against members of the force as the commissioner may deem advisable to refer to said board. Said trial board shall report its findings to said commissioner who may review the same and take such action thereon as he may deem advisable. Except as otherwise provided herein all the powers and duties now conferred or imposed by law upon the board of police of the city of Boston, are hereby conferred and imposed upon said police commissioner. All licenses issued by said police commissioner shall be signed by him and recorded in his office.”

G. L., c. 31, § 44:

“Except as provided in section twenty-six, every police officer holding an office classified under the civil service rules, in any city, whether for a definite or stated term, or otherwise, shall hold such office continuously during good behavior, and shall not be removed therefrom, lowered in rank or compensation, or suspended, or without his consent transferred from such office or employment to any other, except for just cause and for reasons specifically given in writing by the removing officer or board within twenty-four hours after such removal, suspension, transfer or lowering in rank or compensation; and every police officer sought to be so removed, lowered in rank or compensation, suspended or transferred shall be entitled to a public hearing, the same in all respects as provided in the preceding section, including notice of decision, reinstatement and record of proceedings.”

By said section 10 all the powers and duties then conferred or imposed by law upon the board of police of the city of Boston, except as therein otherwise provided, were thereby conferred and imposed upon the police commissioner.

St. 1885, c. 323, § 2, conferred upon and vested in the board of police all the powers then vested in the board of police commissioners in the city of Boston, except as otherwise thereby provided.

St. 1878, c. 244, § 3, authorized the board of police commissioners to remove police officers for cause. Said section is as follows:—

“The said board of police commissioners shall appoint a superintendent of police, a deputy superintendent of police, and such number of captains, inspectors, sergeants, patrolmen, clerks and other officers as the city council may from time to time by ordinance prescribe: *provided, however*, that the appointment of the superintendent of police, the deputy superintendent of police and the captains of police shall be subject to approval by the mayor of the city. Any of said officers or members of the department may be removed by the board for cause. The compensation of the commissioners and the officers of each grade shall be fixed from time to time by ordinances of the city council.”

Prior to the enactment of St. 1906, c. 291, St. 1906, c. 210, entitled “An Act relative to removals and suspensions from office and employment of police officers in the classified civil service,” had been enacted, providing as follows:—

“SECTION 1. Every police officer now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, in any city, and whether appointed for a definite or stated term, or otherwise, shall hold such office continuously during good behavior, and shall not be removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other, except for just cause and for reasons specifically given in writing by the removing officer or board.

SECTION 2. The provisions of section two of chapter three hundred and fourteen of the acts of the year nineteen hundred and four, and of acts in amendment thereof, shall apply to the police officers designated in section one hereof.

SECTION 3. This act shall take effect upon its passage.”

St. 1904, c. 314, § 2, referred to in section 2 above, is as follows:—

“The person sought to be removed, suspended, lowered or transferred shall be notified of the proposed action and shall be furnished with a copy of the reasons required to be given by section one, and shall, if he so requests in writing, be given a public hearing, and be allowed to answer the charges preferred against him either personally or by counsel. A copy of such reasons, notice and answer and of the order of removal, suspension or transfer shall be made a matter of public record.”

It was held in *Logan v. Mayor and Aldermen of Lawrence*, 201 Mass. 506, 511, that St. 1906, c. 210, must be deemed to be in amendment of all city charters whose provisions it modifies. Regarding the statute the court says, in part:—

“This was enacted as a part of the broad scheme designed to bring about a reform in the civil service not only of the Commonwealth itself but quite as much of its cities and towns. See R. L. c. 19, and the many acts passed in amendment and extension thereof. This body of laws was intended to be of general application, except as restricted by R. L.

c. 19, § 36, and St. 1902, c. 544, § 3. To say that any city was to be exempted from the provisions of either the whole or any particular part of this legislation would be to frustrate the manifest intent of the Legislature. Almost all of the cities of the Commonwealth have in their charters provisions similar in kind to those which appear in the charter of the city of Lawrence, with reference both to the police department and to other branches of the civil service. General legislation like that which we are now considering must be deemed to be in amendment of all those charters, so far as it modifies their provisions, . . .”

The office of Boston police was one then classified under the civil service rules. It is my opinion, therefore, that, at the time of the enactment of St. 1906, c. 291, St. 1906, c. 210, was applicable to the removal of police officers in the city of Boston, and that the power of the board of police of the city of Boston had been accordingly restricted.

The trial board established by St. 1906, c. 291, § 10, is a merely advisory board whose function is to report its findings to the Commissioner for final disposition. Concerning this trial board the court said in *Welch v. O'Meara*, 195 Mass. 541, 542, as follows:—

“This trial board is to act only upon such complaints as the commissioner deems it advisable to refer to it. This provision shows that the commissioner may hear complaints and act upon them without such a reference. This board cannot finally dispose of a case, but it can only report its findings to the commissioner. The right of the commissioner to ‘review the same and take such action thereon as he may deem advisable’ includes the right to set them aside for good cause, and to make others upon a proper hearing, and then to take further action. The power to hear and determine everything under such complaints was given to the board of police by the former statute, and by this section it is given to the police commissioner. The trial board is a tribunal appointed to relieve the police commissioner by hearing the evidence and finding the facts in such cases as he thinks it best to refer to it.”

There is, in my judgment, nothing inconsistent between the provision in chapter 291, section 10, authorizing the Police Commissioner to appoint a trial board and to review its findings and take such action thereon as he may deem advisable, and the provisions in chapter 210 imposing conditions upon the removal and suspension of police officers.

Gen. St. 1918, c. 247, combined and revised the provisions of St. 1904, c. 314, and St. 1906, c. 210. This act is codified in G. L., c. 31, §§ 43, 44 and 45.

It is my opinion, therefore, that the removal of police officers in the city of Boston is subject to the requirements of G. L., c. 31, § 44. See *Gordon v. Chief of Police of Cambridge*, 244 Mass. 491; *Mayor of Medford v. Judge of District Court*, 249 Mass. 465.

Accordingly, I reply specifically to your questions as follows:—

1. It is within your power to remove a police officer under G. L., c. 31, § 44, without a hearing other than the hearing provided for by section 44, provided that the requirements of said section are complied with.

2. In accordance with the requirements of section 44 you are obliged to give a public hearing to a police officer whom you have sought to remove, the method of such hearing being as provided in G. L., c. 31, § 43.

There may be some question as to the manner and form of the action necessary to accomplish a removal under section 44. Prior to the act

of 1918 the first step was the giving of notice of the proposed action and the furnishing of a copy of the reasons therefor. Under this law a notice of discharge has been held to be in violation of the civil service laws. *Tucker v. Boston*, 223 Mass. 478; *Thomas v. Municipal Council of Lowell*, 227 Mass. 116. The requirement of notice, however, does not appear in the 1918 statute, and in *Gordon v. Chief of Police of Cambridge*, *supra*, under the new law, the action of the respondent in removing the petitioner from the police department and causing to be delivered to him within twenty-four hours a written notice to that effect, with certain specific reasons for his action, was held to be in compliance with the statute. Clearly, however, such removal cannot be effective until the time has elapsed within which the officer may request a public hearing, or if such hearing is requested, until the hearing is held and a decision made. It seems to me that it would be safe to follow the procedure in the Gordon case, which was approved by the full court.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Education — State Reimbursement — Teachers' Salaries.

Towns are not entitled, under G. L., c. 70, § 1, to State reimbursement for salaries paid teachers on sabbatical leave.

AUG. 7, 1925.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You request my opinion whether certain towns which grant sabbatical leave on half pay to teachers who have served six years, such leave of absence being for the purpose of study under the direction of the superintendents of schools, are entitled to part reimbursement by the State, under G. L., c. 70, for the salary so paid.

I assume that the salaries are paid for services rendered, and that the towns in question are authorized to pay them. See *Averell v. Newburyport*, 241 Mass. 333; *Whittaker v. Salem*, 216 Mass. 483.

G. L., c. 70, § 1 (St. 1923, c. 145), provides for part reimbursement "for salaries paid to teachers . . . for services in the public day schools rendered during the year ending the preceding June thirtieth."

In my opinion, the words "salaries paid to teachers . . . for services in the public day schools" mean salaries for services as teachers in the schools, and not for services which consist not in teaching but in preparation for teaching in the future.

Accordingly, I answer your question in the negative.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Governor and Council — Compensation for Travel — "Abode."

The word "abode," as used in G. L., c. 6, § 4, providing that the Lieutenant Governor and each member of the Council shall be paid for travel from his abode and return his actual expenses as certified by him, means home or domicil and not place of temporary sojourn. The amount to be paid is the amount actually expended for travel and not an arbitrary mileage.

AUG. 10, 1925.

Committee on Finance, Accounts and Warrants of the Executive Council.

GENTLEMEN:— You have asked my opinion as to the construction of G. L., c. 6, § 4, providing for the compensation of the Lieutenant Gover-

nor and each member of the Council for travel "from his abode to the place of sitting of the governor and council, and return." You ask particularly whether the "abode" of a member of the Council under this provision means his home or includes a place of sojourn or temporary residence, and what is the basis for determining the amount which he is to receive for travel.

G. L., c. 6, § 4, is as follows:—

"The lieutenant governor and each member of the council shall be paid for his travel from his abode to the place of sitting of the governor and council, and return, such amounts as he certifies in writing that he has actually expended therefor in the performance of his official duties."

The word "abode" is well defined as "the place where a person dwells." *Dorsey v. Brigham*, 177 Ill. 250; *Bouvier's Law Dictionary*. It is the place of a person's residence, according to the ordinary meaning of that word. "Abode" and "residence" have been used as synonymous in several of the opinions of our court. *Viles v. Waltham*, 157 Mass. 542; *Barron v. Boston*, 187 Mass. 168; *Emery v. Emery*, 218 Mass. 227.

"Domicil" or "home," on the one hand, and "residence," on the other hand, have frequently a different meaning. *Harvard College v. Gore*, 5 Pick. 370; *Briggs v. Rochester*, 16 Gray, 337, 340; *Thayer v. Boston*, 124 Mass. 132. But in our Constitution and statutes the word "residence" is often used as meaning "home" or "domicil." *Lee v. Boston*, 2 Gray, 484; *Briggs v. Rochester*, *supra*.

In Mass. Const., pt 2nd, c. I, § II, art. II, it is provided:—

"... And to remove all doubts concerning the meaning of the word 'inhabitant' in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this state, in that town, district, or plantation where he dwelleth, or hath his home. . . ."

Thus, in the Constitution the place where a man dwells or has his abode is referred to as synonymous with his home. See *Putnam v. Johnson*, 10 Mass. 488, 499, 500.

So in the statutes the word "abode" is used with the apparent meaning of "home." The word "abode" is used in providing for payment for travel to Councillors, to members of the General Court (G. L., c. 3, § 9), and to certain legislative officials (G. L., c. 3, § 20), while the word "home" is used in precisely the same manner in providing for payment for travel to jurors (G. L., c. 262, § 25) and to witnesses (G. L., c. 262, § 29). In an opinion of a former Attorney General on certain questions as to payment for travel to members of the General Court the words "place of abode" and "home" were treated, without discussion, as synonymous. I Op. Atty. Gen., 42.

Accordingly, I am of opinion that the word "abode" as used in G. L., c. 6, § 4, means "home" or "domicil" and not a place of temporary sojourn different from the home.

The amount which the statute provides shall be paid for a member's travel is the amount actually expended, as certified by the member in writing. He is not entitled to an arbitrary sum fixed as mileage nor to an amount which he might theoretically have expended by some

particular mode of travel, but only to the amount which he has in fact expended upon travel between his home and the place of sitting of the Governor and Council.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Inspection of Food — Label — Weight of Loaves of Bread.

Under G. L., c. 94, § 8, and the rules and regulations of the Director of Standards, requiring the weight of loaves of bread and the name of the manufacturer to be plainly stated on a wrapper or label, the wrapper or label may also contain any legend or design which does not obscure the required information and is actually separate and distinct.

AUG. 14, 1925.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — You have asked me to advise you as to the construction of the law relative to printed matter on labels indicating the weight of loaves of bread.

G. L., c. 94, § 8, as amended, provides: —

“Unit weights, as defined in the preceding section, shall not apply to rolls or to fancy bread weighing less than four ounces, nor to loaves bearing in plain position a plain statement of the weight of the loaf and the name of the manufacturer thereof. Such information shall be stated in case of wrapped bread, upon the wrapper of each loaf, and in the case of unwrapped bread by means of a pan impression or other mechanical means or upon a label not larger than one by one and three quarters inches nor smaller than one by one and one half inches. No label, attached to an unwrapped loaf, shall be larger than provided herein, nor shall any such label be affixed in any manner or with any gum or paste which is unsanitary or unwholesome. . . .”

Section 9 provides that the Director of Standards shall prescribe such rules and regulations as are necessary to enforce section 8.

The Director of Standards has prescribed rules and regulations under authority of section 9. The fourth of these reads: —

“The phrase ‘plain statement in plain position’ shall be construed as requiring that the statement of weight and the name of the manufacturer shall be plain and conspicuous, and shall not be a part of or obscured by any legend or design. The statement shall be printed upon the wrapper or label in plain, heavy Gothic capital letters and figures not less than 5/32 inch in height, and shall be so placed as to appear upon the top or side and not upon the end or bottom of the loaf. Unless otherwise specifically approved by the Director of Standards, red, blue or black ink shall be employed in printing the required statement.”

There is nothing in the statute or in the rules and regulations which prohibits the use upon the wrapper or label used in connection with a loaf of bread of any words or design so placed that the required statement of the weight of the loaf and the name of the manufacturer is not obscured by such words or design and is not included as a part of such words or design. The use of printed words or a design, such as a trade mark or a union label, placed upon a separate line from the words giving the weight and the name of the manufacturer, is not pro-

hibited by the statutes or rules and regulations if they do not in any given instance, as a matter of fact, obscure the required words and are actually separate and distinct from them, both physically and as to their meaning when read.

Very truly yours,
JAY R. BENTON, *Attorney General.*

Boston Retirement System—Clerk of the Municipal Court of the Roxbury District.

A clerk of court is a public officer and not a mere employee. A position whose tenure is fixed and limited is not a permanent position. Under the statutes establishing the Boston Retirement System a clerk of court, having a limited term of office, is not a regular and permanent employee, and is not a member of the system subject to retirement at the age of seventy.

AUG. 25, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR:— You have forwarded to me a notice from the Boston Retirement Board stating that at a meeting of the board held July 15, 1925, in accordance with the provisions of St. 1922, c. 521, § 9, “the retirement from active service of Maurice J. O’Connell, clerk of the Municipal Court of the Roxbury District of the City of Boston, was approved, to become effective at close of business, Friday, July 31, 1925.” It appears that Mr. O’Connell refuses to accept the retirement. You ask me to advise you whether you should appoint a successor.

G. L., c. 218, § 8, so far as material, is as follows:—

“Each district court, except the district courts of Nantucket and Dukes County, shall have a clerk, who shall be appointed by the governor, with the advice and consent of the council, for five years . . .”

The power of appointment includes, of course, the power to fill vacancies. The question is whether there is now a vacancy in the office referred to. G. L., c. 30, §§ 8 and 10; *Attorney General v. Loomis*, 225 Mass. 372; *Donovan v. Board of Labor and Industries*, 225 Mass. 410. Cf. IV Op. Atty. Gen. 638.

The Boston Retirement Board was created by St. 1922, c. 521, which established the Boston retirement system. This act has since been several times amended. See St. 1923, c. 381, § 3; St. 1924, c. 251; St. 1925, cc. 18 and 90. Section 5 of said chapter 521 provides that “all persons who are employees on the date when this retirement system is established may become members of the system,” under certain conditions as therein stated. It also provides as follows:—

“On and after January first, nineteen hundred and twenty-six, the services of an employee, not a veteran of the Civil war, of the Spanish war or Philippine insurrection or the World war as defined in section fifty-six of chapter thirty-two of the General Laws, or not a member of the judiciary or not a teacher, who attains or has attained the age of seventy and who is not a member of this system, shall terminate forthwith.”

Section 9, as amended by St. 1924, c. 251, provides, in part, as follows:—

"A member of this retirement system who shall have attained age seventy shall be retired for superannuation within thirty days, except members of the judiciary, heads of departments and members of boards in charge of departments, and except that a school teacher shall be retired on the thirty-first day of August following his attaining the age of seventy."

Said St. 1924, c. 251, § 4, also contains the following provision:—

"Any head of a city department or member of a board in charge of a city department who has declined membership in the Boston retirement system may be admitted to membership therein upon written application to the Boston retirement board at any time within sixty days after this act takes effect, and shall, after being so admitted, receive credit for prior service notwithstanding any provision of said chapter five hundred and twenty-one."

The word "employee" is defined by section 2, as amended by St. 1923, c. 381, § 3, and by St. 1925, c. 18, as follows:—

"'Employee' shall mean any regular and permanent employee of the city of Boston or county of Suffolk (except teachers who, on September first, nineteen hundred and twenty-three, are employed by the city of Boston and are members of the state teachers' retirement association) whose employment is such as to require that his time be devoted to the service of the city or county, or both, in each year during one half or more of the ordinary working hours of a city employee, or any regular and permanent employee of this commonwealth whose compensation is wholly paid by the city of Boston or by the county of Suffolk, and the working superintendent and his employees of the index commissioners of the county of Suffolk."

By St. 1925, c. 90, §§ 2 and 3, employees who had not then become members of the retirement system were given a further opportunity, by making written application, to become members thereof. I understand that following the passage of this act Mr. O'Connell made such application and was recorded as a member prior to the action of the board on July 15th, and that he had reached the age of seventy years before the action of the board. Unless, therefore, Mr. O'Connell comes within the excepting clause of section 9, as amended, or unless his admission to membership was not authorized by the statute, a vacancy in the office now exists which should be filled by a new appointment.

In my judgment, a clerk of court is not a member of the judiciary nor the head of a department. A "member of the judiciary" or "judicial officer" is a person possessing judicial power. *People v. Wells*, 2 Cal. 198, 203; *Cleveland, etc. Ry. Co. v. People*, 212 Ill. 638; *Settle v. Van Evrea*, 49 N. Y. 280, 284. Cf. *Murphy v. Mayor of Boston*, 220 Mass. 73, 75. A clerk of court is a ministerial officer of the court, subject to the direction of the court in the performance of his duties. *Case of Supervisors of Election*, 114 Mass. 247, 250; *Cambridge Savings Bank v. Clerk of Courts*, 243 Mass. 424, 427. He possesses no judicial power. Nor is the clerk of a district court the head of a department in the sense in which that term is used in the statute. A district court is not such a department and certainly the clerk is not the head of it.

The remaining question, therefore, is whether Mr. O'Connell, as clerk of the Municipal Court for the Roxbury District, became a member of

the system by virtue of his application for membership; and that depends upon whether he was at the time an employee within the meaning of that word as used in the statute. If he was not such an employee, in my opinion he did not become a member of the system and was not subject to retirement although he had made written application for such membership.

"Employee," according to the definition, means "any regular and permanent employee of the city of Boston or county of Suffolk (with exceptions not material) . . . or any regular and permanent employee of this commonwealth whose compensation is wholly paid by the city of Boston or by the county of Suffolk . . ." The compensation of the clerk of the Municipal Court for the Roxbury District is wholly paid by the County of Suffolk. See G. L., c. 218, § 74. The question, therefore, whether Mr. O'Connell has been properly retired and whether there is a vacancy in the office of the clerk depends upon whether or not he was a regular and permanent employee either of the city, the county or the State.

The word "employee" is ambiguous. It may be used to include any person who receives pay for his services, or it may be used in a restrictive sense so as to exclude officers who exercise some part of the sovereign power. *Brown v. Russell*, 166 Mass. 14, 26; *Attorney General v. Drohan*, 169 Mass. 534; *Attorney General v. Tillinghast*, 203 Mass. 539. In an opinion rendered by this department to the Commissioner of Public Works, under date of May 8, 1920 (V Op. Atty. Gen. 547), in response to an inquiry whether or not the Commissioner and his Associate Commissioners were members of the State Retirement Association, it was held that the word "employee," as used in the State retirement act, did not include officers appointed by the Governor, with the advice and consent of the Council, for short and definite terms of a few years, and that the Commissioners, therefore, were not subject to the provisions of the act. V Op. Atty. Gen. 576. Cf. III Op. Atty. Gen. 460; IV Op. Atty. Gen. 54; 105.

Following this opinion the Legislature enacted a statute, St. 1921, c. 439, amending the State retirement law by adding provisions to the effect that "an official under fifty-five years of age when appointed or reappointed by the governor for a fixed term of years, may, if his sole employment is in the service of the commonwealth, become a member of the association by making written application for membership . . .," and that "officials in the service of the commonwealth who are members of the state retirement association when this act takes effect, may, upon written application to the state board of retirement . . . withdraw their membership . . ."

The office of clerk of a court is, in my opinion, a public office as opposed to a public employment. In *Attorney General v. Tillinghast*, 203 Mass. 539, it was held that an assistant auditor of a city was a public officer, having entrusted to him some portion of the sovereign authority of the State, and not a mere employee. Important tests to determine the nature of a position were said to be whether its duration is defined by law or by agreement, whether it is created by appointment or election, on the one hand, or merely by contract of employment, on the other, and whether the compensation is fixed by law or by agreement. Under each of these tests the office of clerk of a court is a public office. See *People v. Brady*, 275 Ill. 261; *State v. Smith*, 153 La. 578.

Moreover, an employee, to come within the provisions of the statute, must be a "regular and permanent employee." "Permanent" means lasting or intended to last indefinitely. Century Dictionary. "Permanent employment" means employment for an indefinite time, which may be severed by either party. *Carnig v. Carr*, 167 Mass. 544; *Lord v. Goldberg*, 81 Cal. 596; *Sullivan v. Detroit, etc. Ry.*, 135 Mich. 661. A position whose tenure is fixed and limited by statute, in my opinion, cannot be said to be a permanent position.

St. 1921, c. 439, enacted after the Attorney General's opinion rendered in 1920, accepted the construction of the retirement act given in that opinion and modified the previous law by permitting officials to become members of the State Retirement Association and to withdraw their membership. By the amendment to the Boston retirement law in St. 1924, c. 251, certain city officials are permitted to become members of the Boston retirement system. There is nothing in the statutes, however, which authorizes a clerk of a district court to become such a member.

It is my opinion that Mr. O'Connell was not an employee within the meaning of that word as defined in the Boston retirement act, that he did not become a member of the Boston retirement system, and that his services were not terminated under the provisions of that law. I advise Your Excellency, therefore, that there is no vacancy in the office of clerk of the Municipal Court for the Roxbury District of the City of Boston to be filled by appointment at the present time.

In giving this opinion I ought to point out that the question in another aspect involves a possible or probable controversy between the clerk and the county with respect to the payment of salary, and that this judicial question ought not to be decided without trial and argument, or prejudiced by my response to Your Excellency's inquiry regarding your power to make an appointment to the office of clerk. See *Opinion of the Justices*, 122 Mass. 600; Attorney General's Report, 1922, p. 65.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Fire Prevention Commissioner for the Metropolitan District — State Fire Marshal — Fire Commissioner of the City of Boston — Delegation of Power — Revocation of Authority.

The delegation of power by the Fire Prevention Commissioner for the Metropolitan District to the fire commissioner and his assistants of the city of Boston, under authority of St. 1914, c. 795, § 4, not having been revoked or modified, either by the Fire Prevention Commissioner or by the State Fire Marshal, who succeeded him under Gen. St. 1919, c. 350, whereby the powers of the Commissioner were transferred to the Department of Public Safety, is still in full force and effect.

AUG. 31, 1925.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You request my opinion on the following question: —

"Is the delegation of power by the Fire Prevention Commissioner on the tenth day of September, 1915, to the fire commissioner of the city of Boston still in effect, said delegation not having been revoked or modified thereafter by the Fire Prevention Commissioner nor by the State Fire Marshal."

St. 1914, c. 795, § 4, invested the Fire Prevention Commissioner for the Metropolitan District of Massachusetts with certain powers, as follows:—

“Power is hereby given to the commissioner to delegate the granting and issuing of any licenses or permits authorized by this act or the carrying out of any lawful rule, order or regulation of the commissioner or any inspection required under this act, to the head of the fire department or to any other designated officer in any city or town in the metropolitan district.”

By virtue of the authority thus given, the then Fire Prevention Commissioner for the Metropolitan District, on September 10, 1915, granted the following delegation of power to the fire commissioner and his assistants of the city of Boston.

“I, John A. O’Keefe, duly appointed and qualified Fire Prevention Commissioner for the Metropolitan District of Massachusetts, by virtue of the authority vested in me by Section four of Chapter seven hundred and ninety-five of the Acts of the year nineteen hundred and fourteen, do hereby delegate to the Fire Commissioner and his assistants of the City of Boston, the following powers conferred on me by said Chapter, to be exercised by them within the said City of Boston, in accordance with the rules and regulations now established or hereafter to be established by the Fire Prevention Commissioner in reference severally to said powers. This delegation of power shall continue in force until a revocation thereof shall have been filed with the City Clerk of the said City of Boston.

1. The right to enter at any reasonable hour any building or other premises, or any ship or vessel, to make inspection, or in furtherance of the purpose of any provision of any law, ordinance, or by-law, or of any rule or order of said Fire Prevention Commissioner, without being held, or being deemed to be guilty of trespass; provided, that there is reason to suspect the existence of circumstances dangerous to the public safety as a fire menace.

2. The right to inspect and regulate in accordance with the rules established by the Fire Prevention Commissioner, the keeping, storage, use, manufacture, sale, handling, transportation, or other disposition, of gunpowder, dynamite, nitroglycerine, camphene, or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, firecrackers, or any other explosives, subject to the authority of the Building Commissioner to approve building construction.

3. The right to issue permits for the keeping, storage, use, sale or transportation of volatile inflammable fluids in quantity not exceeding one hundred and thirty gallons for private use, if said fluids are not to be used in connection with an unlicensed garage.

4. The right to approve or disapprove solely from considerations of fire hazard licenses for the keeping, storage, use, manufacture or sale of volatile inflammable fluids issued by the Board of Mayor and Street Commissioner, except so far as the Building Commissioner has authority to approve construction.

5. The right to inspect and regulate in accordance with the rules established by the Fire Prevention Commissioner, paint stores and paint shops within 50 feet of a dwelling-house.

6. The right to issue permits for the keeping, storage, use or sale of non-volatile inflammable fluids to the amount of two thousand five hundred gallons, provided a notice of the issuance of a permit which allows a total quantity in excess of 250 gallons at a certain location, is mailed at the time of issuance to the adjoining property owners.

7. The right to issue any permit required by Section 7 of said Chapter 795.

8. The right to issue all permits and exercise all authority, vested in the Fire Commissioner in the regulations now or hereafter adopted by the Fire Prevention Commissioner.

9. The right to require the removal and destruction of any heap or collection of refuse or débris that in his opinion may become dangerous as a fire menace, and all other powers conferred by Section 8 of said Chapter.

10. The right to require the keeping of portable fire extinguishing devices on any premises by the occupant thereof, and to prescribe the number and situation of such devices.

11. The right to cause obstacles that may interfere with the means of exit to be removed from doors, halls, stairways and fire escapes.

12. The right to order the remedying of any condition found to exist in or about any building or other premises, or any ship or vessel, in violation of any law, ordinance, rule or order in respect to fires and the prevention of fires.

13. The right to require at any time and regulate fire drills in theatres, public places of amusement, and public and private schools.

14. The right to require the enforcement of rules, orders and regulations of the Fire Prevention Commissioner."

In this delegation of power it is expressly set forth that "this delegation of power shall continue in force until a revocation thereof shall have been filed with the City Clerk of the said City of Boston." You state that this delegation of power has not been revoked or modified either by the Fire Prevention Commissioner or by the State Fire Marshal, to whose powers and duties he succeeded.

The office of fire prevention commissioner was abolished by Gen. St. 1919, c. 350, but the powers of the commissioner were expressly transferred to the Department of Public Safety established by the act, and particularly to the State Fire Marshal, an official of that department. Section 99 provides, in part, as follows:—

"All the rights, powers, duties and obligations of the district police, said boards and said offices are hereby transferred to, and shall hereafter be exercised and performed by the department of public safety, established by this act, which shall be the lawful successor of the district police, and of said boards and offices."

Among the offices referred to is that of fire prevention commissioner. By section 101 a Division of Fire Prevention was created in the Department of Public Safety, in charge of a director known as the State Fire Marshal, and by section 104 he succeeded to the duties of the former fire prevention commissioner, under the supervision of the Commissioner of Public Safety. It is expressly provided by section 6 that "all orders, rules and regulations made by any officer, board, commission or other governmental organization or agency which is abolished by this act shall remain in full force and effect until revoked or modified in accordance

with law by the department which succeeds to the rights, powers, duties and obligations of such governmental organization or agency."

The precise question whether a delegation of power by the fire prevention commissioner to officers of cities and towns in the metropolitan district, unrevoked, remained in force after the passage of Gen. St. 1919, c. 350, was decided in the case of *Foss v. Wexler*, 242 Mass. 277, in which the court held that a gasoline license issued by the board of street commissioners of Boston in 1920 under a delegated authority from the Fire Prevention Commissioner for the Metropolitan District was valid, notwithstanding Gen. St. 1919, c. 350. On the authority of this case it is my opinion and I advise you that the delegation of power by the Fire Prevention Commissioner, dated September 10, 1915, to the fire commissioner of the city of Boston, not having been revoked, is still in full force and effect.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Boston Elevated Railway Company — Board of Trustees — Trustee of an Estate holding Shares of the Capital Stock of the Company — Eligibility to Appointment as a Member of the Board of Trustees — Ownership of Stock.

A trustee of an estate holding shares of the capital stock of the Boston Elevated Railway Company is ineligible to qualify as a member of the board of trustees of the company until he divests himself of such ownership.

A trustee of an estate holding shares of capital stock in a corporation is vested with the legal title and with many of the rights and privileges pertaining to full ownership, and it is the duty of such trustee to act solely for the benefit of the beneficial owner of the stock.

SEPT. 9, 1925.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR: — You have orally requested my opinion as to whether a person who is one of several trustees of an estate which includes among its assets shares of stock of the Boston Elevated Railway Company may qualify as a trustee of that company under Spec. St. 1918, c. 159. Section 1 of that act provides, in part: —

"The board of trustees of the Boston Elevated Railway Company is hereby created, to consist of five persons to be appointed by the governor, with the advice and consent of the council. The persons so appointed . . . shall own no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased or operated by it."

The question is whether a person who holds shares of stock in the above described capacity is an owner within the purview of the act.

A trustee of an estate (and, if there are several trustees, each trustee) holding shares of stock in a corporation is vested with the legal title thereof and with many of the substantial rights and privileges pertaining to full ownership therein. Such trustee has a right, for example, to vote for directors at a stockholders' meeting of a corporation. It is his duty to act solely for the benefit and advantage of the beneficial owner of the stock. In the case of *Keith v. Maguire*, 170 Mass. 210, which arose under

a statute requiring that the order of notice issued in foreclosure proceedings upon chattels held under a lien should be served upon the "owner" of the chattels, the order of notice was served upon the bailor of the chattels and not upon the real owner. The court in that case said:

"The word 'owner' is not a technical term. It is not confined to the person who has the absolute right in a chattel, but also applies to the person who has the possession and control of it."

See, also, *Downey v. Bay State St. Ry.*, 225 Mass. 281.

The word "owner" in the statute relative to mechanics' liens has been construed to include the equitable owner as well as the person who holds the legal title. *Carey-Lombard Lumber Co. v. Bierbauer*, 76 Minn. 434; *Belmont v. Smith*, 8 N. Y. Super. Ct. (1 Duer) 675, 678.

It was undoubtedly the intention of the Legislature by the enactment of the foregoing provision that the public trustees of the Boston Elevated Railway Company, in the exercise of their functions as such, should be free and untrammelled from all personal or private considerations in the management of the company. It is conceivable that if a person who held shares of stock of the company as a private trustee of an estate were permitted also to act as a public trustee his duties as a private trustee holding corporate stock might conflict with his duty as trustee in the public management and operation of the corporation, resulting in a situation not wholly free from embarrassment and suspicion.

I am accordingly of the opinion that a person who holds shares of stock of the Boston Elevated Railway Company as a trustee or co-trustee of an estate is an owner of the stock of the company and is not eligible to qualify as a trustee under Spec. St. 1918, c. 159, unless and until he divests himself of the ownership of such stock.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Insurance — Contracts of Pure Endowment.

A corporation which issues a contract of pure endowment is to be considered a life insurance company, under G. L., c. 175, § 118.

If such a corporation is a foreign one and is not incorporated under the laws of its home State for the transaction of life insurance, it may not be admitted to do business in this Commonwealth, under G. L., c. 175, § 153.

SEPT. 15, 1925.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You have requested my opinion upon the three following questions relative to a form of contract described as a bond, a copy of which you have submitted:

"1. Does the said bond constitute a contract of insurance within the definition laid down in G. L., c. 175, § 2?

2. Is the corporation, by reason of issuing this bond, to be considered a life insurance company as defined in G. L., c. 175, § 118?

3. If you answer the preceding question in the affirmative, may this corporation be lawfully admitted to transact business in this Commonwealth as a life insurance company under section 153 of said chapter if it is not incorporated as an insurance company under the laws of the state of its domicile?"

1. The bond is in effect a contract of pure endowment, with certain modes of deferred payment by way of annuities and endowments, of which the holder, at his option, may avail himself at the maturity of the instrument instead of taking the principal sum in cash, if he does not choose so to take it. See *Curtis v. New York Life Ins. Co.*, 217 Mass. 47.

I answer your first question in the negative.

2. It was decided in *Curtis v. New York Life Ins. Co.*, 217 Mass. 47, that a contract of pure endowment, although not within the definition of "a contract of insurance," as set forth in the statutes and now contained in G. L., c. 175, § 2, as amended, was yet a lawful contract and one which an insurance company was not prohibited from making. Since that decision the Legislature has specifically provided that both domestic and foreign life insurance companies may make pure endowment contracts. G. L., c. 175, §§ 119 and 152, as amended. Section 118, as amended, provides:—

"*Definition of life company.* All companies doing business in the commonwealth under any charter, compact, agreement or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities, shall be deemed to be life companies, and shall not make any such insurance, guaranty, contract or pledge in the commonwealth, or to or with any resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment and the consideration therefor, nor any such insurance, guaranty, contract or pledge the performance of which is contingent upon the payment of assessments made upon survivors; provided that corporations incorporated for any educational, charitable, benevolent or religious purpose shall not be deemed life companies and shall not be subject to this chapter. Nothing herein relating to the consideration for the policy shall apply to any extra compensation which may be charged by a company to the insured for engaging in military or naval service in time of war.

All life insurance hereafter transacted by the corporations which formerly issued policies on the assessment plan under chapter four hundred and twenty-one of the acts of eighteen hundred and ninety and acts in amendment thereof shall be carried on in accordance with this chapter; but such corporations may carry out in good faith their assessment contracts made with their members prior to July first, eighteen hundred and ninety-nine."

Considering this section with relation to companies selling annuities, which are there mentioned in the same clause with those selling endowments, the Supreme Judicial Court, in *Mutual Benefit Life Ins. Co. v. Commonwealth*, 227 Mass. 63, held that companies selling annuities, although an annuity is not strictly a contract within the statutory definition, were, nevertheless, in view of the wording of section 118 and the nature of annuities, to be deemed "life insurance companies" within the meaning of this section, and that such companies might be accurately described as "in the business of life insurance." The reasoning used by the court applies with equal force to companies issuing contracts of pure endowment as well as to other forms of endowment contracts spe-

cifically referred to by the court, and to the instant contract with its options of extended endowment and annuity contracts.

I therefore answer your second question in the affirmative.

3. Although the foreign company issuing the contract under consideration is to be deemed to be a life insurance company, in accordance with the provisions of section 118, it is subject to section 153, which provides as follows:—

“Conditions of admission of foreign life companies. A company organized under the laws of any other of the United States for the transaction of life insurance may be admitted to do business in this Commonwealth, upon complying with section one hundred and fifty-one, if it has the requisite funds of a life company and, in the opinion of the commissioner, is in sound financial condition and has policies in force upon not less than one thousand lives in the United States for an aggregate amount of not less than one million dollars. Any such company organized under the laws of a state or government other than one of the United States may be so admitted if, in addition to fulfilling the above requirements, it complies with section one hundred and fifty-five and if it shall have and keep on deposit or in the hands of trustees, as provided in said section one hundred and fifty-five and in section one hundred and fifty-six, in exclusive trust for the security of its contracts with policy holders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than two hundred thousand dollars.”

If the company is not incorporated under the laws of its home State for the transaction of life insurance, it does not fulfil one of the essential conditions for its admission to do insurance business in this Commonwealth, and I answer your third question in the negative.

Very truly yours,

JAY R. BENTON, *Attorney General.*

South Essex Sewerage Board — Qualifying Oaths — Civil Service.

Members of the board who are entitled to places thereon as incumbents of other offices under the Commonwealth are not required to take a qualifying oath.

Employees of the board are not under civil service laws.

OCT. 5, 1925.

ALEXANDER WHITESIDE, Esq., *Chairman, South Essex Sewerage Board.*

DEAR SIR:— You have asked my opinion relative to the taking of qualifying oaths by the members of the South Essex Sewerage Board.

Each member of your board is a person chosen or appointed to an office under the government of this Commonwealth. The provisions of Mass. Const. Amend. VI make it necessary that before entering upon their duties the members of the South Essex Sewerage Board should take the required oath in the manner prescribed by law. Certain members of the board hold office as such because they are already incumbents of certain other designated positions or offices. St. 1925, c. 339, § 2. If a member is entitled to his place on the board because he is the incumbent of another office under the government of the Commonwealth, to which he has been chosen or appointed, and has taken the qualifying oath before undertaking the duties of the latter office, he need not take

the oath again as a preliminary to the discharge of his functions as a member of the board. If, however, such a member has not previously taken the qualifying oath or his former office is not one under the government of the Commonwealth, so that it does not come under the terms of article VI, he must qualify by taking such oath in the manner prescribed by law, before entering upon his duties as a member of the South Essex Sewerage Board.

You have also asked my opinion as to whether or not the said board is subject to civil service requirements in its choice of employees. St. 1925, c. 339, § 3, provides, in part:—

“Said board shall from time to time appoint or employ such engineers, experts, agents, officers, clerks and other employees as it may deem necessary, shall determine their duties and compensation, which shall be paid by the district, and may remove them at pleasure. . . .”

The fact that the statute gives to the board the power to remove the various employees named therein at its pleasure indicates that it was not the intention of the Legislature that the board or its employees should be subject to the requirements of the laws relative to civil service. Attorney General's Report, 1921, pp. 145 and 324.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Reclamation District — Assessment upon Land of the Commonwealth.

Claim for a sum of money equal to an assessment upon a private proprietor may not be paid by an official on behalf of the Commonwealth under St. 1924, c. 395.

OCT. 8, 1925.

DR. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:—I have your letter of October 1st relative to the Assabet River Reclamation District, in which is situated certain land of the Commonwealth.

When the Commonwealth holds land within a reclamation district it is to be treated as one of the proprietors within such district, except that it is not subject to assessments upon its land, as are the other proprietors, under G. L., c. 252, as amended by St. 1923, c. 457. (See opinion of the Attorney General to the Commissioner of Agriculture, December 2, 1924.)

Notwithstanding the fact that the Commonwealth has not made itself liable to pay assessments laid upon land by reclamation districts under the General Laws, it is within the authority of the Legislature to appropriate, for payment to a district, a sum of money equal to the amount which a private proprietor would have been called upon to pay on land of a similar character, if the Legislature determines that such a payment is for the general welfare.

The Legislature has not heretofore indicated an intention to appropriate sums of money for payments of the foregoing character. While a determination by the Legislature as to such an appropriation might be brought about by the inclusion of a sum of money destined to be paid in lieu of an assessment upon land of the Commonwealth, in an item of the budget, in the absence of any indication of a legislative policy with relation to such payments there is no authority in any officer of the Commonwealth to pay or to agree to pay any sum in lieu of an assess-

ment upon land of the Commonwealth, and the inclusion of such a sum in an item of the budget would seem to be inappropriate. The legislative intent with relation to payments of such a character should more properly be expressed by the passage of an act or resolve specifically appropriating a sum of money and authorizing its payment for the desired purpose.

I do not think that a claim for a sum of money equal to the amount of an assessment which might have been made against a private proprietor, had he been the owner of lands held by the Commonwealth, can be made against the Commonwealth under St. 1924, c. 395.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Taxes — Interest — Computation of Time — Sunday.

Under G. L., c. 59, § 57, all Sundays are included in the computation of the seventeen-day period after which interest shall be added to unpaid taxes.

OCT. 8, 1925.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:— You request my opinion as to whether interest is to be collected on local tax payments made prior to November 3, 1925, under the provisions of G. L., c. 59, § 57, with respect to addition of interest on all taxes remaining unpaid after the expiration of seventeen days from October 15th of each year. You state that the last day of the seventeen days, in the current year, falls on Sunday, November 1, 1925, and you inquire whether interest should be collected on taxes paid Monday, November 2, 1925.

G. L., c. 59, § 57, provides, with respect to the payment of interest on all taxes remaining unpaid after the expiration of seventeen days from October 15th, as follows:—

“Taxes shall be payable in every city, town and district in which the same are assessed, and bills for the same shall be sent out, not later than October fifteenth of each year, unless by ordinance, by-law or vote of the city, town or district, an earlier date of payment is fixed. On all taxes remaining unpaid after the expiration of seventeen days from said October fifteenth, or after such longer time as may be fixed by any city, town or district which fixes an earlier date for payment, but not exceeding thirty days from such earlier date, interest shall be paid at the following rates computed from the date on which the taxes become payable: at the rate of six per cent per annum on all taxes and, by way of penalty, at the additional rate of two per cent per annum on the amount of all taxes in excess of two hundred dollars assessed to any taxpayer, in any one city or town, if such taxes remain unpaid after the expiration of three months from the date on which they became payable, but if, in any case, the tax bill is sent out later than the day prescribed, interest shall be computed only from the expiration of such seventeen days or said longer time. In no case shall interest be added to taxes paid prior to the expiration of seventeen days from the date when they are payable, nor shall any city or town so fix an earlier date of payment and longer time within which taxes may be paid without interest as would permit the payment of any taxes without interest after November first of the year in which they are due.”

The question presented is whether, in the computation of "seventeen days," any or all Sundays are included.

The rule for the computation of time, in the absence of a statutory expression of contrary intent, relative to the enumeration of intervening Sundays or of a Sunday when it is the last day of a period of time within which an act is to be done, has long been established in this Commonwealth.

"Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the Legislature to exclude them appears manifest."

Cooley v. Cook, 125 Mass. 406, 408. *Alderman v. Phelps*, 15 Mass. 225. *Thayer v. Felt*, 4 Pick. 354. This rule was restated in *Stevenson v. Donnelly*, 221 Mass. 161, 163, that "in computing any period of time less than a week, Sunday is to be excluded; and that in computing any period of time of a week or more, Sunday is to be included."

The statute does not expressly exclude Sundays. There is nothing in the statute, by its nature or context, from which there appears an intention of the Legislature to exclude intervening Sundays. There appears no reason why the last of the seventeen days should be excluded if it happens to be Sunday, rather than any or all of the intervening Sundays during the time limited.

G. L., c. 4, § 9, relating to the performance of certain acts on a day after Sunday, provides as follows:—

"Except as otherwise provided, when the day or the last day for the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on Sunday or a legal holiday, the act may, unless it is specifically authorized or required to be performed on Sunday or on a legal holiday, be performed on the next succeeding business day."

G. L., c. 59, § 57, requires that taxes shall be payable not later than October 15th of each year unless an earlier date is otherwise fixed. The provision relating to the seventeen-day period does not fix the period within which taxes shall be paid; it fixes a day, after the expiration of the period, on which interest shall be added to taxes already payable. As this provision does not require the performance of any act within the period of seventeen days, it is immaterial whether or not the last day of the period falls on Sunday.

As G. L., c. 59, § 57, manifests no expression to exclude intervening Sundays within the seventeen-day period or the last day of the period when it falls on Sunday, and as the payment of a tax is not an act the performance of which is required to be done within the seventeen-day period, under the law practised in this Commonwealth for many years, all Sundays are included in the enumeration of the seventeen days after October 15th.

You are advised, therefore, that interest should be collected on taxes paid Monday, November 2, 1925.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Board of Appeal — Review of Decision at Instance of Commissioner of Corporations and Taxation — Amendment to Decision.

Under G. L., c. 63, § 71, as amended, providing that the decision of the Board of Appeal shall be final and conclusive as to questions of fact, its decisions are reviewable only by certiorari.

State officials acting in behalf of the Commonwealth cannot appear before the courts on opposite sides of a controversy and be represented by the Attorney General.

A decision of the Board of Appeal, under G. L., c. 63, § 71, as amended, becomes final and conclusive when notice thereof is given as the statute requires, and may not thereafter be amended except for clerical and formal changes.

OCT. 16, 1925.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:— You ask me to advise you whether the Commissioner of Corporations and Taxation should take any action to protect the rights of the Commonwealth by certiorari or otherwise with respect to the findings of the Board of Appeal, assuming that they were contrary to the evidence before the Board, in the matter of an appeal to the Board of Appeal from the refusal of the Commissioner to abate an excise tax assessed to a foreign corporation.

The Board of Appeal is constituted by G. L., c. 6, § 21, as follows:—

“The state treasurer, the state auditor and a member of the council designated by the governor, shall constitute the board of appeal from decisions of the commissioner of corporations and taxation.”

Provisions for taking an appeal from the decisions of the Commissioner to the Board of Appeal in respect to the assessment of corporation taxes are contained in G. L., c. 63, § 51, and § 71, as amended by St. 1921, c. 123, and St. 1922, c. 339, § 2. Said section 51 provides:—

“Application for the abatement or correction of any tax assessed under sections thirty to fifty, inclusive, may be made within thirty days after the date upon which the notice of assessment is sent, and from the decision of the commissioner thereon any corporation may appeal in the manner provided by section seventy-one.”

Section 71, as amended, provides:—

“Except as otherwise provided, any party aggrieved by any decision of the commissioner upon any matter arising under this chapter from which an appeal is given, may apply to the board of appeal from decisions of the commissioner within ten days after notice of his decision. Said board shall hear and decide the subject-matter of such appeal, and give notice of its decision to the commissioner and the appellant; and its decision shall be final and conclusive as to questions of fact, although payments have been made as required by the decision appealed from. . . .”

Section 71, as amended, provides, as quoted above, that the decision of the Board of Appeal “shall be final and conclusive as to questions of fact.” These words, however, do not prevent the use of certiorari by an aggrieved taxpayer to correct errors of law committed in proceedings before the Board. *Worcester v. Board of Appeal*, 184 Mass. 460; *Swan v. Justices of the Superior Court*, 222 Mass. 542; *Commissioner of Pub-*

lic Works v. Justice, Dorchester District, 228 Mass. 12; *Bogigian v. Commissioner of Corporations and Taxation*, 248 Mass. 545. A writ of certiorari, however, will not lie to revise findings of fact (*Swan v. Justices of the Superior Court*, 222 Mass. 542, 546; *Commissioner of Public Works v. Justice, Dorchester District*, 228 Mass. 12, 16), and I know of no method other than certiorari by which the decision of the Board may be reviewed. The question whether the decision of the Board of Appeal was contrary to the evidence before them, in my opinion, therefore, is not reviewable.

There is an additional ground on which, as it seems to me, the Commissioner cannot in any event bring a petition for certiorari or other proceeding against the Board for the purpose of reviewing their decision on appeal from a decision of the Commissioner upon an application for abatement of a tax. This is because in such a proceeding the Commissioner and the Board would be adversary parties, both acting in their official capacity as representatives of the Commonwealth. See *Raymer v. Tax Commissioner*, 239 Mass. 410. The same person cannot be plaintiff and defendant in the same suit (*Warren v. Stearns*, 19 Pick. 73, 77; *Pierce v. Boston Five Cent Savings Bank*, 125 Mass. 593); and it would be unseemly that State officials acting in behalf of the Commonwealth should appear before the courts on opposite sides of any controversy. Moreover, the Attorney General is required by statute to "appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth . . .," and "all such suits and proceedings shall be prosecuted by him or under his direction." G. L., c. 12, § 3. Pursuant to this statute the Attorney General has appeared for the Board of Appeal in certiorari proceedings. *Worcester v. Board of Appeal*, 184 Mass. 460. Cf. *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556. He must also, and invariably does, represent the Commissioner of Corporations and Taxation in all litigated cases. He cannot, however, appear on opposite sides of any case. I must advise you, therefore, that the decision of the Board of Appeal in the matter you refer to cannot be reviewed by petition for writ of certiorari or other proceeding filed in your behalf.

It appears, from your statement, that at a meeting of the Board of Appeal held on May 27, 1925, it was voted in the matter of the appeal relating to the tax in question that for the purpose of the tax the gross receipts were determined to be a certain amount, that notice of this determination was given to the Commissioner under date of June 10, 1925, that at a subsequent meeting of the Board held July 31, 1925, it was voted to amend the previous vote by reducing the amount of the gross receipts as so determined, and that notice of this action was given to the Commissioner under date of August 1, 1925. You ask whether the Commissioner should proceed to collect the excise outstanding against the corporation on the books of your department, or any part thereof.

G. L., c. 63, § 71, as amended, as quoted above, permits a corporation aggrieved by a decision of the Commissioner upon any matter relating to the assessment of an excise tax against it to appeal to the Board of Appeal, and requires that Board to "hear and decide the subject-matter of such appeal, and give notice of its decision to the commissioner and

the appellant." It does not appear unequivocally from your statement that the determination of the amount of the gross receipts was a decision of the subject-matter of the appeal, nor does it appear that notice of this determination was given to the appellant. I assume, however, that the determination as expressed in the vote was intended to be and was in effect a decision of the whole subject-matter of the appeal, and that notice of this decision was given to the appellant as well as to the Commissioner.

The section provides that the decision of the Board of Appeal "shall be final and conclusive as to questions of fact." The word "decision" is defined as a judgment given by a competent tribunal. Bouvier's Law Dictionary. See *Coffey v. Gamble*, 117 Iowa, 545, 548; *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543, 555. Like a judgment or adjudication it connotes finality. A judgment of a court, in the absence of statute, may generally be amended in matter of substance during the term because the sittings during the term are regarded as continuous and, as is said, the proceedings of the court remain in the breast of the judge until the expiration of the term. *Mason v. Pearson*, 118 Mass. 61; *Pierce v. Lamper*, 141 Mass. 20; *Radclyffe v. Barton*, 154 Mass. 157; *Powers v. Sturtevant*, 200 Mass. 519; *Karrick v. Wetmore*, 210 Mass. 578; *Bronson v. Schulten*, 104 U. S. 410, 415; *Wetmore v. Karrick*, 205 U. S. 141; *Baxter v. Buchholz-Hill Co.*, 227 U. S. 637; 34 C.J. 207, 232. There is nothing which corresponds to terms of courts in the sittings of such a tribunal as the Board of Appeal, and their sittings are not continuous but periodic. The statute requires notice of the Board's decisions to be given to the parties interested, and makes those decisions final and conclusive as to questions of fact. It is my opinion that they become final and conclusive when due notice is given to the Commissioner and the appellant, and that thereafter they may not be amended except for the purpose of clerical and formal changes. In my judgment, therefore, and with the assumptions already stated, you should compute the tax upon the basis of the decision of the Board of Appeal of which you were notified under date of June 10, 1925.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Marriage Licenses — Town Clerks.

Certificates may be issued upon filing of notices of intention although the parties are already legally married.

Where the validity of a previous marriage is doubted, town clerks must receive notices of intention and issue certificates thereon.

Town clerks have no discretion in regard to receiving notices of intention of marriage.

Oct. 16, 1925.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR: — You ask my opinion upon the four following questions:—

"1. Can there be more than one legal marriage ceremony, certification and record of the same marriage between the same parties?

2. If a marriage in another State or jurisdiction is doubted, can a notice of intention be accepted, a license issued, a marriage performed and a record made in this State as though there were no previous marriage?

3. Can a notice of intention be filed and a marriage license issued with the clerk or registrar when the parties are already married?

4. Must a clerk accept a notice of intention of marriage when one of the parties, although previously married, claims the same to be void in accordance with G. L., c. 207, § 8?"

Town clerks are required to receive notices of intention of marriage in the form provided by the statutes. G. L., c. 207, §§ 19, 20 and 21; c. 46, § 1.

I therefore answer question 4 in the affirmative, and also questions 2 and 3 so far as they apply to the filing of notices of intention.

As to the issuance of certificates or licenses, it is provided by G. L., c. 207, § 28, that "on or after the fifth day from the filing of notice of intention of marriage, except as otherwise provided, the clerk or registrar shall" issue a certificate.

The only statutory provisions which I have found, either forbidding or making non-compulsory the issuance of a certificate, are G. L., c. 207, §§ 32, 33, 35 and 50. Section 32 applies only to divorced persons; and in addition, the words "previously married" are not to be construed as meaning married to each other. See *Chase v. Chase*, 191 Mass. 166. Section 33 applies only to minors. Section 50 applies only to persons residing and intending to continue to reside in another jurisdiction. Section 35 provides that a clerk "may" refuse to issue a certificate if he has reasonable cause to believe that any of the statements contained in the notice of intention of marriage are incorrect. None of these provisions, accordingly, seems to prohibit the issuance of a certificate to persons who have previously married one another.

Of course, if the earlier marriage were valid the subsequent marriage is a nullity; and no doubt the Legislature did not intend to provide for a useless ceremony. But, on the other hand, if the earlier marriage were void the subsequent marriage is valid (*Schouler, Marriage and Divorce*, § 1197); and certainly it was not intended that parties should not have the usual means of marrying because of the fact that they had previously gone through a ceremony which was invalid. Rather, the law would seek on that account to provide them with a ready means of removing any question as to their status. If a town clerk believes that an earlier marriage is clearly invalid (and questions 2 and 3 do not assume the contrary), it seems to me that he may issue a certificate. And, if that is so, I do not believe it was intended that town clerks should have the discretion of determining, or be under the burden of passing upon, the validity of marriages.

I answer question 1 by saying that a marriage ceremony has no legal effect if the parties are already validly married, but that there may be a legal record of such a second marriage. The record is nothing more than evidence of the marriage. G. L., c. 207, § 45. I answer your other questions in the affirmative.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Attorney General — Duty to advise the Finance Commission for the City of Boston — Authority of Commission to incur Expense.

The Attorney General will give advice to the Finance Commission for the City of Boston so far as it relates to the construction of the statutes creating and governing the commission.

The Attorney General will not give advice concerning the duties of a city official who would not be bound by his opinion, nor concerning a judicial question which ought to be determined by the exercise of the judicial power.

The Finance Commission for the City of Boston is plainly authorized to incur reasonable expense for services of accountants employed in the performance of its duties.

OCT. 21, 1925.

HON. CHARLES L. CARR, *Chairman, Finance Commission for the City of Boston.*

DEAR SIR:—You state that the city auditor of Boston has refused to approve a bill of public accountants for services rendered to your commission and approved by it. You refer to St. 1909, c. 486, amending the charter of the city of Boston, by which act the finance commission was created and by which the powers and duties of the commission and the powers and duties of the city auditor are defined. Pursuant to a vote of the commission you ask my opinion whether the city treasurer is not bound to pay the bills of the commission upon its requisition within the amount authorized by statute.

The position has been taken by former Attorneys General with respect to your commission and with respect to the Police Commissioner for the City of Boston that advice would be given so far as it related to the construction of the statutes creating and governing such offices. IV Op. Atty. Gen. 451; V Op. Atty. Gen. 394. In this conclusion I concur.

St. 1909, c. 486, § 20, provides:

“The said commission is authorized to employ such experts, counsel, and other assistants, and to incur such other expenses as it may deem necessary, and the same shall be paid by said city upon requisition by the commission, not exceeding in the aggregate in any year the sum of twenty-five thousand dollars, or such additional sums as may be appropriated for the purpose by the city council, and approved by the mayor . . .”

By subsequent statutes the limit of authorized expenditures has been increased to \$45,000. St. 1921, c. 81; St. 1924, c. 369. On the point which you raise this statute seems to me to involve no question of construction. Your commission is plainly authorized to incur reasonable expenses for the services of accountants employed in the performance of its duties.

Your further question, however, whether the city treasurer is not bound to pay the bills of the commission upon requisition of the commission, not exceeding the aggregate allowed, is one on which, in my judgment, I ought not to express an opinion for several reasons. In the first place, it seems to me to relate not to your duties but to the duties of a city official who would not be bound by any opinion which I might give. In the second place, it presents a judicial question which ought to be determined by the exercise of the judicial power in a suit between the parties interested. In such matters the Attorney General will not express an advisory opinion. Attorney General's Report, 1922, p. 65. For these reasons I must respectfully decline to advise you further in the matter, leaving the question to await the outcome of legal proceedings if such become necessary.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Department of Public Health — Regulations of United States Public Health Service.

The Department of Public Health has no authority to use its facilities in enforcing regulations of the United States Public Health Service.

OCT 26, 1925.

DR. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR:— You request my opinion as to whether the Department of Public Health has authority to post placards prohibiting the use of water in certain railway stations, in accordance with paragraph 6 of Appendix A of the Interstate Quarantine Regulations of the United States. This paragraph reads as follows:—

“6. Placards stating that the use of unsatisfactory water is forbidden will be posted over taps at stations through the State department of health having jurisdiction, where unfavorable certificates have been forwarded prohibiting the use of a water supply by a common carrier for drinking and culinary purposes in interstate traffic. On vessels, similar placards will be posted over taps by the United States Public Health Service.”

The placards are supplied by the United States Public Health Service.

In my opinion, the Department of Public Health is given no authority under the statutes to use its facilities in enforcing this Federal regulation. G. L., c. 111.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Taxation — Corporation Tax Law.

The general principle that statutes are not to be interpreted as retroactive in operation in the absence of a plainly expressed legislative intent to that effect, is applicable to statutes amending previous statutes.

In the event that G. L., c. 63, § 52, becomes operative, the laws revived thereby are revived as they were at the time of the enactment of Gen. St. 1919, c. 355, and not with subsequent amendments thereto.

OCT. 28, 1925.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:— You ask my opinion upon the following two questions:—

“In the event that it is decided that G. L., c. 63, § 52, is operative, who is vested with authority to collect taxes assessed under the laws thereby revived?”

Are the laws revived to be regarded as revived with any subsequent amendments thereto or revived as such laws stood at the time of the enactment of Gen. St. 1919, c. 355?”

G. L., c. 63, § 52, provides, in part, as follows:—

“If the excise imposed by section thirty-two on domestic business corporations, or that imposed by section thirty-nine on foreign corporations, is declared unconstitutional by a final judgment, order or decree of the United States supreme court or the supreme judicial court of the commonwealth, sections thirty to fifty-one, inclusive, shall be null and void,

and all laws repealed or made inoperative by chapter three hundred and fifty-five of the General Acts of nineteen hundred and nineteen shall thereupon be revived and continue in full force and effect as if the said chapter had not been enacted. In such case the commissioner and local assessors shall forthwith assess all taxes that have become due under such prior laws, . . .”

Gen. St. 1919, c. 355, §§ 12 and 30, contain the following provisions relating to domestic business corporations and foreign corporations, respectively:—

“SECTION 12. . . . Such parts of said chapter four hundred and ninety, as amended, as relate to taxation of the corporate franchises of such domestic business corporations as are subject to this act, shall not apply to the said corporations.

SECTION 30. Those parts of the said chapter four hundred and ninety, as amended or supplemented, which relate to the taxation of the capital stock of such foreign corporations as are subject to the provisions of this act, shall not apply to the said corporations.”

St. 1909, c. 490, pt. III, § 57, as amended by Gen. St. 1919, c. 349, § 20, is as follows:—

“The tax commissioner shall annually, as soon as may be after the first Monday of August, give notice to the treasurer of every corporation, company or association which is liable to a corporate franchise tax under the provisions of sections forty-three and forty-four, of the amount thereof; that it will be due and payable to the treasurer and receiver general within thirty days after the date of such notice, but not before the twentieth day of October; and that within ten days after the date of such notice the corporation, company or association may apply to the tax commissioner for a correction of said tax, and in default of settlement, if application has been made as aforesaid, may be heard upon such application by the board of appeal.”

This provision is continued with respect to corporations subject to taxation on their corporate franchises under G. L., c. 63, §§ 53-60, in G. L., c. 63, § 60, as follows:—

“The commissioner shall annually, as soon as may be after the first Monday of August, give notice to the treasurer of every corporation, company or association liable to any tax under section fifty-eight, of the amount thereof, the time when due, the right to apply for correction, and the right of appeal, all as herein provided. Said tax shall be due and payable to the state treasurer within thirty days after the date of such notice, but not before October twentieth. The taxpayer may apply to the commissioner, within thirty days after the date of the notice, for correction of the tax, and if he so applies, may, in default of settlement, be heard on such application by the board of appeal.”

Section 60 was amended by St. 1922, c. 520, § 9, so as to make the tax payable to the Commissioner instead of to the State Treasurer.

Gen. St. 1919, c. 355, does not expressly repeal any prior laws, but it does provide in sections 12 and 30 that those parts of St. 1909, c. 490, as amended, which relate to the taxation of domestic business and foreign corporations shall not apply to corporations subject to the provisions of

Gen. St. 1919, c. 355. The effect then of Gen. St. 1919, c. 355, is to render inoperative the provisions of St. 1909, c. 490, as amended, with respect to certain corporations. St. 1909, c. 490, pt. III, § 57, as amended, is one of the provisions thus made inoperative with respect to such corporations. This section, except in so far as it is thus made inoperative, is continued in G. L., c. 63, § 60, which was amended by St. 1922, c. 520, § 9.

The question is whether or not St. 1922, c. 520, § 9, amending G. L., c. 63, § 60, is a part of the prior laws under which taxes are to be assessed by virtue of G. L., c. 63, § 52.

It is a general principle that statutes are not interpreted as retroactive in operation in the absence of a plainly expressed legislative intent to that effect, and this principle is applicable to statutes amending previous statutes. *Martin L. Hall Co. v. Commonwealth*, 215 Mass. 326, 329. See also *Fitzgerald v. Lewis*, 164 Mass. 495; *Tremont & Suffolk Mills v. Lowell*, 165 Mass. 265; *Wilson v. Head*, 184 Mass. 515; *Wheelwright v. Tax Commissioner*, 235 Mass. 584.

Section 25 of St. 1922, c. 520, provides that the act shall take effect on January 1, 1923. In my opinion, the amendment made by this statute, substituting the Commissioner for the State Treasurer as the officer to whom taxes imposed by G. L., c. 63, §§ 53-60, inclusive, are to be paid, cannot be said to be a part of the prior laws made inoperative as to domestic business and foreign corporations by Gen. St. 1919, c. 355, and revived and continued in full force and effect by G. L., c. 63, § 52, upon the happening of the event referred to in that section. I therefore advise you that, in my judgment, the person vested with authority to collect taxes assessed under the laws revived by G. L., c. 63, § 52, is the Treasurer and Receiver General.

My answer to your second question is that the laws revived are revived as they stood at the time of the enactment of Gen. St. 1919, c. 355, and not with subsequent amendments thereto.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Attorney General — Duty to advise the Police Commissioner for the City of Boston — Regulations forbidding Political Activities.

The Attorney General will advise the Police Commissioner for the City of Boston so far as such advice relates to the construction of statutes creating and governing his office, and no further.

Regulations forbidding police officers to solicit or make contributions for political purposes, to attend political gatherings except in the course of duty, or to sign nomination papers, would not contravene their political rights.

Nov. 2, 1925.

HON. HERBERT A. WILSON, *Police Commissioner for the City of Boston*.

DEAR SIR: — You ask my opinion in regard to the construction of a rule of the Police Department, and whether certain provisions existing and proposed in the rules and regulations are or would be in contravention of the constitutional rights of police officers.

The position was taken by a former Attorney General that he would advise the Police Commissioner for the City of Boston in relation to his duties so far as such advice related to the construction of the statutes

creating and governing his office, and no further. V. Op. Atty. Gen. 394. His reasons for so doing are stated in IV Op. Atty. Gen. 451. I approve of the conclusion thus reached and will in general be governed accordingly. Your request for my opinion regarding the proper interpretation of one of the rules and regulations of your department, it seems to me, therefore, is clearly one which I should not attempt to answer.

The question whether such rules and regulations are in conflict with statutory and constitutional provisions, while it may not fall strictly within the limits of the rule adopted by the Attorney General for his guidance, as stated above, may be said to call for the proper application of St. 1906, c. 291, § 10, providing that "the police commissioner shall have authority to appoint, establish and organize the police of said city and to make all needful rules and regulations for its efficiency," and corresponding provisions of prior statutes, and I think may properly be answered. In effect the question is whether regulations forbidding police officers to solicit or make contributions for political purposes, to attend political gatherings except in the course of duty, or to sign nomination papers, would contravene their constitutional rights. The complete answer to this question is found in *McAuliffe v. New Bedford*, 155 Mass. 216, 220, where the court said concerning a quite similar regulation:—

"... There is nothing in the Constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here."

See also *Stone v. Smith*, 159 Mass. 413; *Commonwealth v. Libbey*, 216 Mass. 356; *Ashley v. Three Justices of Superior Court*, 228 Mass. 63, 81; *Lawrence v. Board of Registration*, 239 Mass. 424; *Duffy v. Cooke*, 239 Pa. St. 427.

Yours very truly,
JAY R. BENTON, *Attorney General*.

Trustees of the Massachusetts Training Schools—Return of a Ward.
The trustees of the Massachusetts Training Schools have power to secure the return of a ward who has escaped or who has violated the terms of his parole. This power is not impaired by the fact that the ward is out on bail upon another offence.

Nov. 2, 1925.

Hon. RICHARD K. CONANT, *Commissioner of Public Welfare*.

DEAR SIR:—You request my opinion as to whether the trustees of the Massachusetts Training Schools have a legal right to secure the return, as in ordinary cases of violation of parole, of a ward who has been properly committed to one of the training schools and who has

either run away or been placed on parole in due course, and who while on parole or still a runaway is brought into court charged with a new and separate offence, found guilty and released on bail pending an appeal.

G. L., c. 120, § 21, provides, in part: —

“They (the trustees) may release on parole, . . . They may, at any time until the expiration of the period of commitment, resume the care and custody of children released on parole and recall them to the school to which they were originally committed; . . .”

Section 12 provides: —

“A boy committed to the Lyman school or to the industrial school for boys or a girl committed to the industrial school for girls, who has escaped therefrom, or been released on parole and broken the conditions thereof, may be arrested without a warrant by a sheriff, deputy sheriff, constable or police officer and may be kept in custody in a suitable place and there detained until such boy or girl may be removed to the school from which he or she escaped or was released.”

By these provisions authority is clearly and specifically given to the trustees to secure the return of a ward who has escaped or who has violated the terms of his parole. Being released on bail after a conviction for another crime does not render a child, properly committed, immune from the provisions of sections 12 and 21, nor does it serve as a license to be at liberty pending the final disposition of the subsequent proceeding. I am accordingly of the opinion that your question should be answered in the affirmative.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Notaries Public — Justices of the Peace — Acting as Attorneys — Disqualification by Interest.

Notaries public and justices of the peace, not having been admitted to practice as attorneys, may not presume to act as such under cloak of their commissions.

A personal interest in the subject-matter of a transaction, sufficiently direct, may disqualify such officer from acting officially in connection therewith.

An interest of such officer's employer is not sufficient to work such disqualification.

Nov. 12, 1925.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — My opinion is requested respecting the legality and propriety of certain practices of notaries public and justices of the peace.

There can, of course, be no question of the illegality of these officers holding themselves out or presuming to act as attorneys under the cloak of their commissions. It is plainly provided in G. L., c. 221, § 41, that any person who, not having been lawfully admitted to practice as an attorney at law, represents himself to be an attorney or counsellor at law or to be lawfully qualified to practice in the courts of the Commonwealth, by any means, or who undertakes to practice as such, is guilty of a criminal offence for which he may be fined or imprisoned. Conceivably, a statute which expressly prohibited notaries or justices from purporting to act as attorneys might have a more direct moral effect than the general provision to which I have just referred, but it would

add nothing to the strength of the present prohibition unless some greater or additional penalty should be contemplated in case of such misconduct by these officers. A statute authorizing the removal of notaries or justices who are guilty of this offence would add nothing to the power already vested in you to remove them at your discretion. The scope of your powers in this respect has already been reverted to in my letter of January 20, 1925.

The other two problems to which you have directed my attention raise fundamentally the question whether an indirect interest in the subject-matter of the transaction precludes a notary or justice from performing his official duties in connection therewith. I have not found any Massachusetts statute or decision which squarely bears upon this question. I presume that there are circumstances in which the personal interest of such an officer would be so direct as to render his action in connection therewith unlawful as well as unethical. It would seem to me, for example, improper for a notary public who should be the grantee of a deed to take himself the grantor's acknowledgment thereto; but, so far as the taking of oaths or acknowledgments and the protesting of commercial paper go, it has been for a great many years settled in practice that the fact that the notary's or justice's employer may be interested in the subject of the transaction is no impediment to his acting officially in connection therewith. See, for example, *Nelson v. First National Bank*, 69 Fed. 798, where it is held that the cashier of the bank which held the note in question might, as notary, properly protest the same. Of course, there may be statutes in some States which restrict action of this sort, but I should not expect to find very many of them.

The custom whereby notaries take acknowledgments or attend to the protesting of commercial paper where concerns of which they are the employees or officers are interested is of such long standing and so widespread that I think its propriety is not questioned in current thought. For example, attorneys take the acknowledgments of their clients, or of persons dealing with their clients, to all sorts of instruments, and it is a great convenience that they should be able to do so. And it seems to me somewhat significant that there seem to be no Massachusetts decisions in which the propriety of such conduct has ever been brought in question. If the practice had been in fact attendant with many abuses, it seems as though the course of some litigation would have brought them to light.

I therefore say that the practice of notaries who are officials of banking institutions protesting commercial paper or acting in connection with other transactions in which such institutions are interested does not seem to me to be illegal, nor do I think that it can be deemed unethical except in the most abstract sense. As to the employees of insurance companies administering, as notaries, oaths upon affidavits taken in connection with the adjustment of claims, it seems to me that what I have just said is equally applicable. There is, however, this difference, that such affidavits have no greater legal effect than if the statement made therein were unsworn to, and that although the insurance companies may perceive some practical advantage in having sworn statements which may somehow carry greater weight with the persons making them, the request to be appointed a notary merely in order that such oaths may be administered might well receive less favorable consideration than where the acts contemplated have some legal necessity or significance.

Yours very truly,

JAY R. BENTON, *Attorney General*.

OPINIONS UPON APPLICATIONS FOR LEAVE TO FILE INFORMATION IN THE NAME OF THE ATTORNEY GENERAL.

ATTORNEY GENERAL *ex rel.* JOHN L. RHODES V. ARTHUR C. RUTHERFORD.

Public Officer — Selectman — Quo Warranto — Attorney General.

An information in the nature of *quo warranto*, brought *ex relatione* and prosecuted primarily by the relator, will lie to test the title to a public office.

Whether upon the facts the officer in question had resigned his office, *quære*.

Where there is no other purported holder of the same office, the officer in question has been duly elected, the only question relates to the technical sufficiency of his alleged resignation, and no problem of right and wrong in the administration of public affairs is involved, — an application for such an information may well be rejected as serving no public good.

APRIL 29, 1925.

This is an application for leave to use the Attorney General's name in instituting proceedings in *quo warranto* to try the title of one Arthur C. Rutherford to the office of selectman of the town of Oxford. The application purported originally to be made in behalf of the town of Oxford, acting through its town counsel, Hon. George R. Stobbs. At the hearing before me, however, the application was opposed by Charles B. Rugg, Esq., purporting also to act as counsel for the town. The facts relating to this aspect of the matter are that Mr. Stobbs had heretofore on several occasions acted as counsel for the town, but had not, however, been elected or appointed to act in that capacity for the current year; that the chairman of the board of selectmen, Mr. John L. Rhodes, called upon Mr. Stobbs to make this application, and, so far as he could singly do so, authorized him to make it in behalf of the town; that at a meeting of the board of selectmen just prior to the hearing, the third selectman, Mr. Turner, and Mr. Rutherford, constituting, if Mr. Rutherford was competent to act, a majority of the board, voted to authorize the employment of Mr. Rugg to represent the town and to oppose this petition. Under these circumstances it is impossible to say that the town is on record either as favoring or opposing the petition. The chairman of the board, alone, would seem to have no power to bind the town to a particular position, and where the very matter in dispute is the competency of Mr. Rutherford to act it is impossible to accept the purported action of himself and Mr. Turner as that of the town. I have therefore dealt with the matter as if the chairman of the board, a responsible official, were petitioning in his own behalf, and as if the petition were opposed by Mr. Rutherford strictly as an individual, and by Mr. Turner, another responsible town officer, but similarly in his individual capacity.

Assuming the strongest case made out in the petitioner's behalf, the facts are these: On March 2, 1925, Arthur C. Rutherford was duly elected a member of the board of selectmen by the inhabitants of the town of Oxford, and subsequently qualified as such. On March 19, 1925,

Mr. Rutherford called at the office of the town clerk of Oxford and handed him, in writing, his resignation from the office of selectman. After some discussion the town clerk advised Mr. Rutherford that the resignation ought to be sent to the chairman of the board of selectmen. On March 20, 1925, Mr. Rutherford mailed in an envelope addressed to Mr. Rhodes, the chairman of the board, a letter of which the following is a copy.

“OXFORD, MASS., March 20, 1925.

Selectmen of Oxford, Mass.

GENTLEMEN: I, Arthur C. Rutherford, do hereby extend my resignation of the office of Selectman of the Town of Oxford for three years, beginning from March 2, 1925, to take effect at once.

Respectfully,

(Signed) ARTHUR C. RUTHERFORD.”

This communication was received by Mr. Rhodes, who had theretofore had no conversation with Mr. Rutherford leading him to expect such a resignation or conferring upon him any express authority as to its disposition by him, should he receive it. On March 26, 1925, Mr. Rhodes filed the letter with the town clerk. At a meeting of the board March 27, 1925, Mr. Rutherford stated orally that he wished to withdraw his resignation, and some discussion ensued. On April 14, 1925, Mr. Rutherford wrote to the town clerk and to the board of selectmen denying that he had authorized any one to place his letter of March 20th on file with the town clerk and formally withdrawing his resignation and confirming his prior oral withdrawal. Mr. Rutherford is claiming to act, and purports to continue to act, as a member of the board.

G. L., c. 41, § 109, provides, in part, as follows:

“A town officer may resign his office by filing a resignation thereof in the office of the town clerk, and such resignation shall be effective forthwith unless a time certain is specified therein when it shall take effect.”

I do not undertake to determine whether the course of conduct described above resulted in the effectual resignation of Mr. Rutherford in accordance with the terms of this statute. There would seem to be issues both in law and fact which might be litigated without impropriety by the parties in a proceeding in which they might have the proper standing to do so.

The question is whether the Attorney General shall institute such a proceeding at the relation of the petitioner. For the general practice of information in *quo warranto* brought *ex relatione* and prosecuted primarily by the relator there is ample precedent. See *Commonwealth v. Allen*, 128 Mass. 308; *Commonwealth v. Swasey*, 133 Mass. 538; *Attorney General v. Sullivan*, 163 Mass. 446; *Attorney General v. Drohan*, 169 Mass. 534; *Attorney General v. Loomis*, 225 Mass. 372. This practice is not overridden by *Attorney General v. Methuen*, 236 Mass. 564, 580-581. The language of that last-cited case imports no novelty. See *Commonwealth v. Allen*, *supra*, p. 310; *Attorney General v. Sullivan*, *supra*, p. 448; *cf. Attorney General v. Drohan*, *supra*. Of course the standing of counsel for a relator, except when conceded as of grace, as in *Attorney General v. Methuen*, *supra*, must rest upon his actual authority to represent in the proceedings, not the relator, but the Attorney General.

The denial to private persons and the reserving for the sole action of

the chief law officer of the Commonwealth of the right to test in *quo warranto* the validity of the tenure of a public officer is marked evidence that not private interest but public welfare is intended to be subserved by the use in this connection of the extraordinary writ of *quo warranto*. In general, the Attorney General ought not, perhaps, to allow the use of his name for this purpose except in cases where he would consider it his public duty to proceed in any event, and where it is merely the burden of the proceeding which is allowed to be borne by the relator. Not every reasonable controversy over the title to an office presents the occasion for such action. There ought to be a prospect of some substantial accomplishment for the public good.

The present case is one where the officer in question has been recently elected and may still be presumed to be the choice of the inhabitants of the town for that office, provided he is willing to serve; and where the issues of law and fact involved are technical, are not of overwhelming importance, and do not involve any problem of right and wrong in the administration of public affairs. There is no other purported holder of the same office to throw a cloud upon the question whether Mr. Rutherford is still the choice of the inhabitants of the town, or even to raise the issue of competing private rights to the office. It is impossible to say that, should an information be filed and be successful and the petitioner, respondent and town be put to the expense and trouble of the proceeding and of a bye election, Mr. Rutherford would not promptly be returned to the same office to fill out the remainder of the term for which he was originally elected. It is admitted by both counsel that should Mr. Rutherford continue to serve as selectman, the validity of his acts would not be subject to collateral inquiry or attack.

In my opinion, the filing of this information would not at this time serve any public good. See II Op. Atty. Gen. 635; 649. The petition therefore is rejected.

GEORGE R. STOBBS, for the relator.

CHARLES B. RUGG, for the respondent.

ATTORNEY GENERAL V. ROBERT BRECK BRIGHAM HOSPITAL FOR INCURABLES.

Public Charity — Information in Equity — Attorney General.

Duty of the Attorney General respecting charitable trusts stated.

Departures from the directions of the founder or donor of a charity are at most permissible only in the most pressing exigency.

Meaning of the words "chronic or incurable disease" and "citizens of Boston" in the will of Robert Breck Brigham considered.

Facts respecting administration of said hospital discussed.

Where there is no apparent bad faith in the management of a charitable institution and no deviation on the part of its managers from charitable purposes generally, and the only issue arises from an ambiguity in the words of the founder of the charity with respect to the particular purposes of the trust, an application for an information may well be rejected as serving no public good. It appears that the same questions of law can be fully raised upon a bill for instructions brought by the trustees of the charity.

JULY 30, 1925.

This is an application to the Attorney General for the filing of an information in equity, by him, for the purpose of procuring the proper execu-

tion of a public charitable trust established under the will of Robert Breck Brigham, late of Boston.

On April 14, 1924, the city council of Boston, at the suggestion of His Honor the Mayor, James M. Curley, passed the following order:—

“Whereas it has been called to the attention of the City Council of the City of Boston that the officers of the Robert Breck Brigham Hospital for Incurables have been misusing and misapplying the funds of the estate of the late Robert Breck Brigham in connection with the hospital established by the trustees under the will of the said Robert Breck Brigham, said hospital being known as the Robert Breck Brigham Hospital for Incurables; and

Whereas the City Council is informed that the said officers of the said Robert Breck Brigham Hospital for Incurables have not been carrying on the public charity provided for by the terms of the will of the said late Robert Breck Brigham, namely, —

‘For the purpose of maintaining an institution for the care and support and medical treatment of those citizens of Boston who are without necessary means of support and are incapable of obtaining a comfortable livelihood by reason of chronic or incurable disease or permanent physical disability.’

NOW THEREFORE BE IT ORDERED THAT HIS HONOR THE MAYOR, for and on behalf of the city government of Boston, request the Attorney General of the Commonwealth of Massachusetts to bring an information in equity in the Supreme Judicial Court of Massachusetts for the purpose of procuring the proper execution of the public charity directed to be established under the will of the said Robert Breck Brigham, and for the purpose of restraining said corporation and its officers from misusing and misapplying the funds of the estate of the said Robert Breck Brigham and the property of the said Robert Breck Brigham Hospital for Incurables, and for such purposes as may be necessary in the premises for the proper carrying out of the public charity mentioned aforesaid.”

On April 17, 1924, E. Mark Sullivan, Esq., Corporation Counsel of the city of Boston, addressed a letter to the Attorney General, setting forth the above order of the city council and also setting forth specifically those charges to which he directed the attention of the Attorney General. The letter is of considerable length and it seems unnecessary to copy it into this finding. Charges other than those set forth in the letter were also introduced during the hearing, all of which have had consideration and been passed upon.

G. L., c. 12, § 8, imposes upon the Attorney General the following duties:—

“He shall enforce the due application of funds given or appropriated to public charities within the commonwealth, and prevent breaches of trust in the administration thereof.”

In *Burbank v. Burbank*, 152 Mass. 254, 256, 257, the court said, by Devens, J.:—

“‘The Attorney General is the protector of all the persons interested in the charity funds. He represents the beneficial interest; consequently, in all cases in which the beneficial interest requires to be before the court, the Attorney General must be a party to the proceedings.’ Tudor,

Charities, (3d ed.) 323. . . . No proceedings in regard to a public charity, no matter how general the assent of those beneficially interested, would bind him if not made a party, nor can any proceeding in regard to a public charity be invalidated by those beneficially interested, but having no peculiar and immediate interests distinct from those of the public. This duty of maintaining the rights of the public is vested in the Commonwealth, and it is exercised . . . by the Attorney General."

Serious responsibilities are thus imposed upon the Attorney General in cases involving public charitable trusts.

In this case close attention has been given to all the allegations made by the petitioners and to the answers thereto by the respondents. Many public hearings have been held. Great latitude has been given to both sides in the presentation of their evidence. Voluminous evidence, both verbal and documentary, was submitted in the controversy. The case was closed on April 24, 1925.

In the preparation of this decision the Attorney General has not restricted himself to the information brought out by the examination of witnesses and documents at the hearings. He has reviewed the entire stenographic record of the case, and all the exhibits introduced. He has also inspected the Robert B. Brigham Hospital and the city's institution at Long Island.

Upon this study and review, I make the following findings and rulings:

1. *Interpretation of the Will.*

The most difficult question presented for determination is the interpretation of the will of the said Brigham. Under the fifth clause of paragraph thirteen the testator provided as follows:

"For the purpose of maintaining an institution for the care and support and medical and surgical treatment of those citizens of Boston who are without necessary means of support and are incapable of obtaining a comfortable livelihood by reason of chronic or incurable disease or permanent physical disability."

The hospital has so construed the will as to admit three distinct classes: chronic, incurable and permanently disabled. It is contended by the city that the testator employed the word "chronic" to mean incurable. The position of the words "chronic or incurable or permanent disability," taken together with the fact that the testator provided that the hospital should be known to the world as a "hospital for incurables," together with the further fact that the testator made a small gift to many so-called "acute" hospitals, indicates, in my judgment, that the testator did employ "chronic" and "incurable" as synonymous terms. The maxim *noscitur a sociis* may well be applicable here. I believe it was his purpose to establish an institution to take care of those who might reasonably expect to make that institution a home for the remainder of their days and to be provided with medical and surgical treatment. I do not believe, however, that he intended that those who entered should leave all hope behind. I am of the opinion that he intended that the hospital should make every effort to prove to those who entered, as well as to the world, that those diseases that are considered incurable today would tomorrow be found curable. The research work done at the hospital is not open to criticism.

This question as to the interpretation of the will is, however, an exceedingly close one. Chief Justice Lemuel Shaw, in *Sanderson v. White*,

18 Pick. 328, 333, stated that "gifts to charitable uses are highly favored in law, and will be most liberally construed in order to accomplish and carry into effect the intent and purpose of the donor."

One of the clearest and most plainly enunciated principles of law relative to public charities (and this is particularly true in this Commonwealth) is, that such a trust must be executed strictly according to the original intention of the donor. The donor's general intent is not to be subverted. A departure from the directions of the donor can be justified, if at all, only upon proof of the most pressing exigency. *Worcester City Missionary Society v. Memorial Church*, 186 Mass. 531, 539; *Cary Library v. Bliss*, 151 Mass. 364; *Winthrop v. Attorney General*, 128 Mass. 258; *Harvard College v. Society for Theological Education*, 3 Gray, 280; *Fellows v. Miner*, 119 Mass. 541; *Baker v. Smith*, 13 Met. 34, 41; *Trustees of Smith Charities v. Northampton*, 10 Allen, 498, 501, 502; *Jackson v. Phillips*, 14 Allen, 539, 591, 592; *Morville v. Fowle*, 144 Mass. 109; *Attorney General v. Boulton*, 2 Ves. Jr. 380, 387; *Attorney General v. Hartley*, 2 Jac. & W. 353, 382; *Attorney General v. Earl of Mansfield*, 2 Russ. 501, 520; *Attorney General v. Whitchurch*, 3 Ves. Jr. 141; *Attorney General v. Whiteley*, 11 Ves. 241; *Attorney General v. Dedham School*, 23 Beav. 350, 357.

The donor's intention as expressed in his will must be carried out, and if there is any question as to the meaning of his words in that instrument the doubt should be resolved. From statements made at the hearings, I believe that all desire to see Mr. Brigham's will carried out exactly as he intended it should be. I am of the opinion that the court ought to be called upon to interpret the will as to the meaning of the words defining the cases to be cared for and supported at this hospital.

It has been suggested by counsel for the hospital that any resort to the court would injure the institution in the eyes of the public and cause it inestimable damage. If the matter were submitted to the court by the Attorney General, I do not believe that any serious injury would result to the hospital. I am of the opinion, however, that the corporation itself, as a trustee of the charity, might properly file a petition for instructions concerning this matter, and thus avoid any possible public criticism.

If a trustee is uncertain as to his duties, he may petition the court for instructions. *Drury v. Natick*, 10 Allen, 169, 175. A petition of trustees will lie for instructions as to whether a proposed plan for the administration of the trust conforms to the requirements of the trust instrument. *Harvard College v. Attorney General*, 228 Mass. 396. I suggest that the corporation, as trustees, move in this matter upon their own initiative.

2. *The Admission of Children.*

The Corporation Counsel criticises the hospital for admitting children under sixteen. I think it is clear that the testator never intended to establish a children's hospital, but I think it is equally clear that he did not intend to bar them entirely. The number of children to be admitted must, of course, be left to the judgment and discretion of those in control of the hospital, and so long as it does not clearly appear that those in charge have abused that discretion, the Attorney General should not interfere.

3. *Interpretation of the Words "Citizens of Boston."*

It is contended by the city that others than "citizens of Boston" have been admitted to the hospital, in violation of the provision of the will.

It is contended by the hospital that the testator employed the word "citizen" to mean those persons who either voted in Boston or those who had a permanent intention of residing there. The city contends it was used to mean a citizen of the United States who was domiciled in Boston. I am of the opinion that the term was employed to mean one "domiciled" in Boston. I find that the hospital has made an honest effort to limit those admitted to those who were domiciled in Boston. The determination of this question is often a difficult one, and errors in this respect have undoubtedly occurred. There are doubtful cases where the hospital may have been deceived as to the domicile. The Attorney General asks and expects the hospital authorities to make careful inquiry as to the domicile of the applicant, and to make an honest effort to confine the admissions to those domiciled in Boston. If a petition is filed for instructions as to the interpretation of the will, as suggested above, it would seem wise to submit this "citizen" question also to the court for instruction.

4. *The Degree of Indigency.*

The city claims that persons were admitted to the hospital who were not "without necessary means of support and are incapable of obtaining a comfortable livelihood," etc. I think it is clear that the testator did not intend to confine the admissions to paupers. I do not believe the testator meant to exclude the person who had accumulated and saved a few hundred dollars, or even the person who had acquired a modest home. I do not believe that the will should be construed so that the person who had saved a few hundred dollars or acquired a modest home should first consume his small holdings before he could be admitted. It is always a difficult matter to know where to draw the line between those who are and those who are not without necessary means of support and incapable of obtaining a comfortable livelihood, but I do find that the hospital has made an honest effort to admit only those who are without necessary means. If there are doubtful cases which have been admitted, they have been admitted through error of judgment or by reason of the hospital having been deceived. There has been no serious dereliction in this respect.

5. *The Pay Ward.*

The city charges that the corporation is maintaining a hospital more for the accommodation of the rich and well-to-do than for the city's poor. This charge I find is unfounded. The maintenance of the pay ward, which undoubtedly is used by the well-to-do, is not open to criticism. It is legal and, in my opinion, unobjectionable. It appears that the pay ward is and has been run for profit, and profit has been made which has been used for the free ward. In short, the pay ward is run to make up a deficit in the free ward.

6. *Examination Preparatory to Admission.*

The city criticises the manner in which patients are admitted. I find that the present scheme of admission is not open to objection or criticism. In the early days of the hospital each case was passed on by the board of directors. Later a social worker was employed, who investigates each case and reports to the chief of staff and superintendent, and they in turn refer the case to a committee, which committee makes its recommendation to the board of directors. I find that this scheme does not differ from that followed by other reputable hospitals.

7. *Payment by Free Patients.*

The city charges that patients in the free ward are required to pay. I find that none of the patients in the free ward are required to pay, as claimed by the city. I do find that, in some instances, they have been permitted to pay, which, in my opinion, is unobjectionable; on the contrary, it is commendable, if thereby the patient retains in a larger measure his or her self respect.

8. *The Charge of Favoritism.*

The city charges the corporation with favoritism by permitting only certain physicians the privilege of using the pay ward. It appears that a large percentage of the doctors sending in cases to the hospital are located in the same building on Marlborough Street, with the same secretarial service. But I find that any reputable physician who chooses to use the hospital may do so. In my judgment, the charge of favoritism is unfounded.

9. *Cost Per Capita.*

The city has charged that the cost per patient of those in the free ward is too high. This the city would show largely by a comparison with Long Island. The comparison, however, is of little assistance. It is obvious that the larger number of patients at Long Island must of itself make the per capita cost at that institution considerably lower. The original investment in the plant of the Brigham Hospital is another reason why the per capita cost there is larger. The work at the two institutions is quite different; that at Long Island is primarily an almshouse, where, by reason of the very necessities of the situation, the comfort of the patients and the standard of care must be reduced to the most economic basis possible. The cost per capita at the Brigham Hospital compares favorably with other hospitals. From the evidence there is no ground for criticism. It might be that if the "chronic" cases were of an incurable nature the cost would be less per capita, but there is no evidence that this would be so.

10. *The Character of the Hospital Structure Itself.*

The city claims that the plant is too elaborate and too expensive. If that is so, then the trustees under the will are primarily responsible, and not the corporation. The original construction and design of the building were under the supervision of men designated by the testator. The officers of the corporation are not responsible for the pretentious structure now standing on Parker Hill. It was built by another group of men and turned over to the corporation in 1914. On this point there is no occasion for the Attorney General to act.

11. *Rentals From Federal Government.*

The city charges that a rental received from the United States Government is not properly expended. The amount received from the United States is treated by the corporation as capital, and only the income therefrom is expended, except that the fund may be drawn upon, when necessity requires, to take care of any deficit. I am of the opinion that such treatment of the rental is wise. The counsel for the corporation, at page 730 of the record, said: "To suddenly increase the number of patients because of a windfall of that character, which within a few

years was certain, if that was done, to be expended, leaving the hospital operating on a larger scale than it could permanently maintain and having undertaken responsibilities toward a lot of poor people which it was certain to be unable to keep up, would have been a most unwise course for the corporation to have followed." In handling the rent money received from the Federal government in the way they have, the corporation members, as fiduciaries, have exercised their discretion in a sound manner.

12. *Trustees' Failure to File Probate Accounts.*

The suggestion that the trustees under the will of Robert Breck Brigham have failed to file annually their account is a matter which does not concern the hospital corporation, for there is no testimony from which it may be inferred that such failure is the result of collusion between the trustees and the hospital authorities. The matter of filing accounts by said trustees, the Attorney General will consider apart from this inquiry.

13. *Trustees' Purchase and Sale of Real Estate.*

The further suggestion that the trustees under the will acted unwisely in the sale and purchase of real estate belonging to the said estate, if true, is not a matter for which the hospital corporation is responsible or for which it is answerable. Here, too, there is no testimony from which to infer that there was any collusion between the trustees and the hospital. This is a matter which the Attorney General will consider apart from this inquiry.

I have passed upon all the important questions of fact and law raised by counsel in this case. Upon all the evidence presented and upon my own investigation, I find that no substantial wrong is being done to the public. On the contrary, I find that the respondents are doing a work of mercy that is a credit to the medical profession and to the city of Boston.

As to whether the corporation is technically within its legal rights in handling "chronic" cases and admitting others than citizens of the United States domiciled in Boston, I have suggested that the corporation might properly ask to be instructed.

I am of the opinion that the bringing of an information, as asked for, would not accomplish any useful purpose. The application is therefore refused.

JAY R. BENTON, *Attorney General.*

A. PERRY RICHARDS, *Of Counsel.*

E. MARK SULLIVAN, *Corporation Counsel.*

SAMUEL SILVERMAN, *Assistant Corporation Counsel,*

City of Boston,

For the Petitioners.

ARTHUR D. HILL,

RICHARD H. WISWALL,

For the Respondents.

INDEX TO OPINIONS.

	PAGE
Artificial ponds; application of fish and game laws	86
Attorney General; duty to advise Police Commissioner	170
Finance Commission	166
Board of Appeal; review of decision at instance of the Commissioner of Corporations and Taxation; amendment to decision	163
Bonus funds returned to cities and towns; surplus; use for a library building	78
Boston Elevated Railway Company; employees; preference of veterans and citizens	61
Trustee of an estate holding shares of the capital stock of the company; eligibility to appointment to board of trustees	156
Boston retirement system; clerk of the Municipal Court of the Roxbury District	150
Civil service; secretary appointed by the city council of Boston	58
Civil service employees of South Essex Sewerage Board	159
Commissioners for Massachusetts in other States and foreign countries	74
Commonwealth flats; employment by the Commonwealth of a broker in making sales	129
Constitutional law; election of city officials by the method of proportional representation	93
Exemption of veteran organizations from license fees	77
Expenditure of public money; water furnished without charge by a municipal corporation to a private concern	107
Governor and Council; authority to require opinions of the justices	76
Governor and Council; duties under the Constitution	96
Legislative power to authorize a grant of land by a city to a private owner	91
Prohibition of resale of railroad commutation tickets	92
Protection of reservations of ways not laid out	105
Right of petition; fee for filing legislative bill or resolve	102
Tax sales; nature of title acquired	109
Taxation; national banks	116
Cottage Farm Bridge; construction by Metropolitan District Commission	120
Counties; financial year; payments by treasurer	117
Education; reimbursement to towns for salaries paid to teachers	75
State reimbursement for salaries paid teachers on sabbatical leave	147
Election laws; election of city officials by the method of proportional representation	93
Returns of candidates	75
Finance Commission for the City of Boston; duty of Attorney General to advise; authority of commission to incur expense	166
Fish and game laws; artificial ponds	86
General appropriation bill; Governor's disapproval of certain items; vote by House	99
Governor and Council; authority to require opinions of the justices	76
Compensation for travel; "abode"	147
Duties under the Constitution	96
Hackney carriage stands; rules and regulations of the Police Commissioner for the City of Boston	129
Hours of labor; "overtime employment"; legal holiday	134
"Improper person" to hold certificate of registration or license to operate motor vehicles; interpretation	121
Insane persons; requirements for commitment; medical certificates of insanity	98
Inspection of food; label; weight of loaves of bread	149
Insurance; brokers' license fees; partnership and corporation licenses; veteran's exemption	112
Contracts made in a foreign state	125
Contracts of insurance; bond for hospital expenses	59
Contracts of pure endowment	157

Insurance — *Concluded.*

	PAGE
Foreign life insurance companies; net value of policies	132
Form of policy; incontestability	139
Reinsurance; "one half on an individual risk"	56
Interstate rendition; desertion, abandonment and non-support cases; cost; results of prosecution	122
Duty to deliver up fugitive from justice	86
Justices of the Peace; acting as attorneys; disqualification by interest	172
Appointment; removal	67
Powers and duties	71
Legislative bill or resolve; fee for filing	102
Legislative printing; authority of Clerks of House and Senate to make contracts	55
License fees; exemption of veteran organizations	77
Insurance broker; partnership and corporation license; veteran's exemption	112
Marriage licenses; duties of town clerks	165
Massachusetts Training School, trustees of; return of ward	171
Mental Diseases, Department of; records of psychiatric examinations	83
Metropolitan District Commission; authority to construct Cottage Farm Bridge	120
Pipe line rental; cost of water furnished to the town of Clinton	127
Motor Vehicles, Registrar of; "subsequent conviction"	114
Revocation of registration or license; "improper person"	121
License; "final conviction"	135
Notaries public; acting as attorneys; disqualification by interest	172
Appointment; removal	67
Powers and duties	71
Citizenship by marriage	141
Re-registration by women on change of name	143
Optometry, Board of Registration in; registered optometrist; students; examination	123
Permit to travel on a public way; maximum load	79
Police Commissioner for the City of Boston; powers; rules and regulations; hackney carriage stands	129
Regulations forbidding political activities by police officers	170
Removal of police officer	144
Printing for military purposes	138
Public charity; duty of the Attorney General	176
Public Health, Department of; regulations of United States public health service	168
Public officer; use of Attorney General's name	174
Public policy question submitted to voters; majority of all the votes cast	69
Public warehousemen; revocation of license on discontinuance of business	119
Quo warranto proceedings; public officer; selectman	174
Railroad commutation tickets; resale	92
Reclamation district; assessment upon land of the Commonwealth	160
Authority of governmental agencies to institute petitions as owners of land	54
Savings banks; investment in municipal bonds	137
Small loans; unlawful charges; waiver of statutory protection; attempted evasion of the statute	85
South Essex Sewerage Board; qualifying oaths of members of the board	159
State Fire Marshal; fire commissioner of the city of Boston; delegation of power; revocation of authority	153
State hospital; temporary release of patient on visit; authority of superintendent	82
State Retirement Association; interest	142
State retirement system; pensions for veterans; "compensation"	110
"Subsequent conviction"; interpretation	114

	PAGE
Tax sales; nature of title acquired	109
Taxation; corporation tax law	168
Exemption; public charity; theatre	62
Interest on taxes; computation of time; Sunday	161
National banks	116
Teachers' Retirement Association; re-employment of retired teacher	101
Theatre tickets; resale; license; "engaged in the business of reselling"	57
Town clerks; duties as to marriage licenses	165
Fees for duplicate licenses	128
Towns; reimbursement by Commonwealth for salaries paid to teachers	75
Union superintendent; salary; State reimbursement	135
Trust companies; sale of stock for nonpayment of an assessment	100

RULES OF PRACTICE

IN INTERSTATE RENDITION.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:—

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(b) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State

on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1926





The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1926



PUBLICATION OF THIS DOCUMENT APPROVED BY THE COMMISSION ON ADMINISTRATION AND FINANCE

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 19, 1927.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1926.

Very respectfully,

JAY R. BENTON,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL, State House.

Attorney General.
JAY R. BENTON.

Assistants.
ALEXANDER LINCOLN.
JOSEPH E. WARNER.
LEWIS GOLDBERG.¹
A. CHESLEY YORK.
JAMES H. DEVLIN.²
ROGER CLAPP.
CHARLES F. LOVEJOY.
MELVILLE FULLER WESTON.
ALFRED R. SHRIGLEY.
JACOB L. WISEMAN.³

Chief Clerk.
LOUIS H. FREESE.

Cashier.
HAROLD J. WELCH.

¹ Resigned February 2, 1926.

² Resigned November 10, 1926.

³ Appointed March 18, 1926.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES
FOR THE FISCAL YEAR.

General appropriation for 1926	\$93,000 00
Appropriation for small claims, St. 1925, c. 211	5,000 00
Appropriation for 1925, unexpended balance brought forward	6,074 95
Special appropriations:	
Legal services, National Bank Tax Litigation	18,564 10
Publication, Opinions of Attorneys General, 1921-1924, Resolves of 1926, c. 46	4,000 00
	<hr/>
	\$126,639 05

Expenditures.

For salary of Attorney General	\$8,000 00
For law library	508 50
For salaries of assistants	34,425 15
For clerks	7,886 50
For office stenographers	6,920 42
For telephone operator	992 90
For legal and special services	5,912 00
For office expenses and travel	3,578 89
For court expenses	14,524 31
For small claims	2,123 70
For National Bank Tax Litigation	18,564 10
	<hr/>
Total expenditures	\$103,436 47

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 19, 1927.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my annual report.

The cases requiring the attention of this Department during the year ending November 30, 1926, to the number of 10,456, are tabulated below:

Corporate franchise tax cases	1,654
Extradition and interstate rendition	326
Grade crossings, petitions for abolition of	56
Indictments for murder	43
Land Court petitions	361
Land-damage cases arising from the taking of land by the Department of Public Works	41
Land-damage cases arising from the taking of land by the Metropolitan District Commission	50
Land-damage cases arising from the taking of land by the Department of Mental Diseases	4
Land-damage cases arising from the taking of land by the Pilgrim Tercentenary Commission	1
Miscellaneous cases arising from the work of the above-named commissions	57
Miscellaneous cases	1,565
Petitions for instructions under inheritance tax laws	38
Public charitable trusts	200
Settlement cases for support of persons in State hospitals	72
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	5,988

Capital Cases.

Indictments for murder disposed of during the year 1926:

Berkshire County. — In charge of District Attorney Charles H. Wright: Chester Darling.

Middlesex County. — In charge of District Attorney Arthur K. Reading: Vincenzo Bruzzese, John J. Devereaux, Edward J. Heinlein, John J. McLaughlin, Robert L. C. Shafer, Robert A. Smith, Richard Stewart, Jerry Gedzium, Francisco A. Ferraro, Giovanni Ierardi, Carmine Lo Priore, Pelino Presutti, Donald Mark Ferguson, George C. Farley, Charles Henry Slyvert and William C. Moir.

Norfolk County. — In charge of District Attorney Winfield M. Wilbar: Stanislaw Kwistkowski and John E. Mackenzie.

Plymouth County. — In charge of District Attorney Winfield M. Wilbar: George Abrahams, Napoleon J. Cooke and Joseph Silipo.

Suffolk County. — In charge of District Attorney Thomas C. O'Brien: Sabatino Troisi, Rose Candia, Francesco Espisito, Ciro Scherma, Charles H. Tupper, Stanley V. Toothacher, Albert DeShone, Robert Sambursky, Vincenzo Carioti, Peter Carioti and Ralph Cacciaputi.

The following indictments for murder are pending:

Berkshire County. — In charge of District Attorney Charles R. Clason: Louis Mercier, Luther Todd and Mary Todd.

Bristol County. — In charge of District Attorney William C. Crossley: Dan Kaminski.

Hampden County. — In charge of District Attorney Charles R. Clason: Michael Fiorentino, Thomas Kosier, Richard C. Bearse¹ and Trisa S. Nascimbeni.¹

Middlesex County. — In charge of District Attorney Robert T. Bushnell: Herbert J. Gleason.

Norfolk County. — In charge of District Attorney Winfield M. Wilbar: Celestino Madeiros, Nicola Sacco and Bartolomeo Vanzetti.

The Administration of Criminal Justice in Massachusetts.

The past eighteen months have been prolific with widespread activity not only in this Commonwealth but throughout the country on the part of citizens, State legislatures and bar associations in an effort to correct the grave defects that exist in the administration of criminal justice and to arrest the dangers that menace the safety, lives and property of our citizens.

It is a matter of no importance in this connection to determine

¹ Committed to State Hospital.

whether or not there was or is at the present time a "crime wave". It is sufficient to say that the statements of crime in our daily newspapers are a challenge to action. Neither is it necessary to attempt to determine the causes of the present crime situation. Every conceivable cause has been assigned to account for the many crimes of violence that are being committed mainly by comparatively young men.

One of the leading crime commissions of the country has listed the causes as argued before it. They report that "by some the World War is held largely responsible for the increase of crime, but this view is not tenable. Other causes assigned are the great mass of unenforceable laws; the decrease in social and moral responsibility on the part of the people generally; the ease and facility with which persons can obtain the tools of criminals — the pistol and the automobile; the waning of religious faith; the breaking up of home life; the lessening of responsibility of the family; the modern doctrine of 'self expression'; the departure from the old doctrine of discipline; the cultivation of the criminal in the popular press and in fiction; the influence of moving pictures in similar fashion; the hip flask; narcotic drugs; the alien strain in our population; the display of great wealth; the automobile, permitting freedom of movement; the Bedouin life existence of the modern American and his greater mobility; excessive work; insufficient work; childhood complexes; the coddling of the criminal; glandular defects; brain lesions; urban conditions of living; the jazz existence; sentimentalism; the failure to enforce laws; and others too numerous to mention."

But whether the serious situation last year was properly defined as a "crime wave" or not, and whatever the causes for the type of present day crime may have been, there was a positive public demand that something be done. The force of this public demand in regard to the better administration of the criminal law was reflected nowhere more strongly than in the Legislature last year. Approximately one hundred crime bills were filed with the General Court, during the first week in March public hearings were held before the Joint Committee on the Judiciary, and at that time public officials interested in the problem as well as private citizens gave their views on the general situation and on the bills under consideration. As a result several bills were reported out of the committee and later enacted into law. The more important enactments were the following:

A. An act making it mandatory in murder and manslaughter cases and in other felony cases, by order of the justices of the Superior

Court, to certify a transcript of the evidence to the Supreme Judicial Court. The effect of this act is to eliminate the vast delay (sometimes years) usually involved in agreeing upon a bill of exceptions in important criminal cases. Heretofore, in some cases, the delay has been of such an extent as seriously to impair, if not to destroy, the influence of conviction and sentence.

Recently I made a study of all the criminal cases argued before the Supreme Judicial Court of Massachusetts from March 1, 1920, to March 1, 1926, and ascertained the total number of months elapsing between the date of the indictment or complaint and the decision of the Supreme Court. The number of criminal cases appealed to the Supreme Court, and the decisions rendered in this period, was 106, and the average time between the issue and the final decision was 19 months and 2 days, or an average of over a year and a half. During this period there were seven murder cases argued upon exceptions, and the average time from the date of the indictment to the decision was 39 months and 20 days. Such delays tended to decrease the general respect of the community for law. This act will do much to correct the situation.

B. An act further regulating the matter of bail in criminal cases.

This act defines what persons shall be deemed to be professional bondsmen, provides that they shall be governed by rules established by the Superior Court, and in other ways attacks certain evils that existed heretofore in the matter of bail.

C. An act which permits the court to amend complaints and indictments in relation to allegations as to which the defendant would not be prejudiced in his defense. This may be done upon the motion of the district attorney or other prosecuting officer.

Heretofore a defect in the form of an indictment in some cases meant long legal battles before or during the trial, sometimes resulting in the discharge of the defendant regardless of his guilt, thus necessitating the return of a new indictment. This involved needless expense, and delay in some instances meant the defeat of justice, prevented conviction and punishment from acting as a deterrent, and tended to bring the administration of justice into disrepute.

D. An act which empowers the judge to strike from the jury list the names of persons who have been convicted of any felony or any offense punishable by imprisonment in a jail or house of correction for more than one year.

E. An act cutting the number of peremptory challenges of jurors available to defendants in trials for murder and certain other offenses from 22 to 12.

A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court must exclude him. Under the old system, because of the needlessly large number of challenges, it was always necessary in robbery and capital cases to draw from two to five times as many jurors as in ordinary cases.

The system meant considerable unnecessary expense to the counties and frequently enabled defendants to prevent the most suitable men from serving on the jury.

F. An act relative to the arrest of persons while on probation.

G. An act relative to probation, suspended sentences, and filing of complaints in the district courts.

H. An act relative to the criminal records of offenses against the laws of the Commonwealth.

This act requires courts to obtain criminal records of certain prisoners before fixing the amount of bail, requires probation officers to investigate criminal cases and inform the court as to prior criminal prosecutions of the defendants. It further requires the courts to obtain information as to prior criminal prosecutions of defendants before disposing of criminal prosecutions.

I. An act which requires the district attorney to move for sentence not later than seven days after plea of guilty or after a verdict of guilty in cases of felonies not punishable by death, and where no question of law has been reported for decision by the Supreme Judicial Court.

J. An act increasing the punishment for non-appearance of a person duly summoned as a witness in a criminal case.

Heretofore a witness duly summoned to appear and testify and who failed to attend could be punished by a fine of not more than twenty dollars. This has been increased to a fine of not more than two hundred dollars, or by imprisonment for not more than one month, or both.

K. An act providing that the court, on motion of the district attorney, may order the trial of any specific case of crime to take precedence over all other cases.

Seventy-two years ago the Legislature provided that a certain class of cases should be given precedence. This statute had, in many instances, effectively blocked the district attorneys from trying very important criminal cases which ought to have been tried at once. This situation has been cured.

Many of the serious defects that existed in our criminal procedure and statutes have thus been corrected, but the crusade of the law-abiding against the organized business of crime is not completed by

the passage of a few laws. Just as eternal vigilance is the price of true liberty, so eternal vigilance is the only assurance that the administration of criminal law in this Commonwealth shall be made simple, trials speedy and punishment certain and effective.

The battle against crime is not the work of a moment. It requires a breadth and range of study and investigation not comprehended by the pressing of a button, the waving of a magic wand or the stroke of a pen. That is why last year I recommended the establishing of a commission to make a continuing survey of criminal justice in the Commonwealth; to study the causes of crime and factors in the administration of criminal justice, and to make recommendations based on scientifically ascertained facts. I feel just as strongly on this proposition now as I did a year ago, and I renew the recommendation.

It is an inefficient method for the Commonwealth to leave the study of the administration of criminal justice and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals. The most satisfactory method of attacking the problem is through the creation of a continuing commission similar to our Judicial Council, representative of the best citizenship of the community, and equipped to find facts, to interpret them, to formulate a program of action based upon them, and to file annual reports with the Legislature for its consideration and action. Such a commission should be public rather than private, because a commission organized by the Legislature will command wider attention and more immediately influence public opinion. In addition, sources of information inaccessible to a private commission can be commanded by a State commission clothed with the usual powers of such public investigating agencies.

As I pointed out last year, such a commission should not consist entirely of lawyers because a number of the factors involved in the general problem are not legal in character. I therefore recommend the establishment by the Legislature of a crime commission authorized to conduct a continuous study of the crime situation in Massachusetts, to consider the subject matters of prevention of crime, and to examine the procedure, methods and agencies concerned with the detection of crime, the prosecution and trial of persons accused of crime, and the punishment, treatment and pardon of convicted persons, and all other matters which have relation directly or indirectly with the administration of criminal justice in Massachusetts.

In my judgment, a thorough survey and an intelligent study of criminal procedure and of the penal statutes over a period of years will soon result effectively in the cutting of legal red tape, and the elimi-

nation of unending delay through the result of technical defenses and the dilatory tactics as practised today, all to the great end that the rights of the public, which seem so often lost sight of, shall be fully protected, while yet assuring to the accused the complete safeguarding of his constitutional rights.

Unifying Police Departments of Metropolitan Boston.

Last year I advanced the proposition that the police departments of the forty cities and towns that make up Metropolitan Boston should be unified, co-ordinated and vigorously supervised. The Joint Committee on the Judiciary reported a resolve providing for an investigation by the Department of Public Safety relative to this matter. The House Ways and Means also passed favorably upon the proposition, but when it reached the Senate Ways and Means, the resolve received an adverse report. I renew the recommendation this year because in my judgment it is not good business, that is, so far as the law-abiding part of our population is concerned, to have this large metropolitan community, with a population of nearly two million people, policed by forty separate and distinct police forces.

I also suggested the installation of a central broadcasting station for police use so that police orders and information could be communicated simultaneously and instantly to sub-stations. Good roads and high-powered cars have made the escape of criminals far more easy than was the case before the advent of good roads and automobiles. In a half or three-quarters of an hour a person can come into the Metropolitan District of Boston, commit a crime and escape before the alarm can be spread by present methods. When a criminal adopts this method of escape we should determine whether the present system of police communication is adequate to meet the conditions. It would be interesting to ascertain just how long it would take to notify by telephone all the police stations of our forty cities and towns of a crime committed in one of them and to give descriptions of the criminals and the high-powered automobile in which they were escaping.

If the use of the radio in its present development is not feasible, then the printing telegraph system should be availed of. Los Angeles, Chicago and San Francisco have already employed such a system for the capture of criminals and the spreading of alarms. One police official where such a system has been installed has this to say:

The need for speed and accuracy in transmitting orders or information from headquarters to each of our thirty-seven districts (up to thirty-five miles away) is

obvious. Up to about three years ago messages were transmitted by telephone and taken down in long hand. To transmit a message to all stations it was necessary for the central point to call in seven district stations that in turn would call in the stations under their control. The time required was considerable, especially in emergencies, and mistakes and misunderstandings were bound to occur. We installed a printing telegraph system consisting of one transmitting machine at detective headquarters and a receiver at each of the thirty-seven district headquarters. One switch connects the transmitting machine to all thirty-seven receivers so that with one operation orders can be communicated simultaneously and instantly to every district headquarters in the city. As the messages are printed in plain type there is no chance for misunderstandings. With this system information that involves calling every station can be secured in five minutes instead of the forty-five minutes formerly required.

The primary function of a government is to protect life and property. It should protect itself against crime in a business-like way. The old traditions which cling to the administration of criminal justice, and which have nothing to commend them save their age, should give way to sensible and practical arrangements to reduce crime. To allow our police to fall short of their full effectiveness for lack of proper equipment is an unwise and expensive policy.

A State Central Criminal Identification Bureau.

I recommend the establishment in the Department of Public Safety of a central bureau of identification of criminals. This recommendation is made so that there may be gathered together in one place and made available for every agency dealing with criminals in the Commonwealth the records of the different cities and towns and institutions throughout the State and also other State and Federal jurisdictions, so disclosing promptly for their use the criminal's past history in every other community.

The Pistol Menace.

The pistol is one of the greatest, if not the greatest, menace to the peace of society today. It is the main reason why crimes of violence are common today. The gunman must go. The demand of the hour is for some means to be found by which the consequences of the use of pistols by criminals can be made so dreaded that they will be deterred from using them. The Governor's recommendation in his recent message to you on this subject should have your early attention and support. The deliberate use of a dangerous weapon in the attempt or accomplishment of a crime should add very materially to the measure of punishment to which the user would be subjected.

But however drastic individual State laws may be in regard to this matter, it is not going to be easy to accomplish real results while there is still the opportunity for bringing in weapons by mail and on the person over the borders of the State, and so long as the Federal government and other States do not keep pace. Your Attorney General is a member of the sub-committee on firearms regulation of the National Crime Commission. This committee held an all-day conference in New York City recently and meets again in Chicago on January 28 and 29. Recommendations are now being drawn up which, if enacted into law by Congress and the several State legislatures, will go far toward deterring the commission of crimes by the use of a pistol.

Authorizing the Court to Comment upon the Evidence.

In the Federal courts and in England, it is competent for the court to comment on the evidence and to express an opinion thereon. This right existed in Massachusetts about fifty years ago. The court's view as to the evidence is not binding upon the jury, but is merely advisory. This right of the court has operated in a very satisfactory manner in the Federal courts and has been of great assistance to the jury. It has enabled the jury to get a clearer view of the case and better to comprehend the law applicable to the situation, as laid down by the court. It seems to me that a judge in this Commonwealth should be something more than a referee in a battle of wits. He should guide and control an inquiry; he should have not only the right but the absolute duty to give to the jury the assistance of an unbiased, dispassionate mind to aid them in the consideration of the evidence. In my judgment, the extension of the power of our judges with reference to the analysis of and comment upon evidence is desirable.

Changes in the Criminal Law recommended at the Instance of the District Attorneys.

In my first annual report I stated that the eight district attorneys were administering their important offices honestly and with great industry and loyalty to the Commonwealth. During the four years of my administration the relations of the office with the eight prosecuting officers have been most harmonious, and in this final report I desire to express my appreciation of the ability, fidelity and earnestness with which the several district attorneys have performed their respective duties and responsibilities.

To bring about an increased efficiency in the administration of the criminal law, and with a view to securing greater co-operation among the district attorneys, each year a call has been issued for official conferences, at which time opinions have been exchanged relative to needed changes in the criminal law. Two such conferences were held the past year, namely, on November 27 and December 18.

At the conclusion of our deliberations it was unanimously voted to authorize me, on behalf of the district attorneys, to make the following recommendations and suggestions:

A. DISTRICT COURT JUDGES SITTING IN THE SUPERIOR COURT.

The Judicature Commission in 1921 recommended the enactment of a permissive statute enabling the Chief Justice of the Superior Court to call to his aid justices of the district courts for the trial of jury cases, which would provide the necessary means to relieve congestion of the criminal docket without increasing the number of permanent judges. Such an act was passed in 1923, and the district attorneys, at every conference meeting since that time, have been unanimous in their opinion that the calling of the district court judges has very promptly and effectively resulted in relieving the congestion of the criminal dockets. The deliberate congestion of cases in the Superior Court has been practically swept away. More cases have been tried; more have produced pleas of guilty when trial was found to be imminent; and still more have not been appealed. There is a strong public demand for speedy criminal trials. To let the practice of calling up justices of the district courts come to an end now would be to bring back the deliberate congestion of criminal cases, as referred to. It is most important that this statute should not be allowed to lapse on July 1, 1927, and the district attorneys recommend that it not only be continued in force, but that jurisdiction of the judges so called be properly increased.

B. BAIL IN CRIMINAL PROCEEDINGS.

Of the four hundred criminal cases that were specially investigated by this department the first of last year, by far the greater percentage of the cases involved issues and problems arising out of and incidental to the admission of defendants to bail.

No general observations or recommendations are made on this subject at this time in view of the fact that the Judicial Council now has this subject under consideration, and undoubtedly will file an exhaustive report on this important matter later. The district attorneys do, however, make one specific recommendation.

Cases are not infrequent where persons who have become bail or surety in criminal cases, and who have offered real estate as their qualification for acceptance as such bail or surety, subsequently, while the criminal cases are pending, dispose of or encumber the real estate without notifying the court. Such an act, under St. 1922, c. 465, may be punished by a fine or imprisonment. Criminal prosecution of the bail or surety does not, however, satisfy the purpose of bail. There ought to be additional legislation which would protect the Commonwealth as far as possible in its monetary rights. It is, therefore, recommended that legislation should be enacted providing that where a person or persons who qualified as surety or sureties in cases involving felonies by reason of the ownership of real estate, the officer taking the bail shall file a certificate or caveat with the register of deeds for the county where the real estate is located, the same to constitute a lien upon such real estate, which shall not be discharged until final judgment has been rendered in the case or the principal surrendered by leave of court.

C. THE TIME WITHIN WHICH A MOTION FOR A NEW TRIAL MAY BE FILED.

In 1922, to take care of a special situation in Suffolk County, the Legislature passed an act which provides that "the superior court may, at the sitting in which an indictment is tried, or within one year thereafter, or, in capital cases, within said year or at any time before sentence, upon motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted or if it appears to the court that justice has not been done, and upon such terms or conditions as the court shall order." (See St. 1922, c. 508.)

It is recommended that this act be repealed and restated as formerly contained in G. L., c. 278, § 29, which read as follows:

The superior court may, at the sitting in which an indictment is tried, or within one year thereafter, upon motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted or if it appears to the court that justice has not been done, and upon such terms or conditions as the court shall order.

D. LARCENY OF PROPERTY EXCEEDING \$2,000 IN VALUE.

G. L., c. 266, § 30, provides for a penalty of not more than five years in State Prison for larceny of property exceeding \$100 in value. In a recent case a defendant was convicted of larceny of a huge sum of money from a bank. The larceny wrecked the bank and caused

great suffering to many depositors, yet the maximum penalty was only five years in State Prison, the same penalty which might have been imposed for larceny of property of \$101 in value. While such cases may not often arise, it is desirable that the statute should be so enlarged as to meet such a situation. It is recommended that the statute be amended so as to enable the court to impose a sentence of not more than twenty years in State Prison for larceny of property which exceeds \$2,000 in value.

E. CONSPIRACY TO COMMIT A FELONY.

It is recommended that legislation be passed providing that a conspiracy to commit a felony shall be punished in the same manner and to the same extent as an attempt to commit a felony.

Interstate Rendition.

The number of interstate rendition cases handled this year was 329, an increase of 33 cases over the previous year. The number of rendition cases heard by this department is increasing each year. The cases involve all manner of crimes from simple misdemeanor to murder. The major portion of the fugitives returned to Massachusetts were upon charges of desertion, non-support and abandonment. The benefits derived in bringing back these erring husbands in the savings to the community and the deterrent effect upon the community are obvious.

There were 18 hearings given to fugitives sought by other States. In all of these hearings the fugitive was represented by counsel. Some of the hearings involved perplexing questions of law. In three instances writs of habeas corpus were brought by the fugitives from justice; in two instances the Commonwealth was sustained and the third case is now pending before the Supreme Judicial Court.

The Commonwealth has honored all requests from other States. In no case has the governor of any State refused to surrender the fugitives from justice of Massachusetts upon the ground that the papers accompanying the requisitions and passed upon by this department were not in proper form. The State of Florida, however, has refused in two instances to return fugitives from the justice of Massachusetts upon improper grounds, and the Commonwealth of Pennsylvania has refused to honor the application for requisition in one case because it considered the crime as too trivial.

The Ponzi Case.

On February 26, 1925, Charles Ponzi was found guilty in the Superior Court for the County of Suffolk upon four indictments, charging larceny in several counts. On July 11, 1925, the Commonwealth moved for sentence, and three of said indictments were placed on file, and the defendant was adjudged a common and notorious thief under G. L., c. 266, § 40, upon the remaining indictment, and was sentenced thereon "to not less than seven nor more than nine years in the State Prison." A stay of the execution of said sentence was granted, and the defendant was admitted to bail with sureties in the sum of \$10,000, pending an appeal on exceptions to the Supreme Judicial Court. The exceptions were overruled by the Supreme Judicial Court on May 28, 1926. On June 1, 1926, Ponzi failed to appear in court for confirmation of sentence, was defaulted, and a warrant issued for his arrest. Circulars containing a photograph and finger prints of Ponzi, requesting his apprehension, were sent throughout the United States, Canada, England, Mexico and Central America by this department.

Immediately following his default in the Superior Court for the County of Suffolk, Ponzi, in disguise, shipped as a waiter at Tampa, Florida, under the name of Andrea Luciana, on the "Sic Vos Non Vobis", a ship under Italian registry, the ultimate destination of which ship was Italy. The ship proceeded to Houston, Texas, where Ponzi was recognized by a member of the crew, who notified the authorities of that city. The ship, after leaving Texas, stopped at the port of New Orleans in the State of Louisiana, where Ponzi was detained by a sheriff from the State of Texas, who subsequently brought him back to that State.

On June 29 Charles Ponzi was formally arrested in Houston, Texas, under a warrant charging him with being a fugitive from justice. On July 1 Ponzi sought his release from arrest by a petition for a writ of habeas corpus addressed to the District Court of Harris County, Texas, which petition alleged, in substance, unlawful arrest, kidnapping and a violation of his rights as an Italian subject under a treaty existing between the United States and Italy.

A requisition was made by the Governor of Massachusetts upon the Governor of Texas on June 29 for the surrender of the fugitive, and Assistant Attorney General Shrigley, with Police Inspector John F. Mitchell of this department and Police Inspector Henry M. Pierce of the office of the District Attorney for Suffolk County, proceeded to Texas, and the requisition was duly presented to Governor Miriam A.

Ferguson on July 8. A hearing upon said requisition took place on July 16 before the Governor at Austin, Texas, at which hearing Ponzi was represented by counsel. A rehearing thereon was assigned by the Governor for August 2, upon which day the requisition of the Governor of Massachusetts was duly honored, the executive warrant issued, and the return of Ponzi to Massachusetts ordered. The hearing upon the petition for a writ of habeas corpus was continued from time to time to await the action of the Governor upon the requisition. This petition was dismissed on August 5, after a hearing which lasted two days.

An appeal to the Court of Criminal Appeals of Texas was thereupon entered by Ponzi, and he was ordered remanded to the county jail without bail, no bail being allowed under Texas statutes after the executive warrant has issued for the return of a fugitive. On October 12 arguments were made before the Court of Criminal Appeals of Texas, the Commonwealth of Massachusetts being represented by Assistant Attorney General Shrigley. A judgment was entered by that court on October 27, affirming the judgment of the District Court for Harris County, and dismissing the appeal. On November 12 a motion for a rehearing was filed by Ponzi before that tribunal, and an ex parte hearing thereon took place on December 22. No decision has yet been rendered.

Last October one Calcedonio Alviti purchased approximately one hundred acres of land near Lake City in Florida. The property was described by the Boston Better Business Commission as being reached by a narrow, rough sand road and a picture of desolation and loneliness, parts containing high dead pine stumps, with street signs planted in the weeds. It was also further alleged that part of the property was swamp land. This property was deeded by Alviti to the Charpon Land Syndicate, a copartnership of Alviti and Ponzi. It was later transferred to Ponzi, as trustee of the Charpon Land Syndicate. The property was then plotted into small lots, and those interested started disposing of it by a "200 per cent profit in thirty days" scheme. The scheme had features similar to Ponzi's international reply coupon sale of 1920.

Alviti arrived in Boston on Sunday, January 10, and two days later it came to my attention that Alviti was offering "units of indebtedness" of the Charpon Land Syndicate without his having complied with the requirements of the "Blue Sky" Law relative to the sale of securities. The State police were immediately sent to Alviti's Boston office, and the offering for sale of the "units of indebtedness" was stopped that afternoon. Subsequently a warrant was secured from the

Municipal Court of the City of Boston, and Alviti was charged with violation of the "Blue Sky" Law. He pleaded not guilty, and after trial was found guilty by Judge Murray, and sentenced to six months. He appealed and later came into the Superior Court, pleaded guilty, and was fined \$300.

Cattle Fraud Cases, so called.

During the summer it was brought to the attention of His Excellency, and by him to this office, that certain frauds existed in obtaining reimbursement from the Commonwealth for cattle condemned as tubercular under the provisions of G. L., c. 129, § 33, as amended. It was found that certain persons were using this statute (which was passed in order to enable dairy farmers to have a clean herd of cows and partially to help them to bear the burden of the loss of such cows as were condemned) as a cover for profit-making schemes.

I assigned Assistant Attorney General Alfred R. Shrigley to assist District Attorney Wright of Hampden County in a Grand Jury investigation. Mr. Shrigley being obliged to leave the State on another important matter connected with this office, I assigned Assistant Attorney General James H. Devlin, who continued the Grand Jury investigation with Mr. Wright. At the conclusion of that investigation indictments were returned, which are still pending.

The matter was then taken up by District Attorney Emerson W. Baker of Worcester, and Mr. Devlin assisted him in the Grand Jury investigation there, and, as a result of the investigation, the Grand Jury returned indictments in Worcester County also. These cases are still pending before the courts of this Commonwealth, and I make no further comment on them.

Judicial Salaries.

Seven years prior to the adoption of the United States Constitution, Massachusetts put into its Constitution what has become the classic statement of the American theory of the division of governmental powers. After directing that neither the legislative, executive nor judicial branch of the government should encroach upon the functions of the others, the provision ended with the statement: "To the end that it may be a government of laws and not of men."

The stability of our system of State government depends to a great extent upon the confidence and respect of the people for those who, as judges, hold the scales of justice in their hands; depends upon the character and the wisdom of these men. The ablest and the best of our citizens and those most learned in the law are needed to fill these

great positions of power and responsibility. It is not reasonable to expect that men who have proved their worth in practice will surrender incomes many times as great for the honor of a judgeship. We must pay to our judges salaries more nearly commensurate with the worth of the men called to the service or we shall have a less able judiciary drawn either from mediocre members of the bar or from the class of wealthy lawyers who can afford the inadequate salary in return for the honor of the place. To accept either alternative is to have a lower standard of service than the citizens of the Commonwealth are entitled to have.

The salaries of the justices of the higher courts of the Commonwealth are inadequate to the amount of work required and to the dignity and importance of their offices. I think it is due not only to the court but to the bar that the Attorney General should call the attention of the Legislature to the matter. The fact that notwithstanding the present scale of salaries His Excellency the Governor has been fortunate thus far in having been able to obtain the services of competent and able men for judicial positions does not dispose of nor affect the question. There has been manifested already considerable reluctance to accept positions on the bench on account of the salary of the office. This should not be. The acceptance of judicial appointment ought not to involve a serious pecuniary sacrifice. The compensation of those holding high judicial positions should be made more nearly commensurate with the value and high importance of their services.

Congested Conditions in our Court Houses.

It has come to my knowledge that immediate action is required to provide sufficient accommodations for the courts in several of our counties. Additional sessions which the present business requires cannot, under existing conditions, well be attempted; and those sessions now required by statute cannot be held with reasonable convenience. The large increase in court sessions, and especially criminal sessions, has resulted in a congestion in the court houses of one or two of our larger counties, but a situation particularly exists in Suffolk County which can be accurately characterized as critical. At the present time the accommodations for the administration of criminal and civil justice in Suffolk County are so inadequate as seriously to hamper and affect such administration, and nothing short of additional accommodations in the way of housing the courts in Suffolk can provide the relief that is demanded. In my judgment, the matter does not permit of further delay and remedial action should be taken at this session of the Legislature.

Daylight Saving Law.

In my last annual report I stated that the constitutionality of the so-called daylight saving law of the Commonwealth had been attacked in the United States District Court by a bill in equity, in which the Attorney General and three other State officers were named as defendants, and that the court had, after hearing and arguments, dismissed the bill. The plaintiffs appealed directly to the United States Supreme Court under a Federal statute permitting such procedure. Briefs were filed and the case was argued in Washington last October. Immediately upon the conclusion of the argument Chief Justice Taft, speaking for the court, stated that the construction of the statute urged by my department, and adopted by the court below, was correct and that the bill of complaint would be dismissed. Subsequently the Supreme Court rendered a formal opinion dismissing the bill and sustaining the various contentions made on behalf of the State officers. By this decision litigation relative to the legality of the daylight saving law is definitely ended.

Alpha Portland Cement Company Cases.

Last year I referred to a large number of petitions filed by both domestic and foreign corporations, following the adverse decision of the Alpha Portland Cement Company cases by the Supreme Court of the United States and founded on the alleged invalidity of the Massachusetts corporation tax law. The total number of such petitions was 801, and the total amount sought to be recovered was about eight million dollars. In all these cases hearings were had before the Supreme Court on motion to dismiss or demurrer filed in behalf of the Commonwealth, and in all of them final decrees have been entered dismissing the petitions. In a few cases appeals were taken to the Full Court and one case (*The Celluloid Company v. Massachusetts*) was taken to the Supreme Court of the United States on writ of error and petition for writ of certiorari. The petition was denied, and the writ of error is now pending.

Railroad Rate Differentials.

The Maritime Association of the Boston Chamber of Commerce has over a long period of time conducted before the United States Shipping Board and before the Interstate Commerce Commission a vigorous fight against the differentials now operating against the Port

of Boston. In November of 1924 this office represented the Commonwealth before the United States Shipping Board in support of the case of the Maritime Association, which sought a rearrangement of the fixed and arbitrary ocean freight rates in order that the inequities of the rail differential might be corrected. At that time certain southern ports were looking for rates which would further discriminate against the Port of Boston and New England ports. The result of the hearing was that, at least as to ocean rates, there was no revision to place a greater burden on Boston and New England ports.

The Maritime Association, however, also brought a complaint before the Interstate Commerce Commission against the Ann Arbor Railroad Company and other roads seeking to abolish the rail differentials that existed in favor of Philadelphia, Baltimore and Norfolk, which resulted in Boston's getting no bulk cargo and losing its export business. The Interstate Commerce Commission denied the petition, but suggested that the railroads agree to equalize the rates on grain ex lake Buffalo. The roads not so agreeing, the matter was then again brought before the Interstate Commerce Commission, and hearings were held May 24, 25 and 26 of 1926. The Commonwealth was represented by Assistant Attorney General James H. Devlin. The examiner recommended to the Commission that the rates on grain ex lake Buffalo to all the North Atlantic ports should be equalized. A petition for a rehearing was filed, granted, a hearing held, and the final decision has not yet been handed down. The Maritime Association, however, is hopeful that the Commission will equalize the grain rates ex lake Buffalo to all the North Atlantic ports, removing the rail differential that Philadelphia, Norfolk and Baltimore now enjoy. It is felt that, if that is done, Boston will regain its export business, as this bulk grain for export will furnish a bottom cargo for vessels, and they will call for it at the Port of Boston and take on our goods manufactured here, which now in most instances go to New York, for overseas shipment.

The Billboard Cases.

The numerous suits brought by the outdoor advertising companies to enjoin the enforcement of the rules of the Department of Public Works for the regulation of billboards have occupied much of the time of an assistant attorney general. The bill filed in the United States District Court, and dismissed by that court because of the pendency of the similar suit in the Supreme Judicial Court, was reinstated by a decision of the Circuit Court of Appeals, which decision the United States Supreme Court declined to review. No further steps have to

date been taken in the Federal court, however. In the State court, progress may be summarized as follows: The dismissal of the numerous petitions for mandamus was obtained upon the ground that the issues raised thereby as to permits for particular years had by lapse of time become moot; the cases seeking review in *certiorari* have not as yet been prosecuted by the complainants, who have placed their principal reliance upon their several bills in equity; the equity cases have been consolidated, and, together with a somewhat similar suit against the town of Concord, have been referred to a master, before whom hearings are now being had as speedily as is practicable. The final determination of these cases will take some time to reach, for they are complicated and difficult and may require a vast amount of evidence upon the facts as to the billboard situation in Massachusetts.

Initiative Petitions.

Under the provisions of article XLVIII of the Articles of Amendment to the Constitution, initiative petitions, after being signed by ten qualified voters, must be submitted to the Attorney General for his consideration. If the Attorney General certifies that the measure is in proper form for submission to the people, that it is not substantially the same as any measure which has been qualified for submission or submitted to the people within three years, and that it does not contain subjects excluded from the popular initiative, it may then be filed with the Secretary of the Commonwealth, but not otherwise.

Anderson v. the Attorney General.

In the above entitled case, argued and decided during the year just past, an attempt was made to have reviewed upon *certiorari* the decision of the Attorney General certifying that a certain initiative petition "sets forth a measure which is in proper form for submission to the people; that it is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people within three years preceding the first Wednesday in December next; and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent." In this, and the companion case of *Anderson v. Secretary of the Commonwealth*, in which it was sought by *mandamus* to prevent the submission of the measure to the people, the important decision was rendered that the exercise by the Attorney General of the power with respect to such certification, conferred upon

him by article XLVIII of the Amendments to the Constitution, was not subject to collateral attack, nor, in the absence of bad faith, to direct review in the courts.

Settlement of Small Claims against the Commonwealth.

Since the period covered by my last report forty-one claims have been considered and disposed of under St. 1924, c. 395. Of this number twenty-five were allowed, representing a total of \$3,161.70; fifteen were heard and disallowed; and one was treated as dismissed for want of prosecution by the claimant. In four matters the department cooperated with the House Committee on Ways and Means, investigating the facts and presenting reports upon the claims embodied in pending bills.

Of the claims dealt with as above twenty-five arose from automobile accidents; five from fires; three from injuries to State employees; two from the expenditure of money by the claimants in dredging operations in Boston harbor, claimed to have been in reliance upon a purported understanding as to further dredging to be done by the State; and one each from the following matters, — depredations of escaped prisoners, depredations of foxes from a reservation, undue delay in fencing along a new State road in accordance with award, personal injuries from defective steps, personal injuries from glass on boulevard, personal injuries from pile of ashes on beach, interference with a private drain, death of a seaman on board Nautical Training School Ship, injuries received by a loyal officer during Boston Police strike, and deposit of money by public administrator.

Public Charitable Trusts.

During the past year, the two suits relating to the management of the Robert B. Brigham Hospital for Incurables, to which reference was made in my prior report, were heard by the full bench of the Supreme Judicial Court, and disposed of; the hospital corporation being instructed as to its duties under Mr. Brigham's will, in accordance, for the most part, with the construction contended for by this office.

Litigation over the will of Lotta M. Crabtree is still in progress, a long hearing having recently been had before the probate court, with the executors opposing the claim of an alleged niece of Miss Crabtree to be entitled, as such, to contest the allowance of the will. The contempt case against Ida M. Blankenburg, which grew out of earlier matters in the Crabtree case, was heard by a justice of the Supreme

Judicial Court, and later, upon certain issues, by the full bench, and is as yet undecided.

The passing upon accounts of trustees for charitable uses, consideration of proposed compromises of wills containing charitable bequests, participating in suits of such trustees and of charitable corporations for instructions, participating in litigation respecting the application *cy pres* of charitable funds no longer able to be applied precisely upon the terms of the original gifts, and like matters, have occupied a large proportion of the time of one assistant.

Compulsory Automobile Insurance.

The Attorney General has been closely concerned with the preliminary steps taken toward putting into effect the provisions of the Compulsory Automobile Liability Security Act (Acts of 1925, c. 346 as amended). Several advisory opinions requested by the Commissioner of Insurance and the Department of Public Works were rendered with relation to rate-making and other duties under Acts of 1925, c. 342, essential to the proper operation of the law, as well as to the proper interpretation of chapter 346. Five petitions were entered against the Commissioner in the Supreme Judicial Court to review the rates established by him. These were referred to a master and were tried by Assistant Attorney General Roger Clapp. The cases are still before the court.

The law requires that an assistant attorney general shall be one of the three persons constituting the Board of Appeal, provided for by chapter 346. The authority of this Board under the statute is broad and the proper discharge of its duties of the greatest importance, not only to the insurers and automobile owners but to the general public. It has already rendered valuable service in making plain the relative rights and duties of the insurance companies and of the car owners. Mr. Clapp was designated as a member of the board and serves thereon.

The Commonwealth's Claim for Expenses incurred by it in the Defense of the United States at the Request of the President.

On October 14, 1861, the Secretary of State, William H. Seward, addressed a communication to His Excellency John A. Andrew, Governor of the Commonwealth at that time, calling his attention to the defenseless condition of the coast of Massachusetts in case of a foreign invasion. The communication read in part as follows:

The President has directed me to invite your consideration to the subject of the importance of perfecting the defenses of the State over which you preside, and ask you to submit the subject to the consideration of the Legislature when it shall have assembled. . . . The expenditures ought to be made the subject of conference with the Federal government. Being thus made with the concurrence of the Governor for the general defense, there is every reason to believe that Congress would sanction what the State would do and would provide for its reimbursement. Should these suggestions be accepted, the President will direct proper agents of the Federal government to confer with you and to superintend, direct and conduct the prosecution of the system of defenses of your State.

The Commonwealth made the improvements necessary to strengthen Boston Harbor and also to fortify the coast, but was obliged to borrow the money, issuing five per cent twenty-year bonds for that purpose. They were authorized by the Massachusetts Act of March 23, 1863, and were made payable, principal and interest, in coin. After these improvements were made, the Commonwealth presented a claim to the Federal Treasury Department for reimbursement, which was disallowed. Subsequently, however, in 1884, Congress passed an act providing as follows:

That the proper accounting officers of the Treasury Department be, and are hereby, authorized and directed to examine the claim of the State of Massachusetts for expenses incurred and paid, at the request of the President and Secretary of State, during the war, in protecting the harbors and strengthening the fortifications on the coast, . . . and report the amount to Congress.

Under the provisions of this act the accounting officers found that the sum of \$209,885.61 should be refunded to Massachusetts; said amount not, however, including any interest which the State had paid on this borrowed money.

When the Commonwealth presented its claim under the above-mentioned act, it also asked reimbursement for the money which it had paid for interest and premiums on this bond issue. This claim, however, was disallowed by the Comptroller of the Treasury on the ground that the Act of Congress authorized only the payment of the amounts expended and made no mention of interest.

It appeared that the Massachusetts claim was precisely parallel to that of the State of New York, which was decided by the Supreme Court of the United States, 160 U. S., p. 598. This decision allowed interest incurred and paid by such State in obtaining the money for which reimbursement was allowed under another act. That this decision was regarded by the Treasury Department as an authority

in support of this claim is shown by a letter of the Comptroller transmitted to the Secretary of the Treasury in 1911, referring to the Massachusetts claim, from which the following is an extract:

I see no reason why the interest necessarily incurred and paid by the State on the bonds issued for the coast defense should not be allowed as a part of the costs incurred by the State in accordance with the decision of the Supreme Court in the New York case.

As the money expended for coast defense was secured from bonds issued after the act of the Massachusetts Legislature which provided for payment in gold or silver coin of the interest and principal of all bonds hereafter issued, there was a legal contract between the State and the holders of said bonds when issued for the payment of principal and interest in coin. The additional cost of said coin was therefore a part of the costs incurred by the State in the matter of the coast defense.

The amount of this claim is stated in a letter of B. F. Harper, auditor, in a communication to the Secretary of the Treasury, under date of January 11, 1911. Mr. Harper found that the total expense of Massachusetts on account of interest and gold premium on bonds issued for coast defense purposes was \$233,885.82. He further stated:

The expense thus incurred by the State of Massachusetts for interest and gold premium on its coast-defense bonds to the amount above stated is of the same character as that paid by the State on its bonds issued in the year 1862 and reimbursed under the act of July 27, 1861.

Following the decision of the Supreme Court of the United States mentioned above, many other States have presented claims of this same nature which have been allowed by Congress.

In 1916 the Committee on Claims of the Senate reported that they were of the opinion that Massachusetts should be reimbursed for this interest, and recommended favorable action. Although a favorable report was made by this committee having the bill in charge in the Sixty-second Congress, it did not become a law.

In the Sixty-fourth Congress a bill was introduced, and passed, conferring jurisdiction on the Court of Claims to adjudicate the claims of Massachusetts. The case was presented to the Court of Claims, and in April, 1917, the court rendered its decision.

A reading of the opinion of the Court of Claims discloses that, although it was found that the money had been expended by Massachusetts for the purposes stated, the conclusion was reached that there was no act of Congress authorizing the court to render judgment for the sum so expended by Massachusetts for interest and premium. In the opinion the court said:

We have been cited to no law of Congress promising to repay Massachusetts any part of the money so expended by her, from which it follows that, however generous and patriotic this action on the part of the State may have been, she has no legal status in this court for the repayment of the same.

In 1921 the then Committee on Claims again reported favorably, and stated in part as follows:

The decision of the court (the Court of Claims) was based upon a technical construction, and your committee is of the opinion that had there been a law in existence authorizing the payment of the money to Massachusetts, the court would have rendered judgment in favor of the State. Justice and equity would seem to demand the reimbursement of the State of Massachusetts for her outlay made at the request of the President of the United States and for the benefit and in the interest of the United States, and as there appears to be no law under which payment can be made it is necessary for Congress to enact legislation for the relief of the State.

Despite this favorable finding, the Sixty-sixth Congress did not pass the necessary remedial legislation. Last spring the Senate passed a bill providing for the reimbursement to Massachusetts of this sum of \$233,885.82. The matter was then heard before the War Claims Committee, and the Attorney General appeared before the Committee on April 29, and argued the claim of Massachusetts. Representatives Robert Luce and George R. Stobbs also entered their appearances and argued on behalf of the Commonwealth. The decision was again adverse.

The claim of Massachusetts is a meritorious one, and I recommend its vigorous prosecution by the incoming Attorney General, and ask that he have the concerted aid of all the representatives from this State now serving in Washington.

Centralization of the Law Business of the Commonwealth.

The first act purporting to define in detail the duties of the Attorney General was St. 1832, c. 130. So long as the government of the Commonwealth was administered directly by its constitutional officers, the Attorney General handled substantially all the law business of the Commonwealth. Subsequently, however, there grew up the practice of committing much of the administrative work of the government to commissions. Gradually the practice grew of having the legal work of such commissions handled by attorneys employed by them under authority of the statutes creating such commissions. The attention of the General Court was called to this anomalous condition of things

by Governor Greenhalge. In his message to the General Court in January, 1896, he recommended:

Reorganize and enlarge the law department of the Commonwealth, let the Attorney General have compensation sufficient to command his whole time, furnish the department with all the assistants or deputies necessary to perform substantially all the law business of the Commonwealth in the way of advising the several administrative departments or furnishing other legal assistance. In this way more unity of system and of legal and consistent policy will be obtained than by committing this responsibility and labor to a dozen or a score of attorneys acting without reference to any general plan or purpose.

In consequence of the Governor's recommendation a statute was enacted in 1896, which provided that all the law business of the Commonwealth should be conducted by the Attorney General or under his direction. Under this act the Department of the Attorney General became, under the direction of Mr. Knowlton, once more what it was undoubtedly originally intended to be, the law department of the Commonwealth having charge of its business.

In one of his annual reports to the Legislature Mr. Knowlton stated that the wisdom of the act had been fully justified. "The law work", he said, "being concentrated in one department and under one control has been systematized and done more economically and to better advantage. The act commits the responsibility of the conduct of the law business of the Commonwealth and of this department to an officer chosen directly by the people of the Commonwealth, to whom he in turn is responsible; and to that extent is in conformity with the spirit of the Declaration of Rights, which asserts as a fundamental principle of government that all power resides originally in the people and that the officers of the government are at all times accountable to them."

For over thirty years the law business of the Commonwealth has been done by and under the control of the law department, carrying out the recommendations of Governor Greenhalge, Attorney General Knowlton and the mandate of the Legislature.

Recently it came to my attention, while examining the Griffenhagen report, that there were a few instances where special counsel were being placed in some of the State administrative departments. I doubt if any such situation was contemplated by the Legislature, and I am quite certain that it is not expedient. I recommend that if it is necessary to have special counsel assigned to any of the State departments, boards or commissions they be designated by the Attorney General and subject to his control.

The Office of the Attorney General.

The office of Attorney General is of considerable antiquity. It was one of the institutions of the common law brought to this country by the early settlers, and its functions constituted a part of the body of the common law generally recognized as a part of our jurisprudence. The office was recognized as already in existence by the Province Laws, 1693-4, c. 3, § 12.

The Attorney General is vested by the common law with a great variety of duties in the administration of government. As the chief law officer of the State he may, in the absence of some express legislative restriction to the contrary, exercise all power and authority as public interest may from time to time require. He may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights. In addition to his common law powers, many important functions, powers and duties have been prescribed by the Legislature from time to time. The more important are as follows:

The Attorney General appears for the Commonwealth, the Governor, the Executive Council, the Secretary, the Treasurer and Receiver General, the Auditor, and for State departments, officers, boards and commissions in all suits and other civil proceedings in which the Commonwealth is a party, or interested, or in which the official acts and doings of said officers are called in question, in all the courts of the Commonwealth, and in such suits and proceedings before any other tribunal when requested by the Governor or by the General Court or either branch thereof. All legal services required by such officers, boards and commissions in matters relating to their official duties are rendered by the Attorney General or under his direction. He also consults with and advises the district attorneys in matters relating to their duties, and if the public interest so requires he may assist and appear for the Commonwealth in the trial of indictments for capital crimes.

He is empowered to enforce the due application of funds given or appropriated to public charities within the State, to prevent breaches of trust in the administration thereof, and, if necessary, to prosecute corporations which fail to make returns required by law.

He gives opinions upon questions of law submitted to him by the Governor and Council, or by either branch of the General Court.

He, or some person designated by him, upon vote of a legislative committee, is required to appear before such committee and advise it upon the legal effect of proposed legislation pending before it.

He may bring action in the name of the Commonwealth against a corporation or any officer thereof, to restrain monopolies, discrimination in the sales of articles in common use, etc.

He may file with the Supreme Court informations in equity in order to restrain by injunction corporations from doing business not authorized by their charters.

He may institute, upon information given by the Commissioner of Banks, prosecutions for violations of the banking law.

He may file informations in equity to recover the penalty imposed by law upon any person who breaks up or removes a wrecked or abandoned vessel without securing the required license from the Department of Public Works.

He may institute and prosecute proceedings for enforcement of the act which requires cities and towns receiving water from the Metropolitan Water System to equip their water service with meters.

He approves town by-laws and zoning laws.

He passes in certain cases upon proposed settlements of taxes on collateral legacies or successions or future interests in legacies or successions, which may be effected by the Treasurer and Receiver General, if the Attorney General approves.

He acts with the Commissioner of Corporations and Taxation in recommending abatements by the Board of Appeal of unpaid and uncollectable taxes assessed on the corporate franchises of domestic corporations.

He passes upon instruments of conveyance of and titles to all land purchased by the Commonwealth, notably for highways, reforestation or experiment in forest management.

He may bring action against savings bank corporations which fail to pay the fee required for examination and audit of their books by the Commissioner of Banks in order to recover such fee.

He takes cognizance of all violations of law or of court orders which affect the general welfare, including combinations in restraint of trade, and institutes or causes to be instituted before the proper tribunal criminal or civil proceedings to punish such violations.

He investigates, if the Governor so requires, the grounds of any demand made by the authorities of another State for the extradition of a fugitive from justice, or of any application made to the Governor

for the extradition from another State of a fugitive from justice in this State, and reports to the Governor all material facts, with an abstract of the evidence, and, in case of a person demanded, with an opinion as to the legality or expediency of complying with the demand.

His annual report to the General Court includes the cases tried or argued or directed by him during the year, with suggestions and recommendations as to the amendment and the proper and economical administration of the laws.

With the approval of the Governor and Council, he prepares and publishes such report of capital trials as he deems expedient for public use.

He enforces the collection of money due on the bonds, notes and securities listed in accounts transmitted to him by the Treasurer and Receiver General under the provisions of G. L., c. 10, § 9.

If in his judgment the public interest requires, he may prosecute informations or other processes against persons who intrude on the land, rights or property of the Commonwealth.

He institutes in the name of the Commonwealth appropriate civil proceedings or refers the cases to the proper district attorneys to enforce the provisions of the corrupt practices act.

He assists the Board of Boiler Rules in framing rules for the construction, installation and inspection of steam boilers.

He enforces, at the relation of the Commissioner of Insurance, the provisions of the insurance law.

He has the right to be present personally or by an assistant at the deliberations of any grand jury, whenever his public duty seems to him to require it.

He may, with the approval of the Chief Justice of the Superior Court, call a special grand jury to hear such matters as he may present.

He has authority, at the relation of the Department of Public Utilities, to recover all forfeitures incurred by officers of municipal light plants, gas and electric companies, who fail to file annual returns as required by law.

He may, at the relation of the Commissioner of Corporations and Taxation, bring actions in contract against tax collectors to recover taxes which remain uncollected at the end of two years from the commitment of any warrant.

He is a member of the State board which decides whether or not public necessity requires a right of way for access to any great pond within the Commonwealth.

He is required to investigate all claims against the Commonwealth which may be presented to him, where there is no statutory authority whereby the claimant may prosecute his claim by suit, at law or in equity, or where no other mode of redress is provided by law.

He may, at the relation of the Commissioner of Insurance, proceed in equity to restrain all violations of law by fraternal benefit societies.

The Constitution requires that all initiative petitions must be submitted to the Attorney General for his consideration. If the Attorney General certifies that a measure is in proper form for submission to the people, it may then be filed with the Secretary of the Commonwealth.

He is required to determine whether or not applications for submission to voters of questions of public policy contain questions that are, as a matter of law, those of public policy.

He is also, with the Secretary of the Commonwealth, required to draft such questions in proper form for presentation upon the ballot.

He, or an assistant designated by him, is a member of the board of appeal on motor vehicle liability policies.

He is required to prepare brief statements as to measures submitted to the people under the initiative and referendum, which are printed in pamphlet form and sent to all the voters in the State.

He designates a member of the board who passes upon the sale and disposition of old and obsolete records, books and documents of the Commonwealth.

He is required to proceed against county officers who fail to comply with the provisions of the statute relative to the keeping of accounts.

At the relation of the Adjutant General, he is authorized to bring an information in equity against any municipality failing to comply with requirements of the law to provide armories and headquarters.

He is required to record in the registry of deeds certificates of revocation of licenses of structures in Boston Harbor.

He is authorized to bring suit to recover forfeitures on bonds filed in connection with the licensing of boxing matches.

Proceedings to enforce the law relative to the protection of the Charles River from pollution are prosecuted by the Attorney General.

At the relation of the Division of Waterways, he is required to institute proceedings to enjoin or abate unlicensed structures in the Connecticut and Merrimac Rivers.

At the relation of the Commissioner of Insurance, he may apply for an injunction to restrain assessment insurance companies which exceed their powers or fail to comply with any provision of law, or conduct business fraudulently.

At the relation of the Department of Public Utilities, he may proceed against common carriers for violation or neglect to comply with provisions of law relating to common carriers.

He enforces the penalties against railroads for violation of law relative to signs at crossings.

He has authority to recover the expenses of examination in cases of savings and loan associations.

He may apply to the Probate Court for payment to the State Treasurer by savings banks of all deposits which have remained unclaimed for more than thirty years.

He approves the form of the bonds of county treasurers.

He may, notwithstanding a medical examiner's report that the death was not caused by the act or negligence of another, direct an inquest to be held.

He is required to cause prosecutions to be instituted for violations of the law relative to legislative counsel and agents.

Written permission of the Attorney General is required before any person may use a dictagraph or dictaphone for the purpose of procuring information concerning any official matter or to injure another.

He is a member of the board which passes upon requests for emergency appropriations by cities and towns.

He is required to approve the form of employment certificates.

He approves the fire district by-laws.

He enforces the laws relative to municipal finances.

It appears as a matter of record that the volume of business receiving the attention of the office has increased tremendously in recent years.

It is interesting to note that in 1894, the first year of Mr. Knowlton's incumbency of the office, the number of cases requiring attention was but 549, and in 1900 the number was increased only to 1,801. As will be seen by the table contained in this report, the number of cases requiring attention during the past year was 10,456.

No satisfactory record can be kept of consultations with State officers, boards, departments and commissions, except in cases in which official opinions in writing are required, of which there were 553 the past year.

It has become more and more the practice of officials in all branches of the government of the Commonwealth to consult with this office. Many such consultations are held daily, and much of the time of the Attorney General and of his assistants has been so occupied.

The collections of the Department for the fiscal year were \$157,791.20.

Four hearings were held before the Supreme Court of the United States. Three cases were tried in the United States District Court, one in the Circuit Court of Appeals, one case tried before the United States Court of Claims and one before the Interstate Commerce Commission. Twenty-seven cases have been argued before the Supreme Judicial Court of this Commonwealth, and there have been sixty-one hearings and trials before a single justice of that Court. There have been thirty-nine hearings and trials in the Superior Court. Six cases have been tried in the Probate Courts, and five in the Land Courts. Three cases have been prosecuted in the local District Courts. The Department has been in attendance at twenty-one hearings before the Industrial Accident Board and twenty hearings have been held in extradition cases, one of them being before the Governor of North Carolina, another before the Governor of Texas, and arguments presented in the District Court at Houston, Texas, and the Court of Criminal Appeals of Texas.

Of the four hundred and fifty-four acts and resolves passed at the last session of the Legislature four hundred and nineteen, when engrossed, were referred to the Attorney General by the Governor, and reports given in writing as to their legal form and constitutionality.

Two hundred and seventy contracts and seventy-six instruments of conveyance submitted by various State departments were passed upon as to matters of legal form.

Our General Laws provide that before town by-laws, building, plumbing, electric wiring, and other regulations can take effect they must be submitted to the Attorney General for approval. During the past year seventy-six sets of town by-laws and other regulations were passed upon.

Certain changes have been made in the personnel of the Department during the year.

On February 2, 1926, Lewis Goldberg, Esq., after nearly five years of faithful and efficient service as an Assistant Attorney General, resigned to accept an appointment to an Associate Commissionership in the Department of Public Utilities. While Assistant Attorney General, Mr. Goldberg performed the duties assigned to him with conspicuous ability and the meritorious performance of his work deserves high commendation.

On March 18 last, Jacob L. Wiseman, Esq., of Boston, was appointed an Assistant Attorney General.

On November 10 last, James H. Devlin, Esq., retired from the position of Assistant Attorney General, having been appointed by His Excellency the Governor to be an associate justice of the Municipal Court of the City of Boston.

As Assistant Attorney General, Mr. Devlin performed the duties assigned to him with fidelity and efficiency, rendering valuable public service.

No appointment was made to fill the vacancy caused by the retirement of Mr. Devlin.

When Mr. Wyman left the office in January, 1920, he recommended an increase in the salary of the Attorney General. He stated, "The salary of the Attorney General, concededly the office second only in importance to that of the Executive, has remained at the present figure for eight years. The salaries of the heads of various commissions, of some district attorneys and of the judges of the Supreme and Superior Courts are in excess of his salary."

I have for some time been of the opinion that the present salary is inadequate to the importance of the duties performed, but I have not hitherto deemed that I was justified in recommending an increase in my own favor. That reason no longer exists. It is proper that the salary of the Attorney General should approximate the salaries of the justices of the Supreme Judicial Court, whose principal officer he is. I recommend the enactment of legislation to that end.

Not only is the work of the office growing year by year in amount, but its importance also increases. Notwithstanding a number of criminal cases which have required attention, the principal labor and responsibility in the discharge of the duties of this office have arisen from the civil business. This civil business of the Commonwealth to which the assistants are called upon to give attention requires, by reason of its extent, variety and character, a high degree of legal ability, and is exclusive of private law practice.

In taking leave of this office I desire to express my profound appreciation of the loyalty, fidelity and efficiency of the Assistant Attorneys General who have served under me. They have been from time to time as follows: Alexander Lincoln, Esq., Joseph E. Warner, Esq., Albert Hurwitz, Esq., Lewis Goldberg, Esq., A. Chesley York, Esq., James H. Devlin, Esq., A. Perry Richards, Esq., Day Kimball, Esq., Roger Clapp, Esq., Charles F. Lovejoy, Esq., Melville Fuller Weston, Esq., Alfred R. Shrigley, Esq., and Jacob L. Wiseman, Esq. All these gentlemen have served the Commonwealth with ability and devotion.

I wish further to express my appreciation of the fidelity and efficiency with which all the employees of the office have discharged their duties during my incumbency. I pay a special tribute, because of long faithful service to the Commonwealth, to Louis H. Freese, who has been in the Attorney General's office thirty-five years, Alexander D.

Robinson, thirty-three years, Harold J. Welch, twenty-three years, Miss Carrie M. Crawford, twenty-two years, and Miss Alice G. Brinn, twenty-one years.

It gives me pleasure to acknowledge the attention which the Legislature has paid to my recommendations each year. I believe that the changes thus effected, in the duties of this office and in the general laws, are in the public interest, and will be further approved by experience.

I annex to this report such official opinions rendered during the past year as it is thought may be of interest and which may properly be made public at this time.

Respectfully submitted,

JAY R. BENTON,

Attorney General.

OPINIONS.

Taxation — Income Tax — Authority of Commissioner with Reference to Certain Agreements as to Payment of Taxes.

The Commissioner of Corporations and Taxation has no authority to decline to enter into the agreement which may be filed with him under the provisions of G. L., c. 62, § 1 (e).

DEC. 1, 1925.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — G. L., c. 62, § 1 (e), contains the following provision: —

“Dividends on shares of any partnership, association or trust, of the classes designated in paragraphs first and second of subsection (c), shall be subject to taxation under this section unless the trustees or managers thereof file with the commissioner, in such form as he determines, its agreement to pay to the commonwealth annually the tax imposed by subsection (d) and any tax imposed by section five.”

You request my opinion whether under this provision the Commissioner has any authority to decline to enter into such agreement.

The word “agreement” is frequently used in a broad and popular sense to designate a promise or stipulation. *Marcy v. Marcy*, 9 Allen, 8; *Virginia v. Tennessee*, 148 U. S. 503, 518. In my opinion, it is used in subsection (e) as meaning a written paper, in the form prescribed by the Commissioner, by which the partnership, association or trust purports to agree to be taxed under subsection (d) and section 5. The Legislature in enacting subsection (e), in my opinion, intended to provide that upon the filing of such written document the partnership, association or trust should be taxed accordingly, and did not intend to provide that the Commissioner must either assent to or dissent from such agreement when filed. I therefore answer your question in the negative.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Governor and Council — Power of Appointment.

Appointments required to be made by the Governor, with the advice and consent of the Council, may be acted upon either separately or collectively.

DEC. 4, 1925.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — You ask my opinion whether nominations for major appointments, so called, such as judges, trustees and department heads, should be acted upon separately by the Council, or whether action may be taken under one motion for confirmation by the Council of nominations to such positions made by the Governor.

The power of appointment to various judicial, administrative and other positions is conferred by the Constitution and by the statutes of the Commonwealth upon the Governor, with the advice and consent of the Council. The Constitution provides, pt. 2nd, c. II, § III, art. I, that “the governor, with the said councillors, or five of them at least, shall and may, from time to time, hold and keep a council,

for the ordering and directing the affairs of the commonwealth, according to the laws of the land"; and it is further provided, pt. 2nd, c. II, § III, art. V, that "the resolutions and advice of the council shall be recorded in a register, and signed by the members present; and this record may be called for at any time by either house of the legislature; and any member of the council may insert his opinion, contrary to the resolution of the majority." I am aware of no other provision, either in the Constitution or in the statutes of the Commonwealth, regulating the manner in which action by the Council shall be taken. In my opinion, it is wholly immaterial whether nominations are acted upon separately or collectively, so long as the result of such action is that the appointment of each individual whose name is presented to the Council is made with the advice and consent of the Council, as shown by the register kept in accordance with article V.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Highways — Appropriation — Interpretation of Statute.

It is a canon of statutory construction that a general act passed after a special act relating to the same subject-matter is not to be construed as an implied repeal of the special act without clear indication that it was the intention of the Legislature that the latter should supersede the former.

St. 1925, c. 288, providing for the creation of the Highway Fund, was not intended to repeal Gen. St. 1915, c. 221, § 5, as amended, under which money repaid to the Commonwealth by the counties in which highways were to be constructed was required to be expended by the Division of Highways without further appropriation.

DEC. 4, 1925.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You ask me to advise you if money paid to the Commonwealth under the provisions of Gen. St. 1915, c. 221, § 5, as amended by St. 1920, c. 572, and St. 1924, c. 203, is available for expenditure by the Division of Highways, as provided in said section 5, without further appropriation by the Legislature.

Gen. St. 1915, c. 221, provides for the construction of certain highways in the five western counties. Section 1 directs the Massachusetts Highway Commission to construct during the years prior to 1919 certain highways in the five western counties, therein particularly described. Section 2 authorizes the Commission to expend a sum not exceeding two million dollars, and in addition thereto the sums of money repaid by the several counties under the provisions of section 5. Section 5 provides as follows:—

"One fourth of any money which may be expended under the provisions of this act for a highway in any county, with interest thereon at the rate of three per cent per annum, shall be repaid by the county to the commonwealth in such instalments and at such times, within six years thereafter, as said commission, with the approval of the auditor of accounts, having regard to the financial condition of the county, shall determine. The money so repaid before November thirtieth, nineteen hundred and twenty-one, shall be expended by said

commission from time to time, without specific appropriation, either in completing the highways hereinbefore mentioned or in improving a highway in any town in the five western counties that is not located upon one of the highways hereinbefore mentioned: *provided*, that the valuation of the town does not exceed one million dollars; the highway so improved to be a main highway connecting such town with its railroad station, with a main through highway, or with an adjoining city or town."

St. 1920, c. 572, provides for the completion of the same highways. Section 1 authorizes the expenditure of an additional sum of one million dollars before November 30, 1924. Section 2 provides, in language similar to section 5 of the act of 1915, for the repayment to the Commonwealth, within six years, of one-fourth of any money expended under section 1 by the county, and for the expenditure by the Division of Highways of a sum equal to the money so repaid before November 30, 1926, without specific appropriation.

St. 1924, c. 203, amends section 2 of the act of 1920 by extending the time for expenditure of money repaid by the counties to November 30, 1928.

Your question whether money repaid by the counties under these statutes is available for expenditure by the Division of Highways without further appropriation by the Legislature is raised, as I understand it, by reason of St. 1925, c. 288, § 1, which provides for the establishment of a Highway Fund and amends G. L., c. 90, § 34, by striking out that section and inserting a new section 34, in part as follows:—

"The fees and fines received under the preceding sections, together with all other fees received by the registrar or any other person under the laws of the commonwealth relating to the use and operation of motor vehicles, shall be paid by the registrar or by the person collecting the same into the treasury of the commonwealth, and said fees and fines, together with all contributions and assessments paid into the state treasury by cities, towns or counties for maintaining, repairing, improving and constructing ways, whether before or after the work is completed, and all refunds and rebates made on account of expenditures on ways by the division, shall be credited on the books of the commonwealth to a fund to be known as the Highway Fund. Said Highway Fund, subject to appropriation, shall be used as follows:

The section then provides that the fund is to be expended in carrying out the provisions of law relative to the use and operation of motor vehicles, the maintenance and construction of highways and other expenditures. By section 2 G. L., c. 81, § 23, is repealed.

The question is whether repayments by the counties, under the western highways acts, made after the passage of St. 1925, c. 288, were intended by the Legislature to be included in the terms of that act as "contributions and assessments paid into the state treasury by cities, towns or counties for maintaining, repairing, improving and constructing ways," so that such repayments must be credited to the Highway Fund and there held subject to appropriation by the Legislature.

G. L., c. 81, § 9, provides as follows:—

"One fourth of any money, except money appropriated from motor vehicle fees and fines under section thirty-four of chapter ninety, which

Corporation — Change of Name — Secretary of the Commonwealth.

After approval has been duly given to a change of name by a corporation, and notice thereof duly published, the Secretary of the Commonwealth is required to grant a certificate of such change.

DEC. 29, 1925.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR:— You have asked my opinion as to whether, under the circumstances set forth in a letter addressed to me, you are obliged to sign and issue a certificate of change of name to a corporation.

It appears from your letter that, acting under G. L., c. 138, § 76, you had declared void the charter of a previously existing incorporated club having the same name as that now sought to be taken, by way of amendment, by an existing incorporated club; and that your action in relation to such previously existing corporation was taken four months prior to the submission to you of articles of amendment by the existing corporation, which by such amendment sought to change its name to that of the defunct corporation.

I assume that in relation to the voiding of the charter of the previously existing corporation you complied with all the requirements of the statute, and I also assume that all the requirements of G. L., c. 155, § 10, in relation to the adoption of the change of name by the existing corporation had been fully complied with.

You further state that you approved the certificate of change of name submitted by the new corporation, that the officers thereafter published notice of such change of name, under your direction, and that proof of publication is now presented to you and you are requested to issue a certificate as to the change of name. I assume that such publication has been made, and that all acts required to be performed by the officers of the existing corporation have been done in due order.

After approval has been duly given to a change of name by a corporation and a notice thereof has been published, G. L., c. 155, § 10, provides:—

“When the state secretary is satisfied that such notice has been published as required by him, he shall upon the payment of a fee of one dollar grant a certificate of the name which the corporation shall bear.”

The granting of the certificate, after all the other acts required by section 10 have been duly performed and the Secretary has previously certified and indorsed his approval of the change of name, is not left to the discretion of the Secretary, but, when all the preliminary requirements of the statute have been fulfilled, is mandatory.

The preliminary determination as to the conformity of the change of name with the requirements of law requires the exercise of discretion upon the part of the Secretary, within the limitations of the statute. The requirements of law relative to the assumption of a name by a corporation, set forth in G. L., c. 155, § 9, appear to be applicable to the adoption of a new name by a corporation under section 10, in so far as they relate to the prohibition of the use of certain designated types of names. It is provided, among other matters, that a corporation “shall not assume the name of another corporation established under the laws of the commonwealth.” It is evident, from a

review of earlier statutes, that this prohibition refers to the names of existing corporations and does not include corporations once organized but which have ceased, by the annulment of their charters, to have any corporate life. The use of the name adopted by amendment by the existing corporation does not appear to fall within any other of the types of names whose use is prohibited. There does not appear to have been abuse of the power of the Secretary, discretionary or otherwise, in his approval of the proposed change of name.

In view of the foregoing considerations, I am constrained to advise you that upon payment of the required fee it will become your duty to grant a certificate of change of name to the existing corporation.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Authority of a Telephone Company to transfer its Locations — Right of a Foreign Telephone or Telegraph Company to do Business in Massachusetts.

In the absence of special enactment, one telephone or telegraph company may assign to another the right to use its locations.

The right of a foreign telegraph company to operate lines within the State is established by act of Congress, but the State may impose reasonable restrictions and regulations.

The State may not deny to a foreign telephone company desiring to construct lines in Massachusetts the same right to use public ways which is given to domestic companies, provided the use is for interstate communication.

JAN. 7, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You ask my opinion as to the authority of a Massachusetts telephone company to permit a foreign telephone company to use its locations, and what authority a foreign telephone company has to construct and operate equipment on the locations of a domestic company.

The right to construct lines for the transmission of electricity, including telephone and telegraph lines, is given to companies incorporated for the purpose by G. L., c. 166, § 21, originally enacted in St. 1849, c. 93. Under this statute (§§ 22 and 25) locations in public ways may be granted by the cities and towns through which the lines are to pass.

A telephone company is a public service corporation, dealing in a public utility. Such a corporation cannot, without legislative authority, part with its property, franchises and privileges, including locations in public streets, so as to disable itself from performing its public duties. *Commonwealth v. Smith*, 10 Allen, 448, 455, 456; *Richardson v. Sibley*, 11 Allen, 65; *Pierce v. Drew*, 136 Mass. 75; *French v. Jones*, 191 Mass. 522; *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556; *Attorney General v. Haverhill Gas Light Co.*, 215 Mass. 394. Locations given to public service corporations in public streets by cities and towns are not contracts or franchises, but are in the nature of permits or licenses which are subject to revocation. *Springfield v. Springfield St. Ry. Co.*, 182 Mass. 41, 47, 48; *Metropolitan Home Tel. Co. v. Emerson*, 202 Mass. 402. Where a license is required by statute the question whether it is transferable depends upon the legislative intent. *Quinn v. Middlesex Electric Light Co.*, 140 Mass. 109; *Commonwealth v. Lavery*, 188 Mass. 13.

Your questions involve a consideration, first, of the right of a foreign corporation to engage in the transmission of intelligence by telephone in Massachusetts, and, secondly, of the transferability of rights in locations. As to the latter question, there is nothing in the general statutes of the Commonwealth indicating an intention to make locations granted under G. L., c. 166, §§ 22 and 25, personal to the immediate grantee; and in *Postal Telegraph Cable Co. v. Chicopee*, 207 Mass. 341, 343, it was said that such rights passed by assignment to the plaintiff from its predecessors. In the absence of some special enactment, therefore, limiting the right of transfer with respect to some particular company, the granting by one company to another of permission to use its locations, so long as it does not thereby disable itself from doing business, and the use of such locations by the other company, otherwise qualified to do business in the Commonwealth, would seem to be without legal objection.

But the question of the right of a foreign telephone company to exercise the franchise of carrying on its business in Massachusetts is more doubtful. It has been held that the authority given by G. L., c. 166, § 21, is limited to domestic companies only. *Commonwealth v. Boston*, 97 Mass. 555. But in *Postal Telegraph Cable Co. v. Chicopee*, *supra*, the court expressed the view that under the Federal law, and under the Massachusetts statutes as well, a foreign telegraph company, the plaintiff's predecessor in title, had a right to construct and maintain a telegraph line in this State which was part of an interstate system. This question, therefore, cannot be answered with certainty in the light of the decisions of our court alone. It involves a consideration of Federal law applicable to the subject.

The right of telegraph companies to operate lines within the State, regardless of any franchise from the State, seems to be established by the Act of Congress approved July 24, 1866 (14 Stat. 221, c. 230, Rev. Stat. § 5263, *et seq.*), and a series of decisions interpreting the act. That act was an exercise of the power of Congress over interstate commerce and over military and post roads. Its effect was to deny to a State the authority to say that a telegraph company may not operate lines constructed over postal routes within its borders; limiting the right of the State to the imposing of reasonable restrictions and regulations. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 548, 554; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 104, 105; *Western Union Tel. Co. v. Penn. R.R. Co.*, 195 U. S. 540; *Western Union Tel. Co. v. Richmond*, 224 U. S. 160, 169, 170; *Essex v. New England Tel. Co.*, 239 U. S. 313; *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 259.

In *Western Union Tel. Co. v. Richmond*, the court said:—

"The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. . . . It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. . . . It has been held to prevent a State from stopping the operation of lines within the act by injunction for failure to pay taxes. . . . But except in this negative sense the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the appellant from getting a foothold within its territory, both because

of the statute and of its carrying on of commerce among the States, gives the appellant no right to use the soil of the streets, even though postroads, as against private owners or as against the city or State where it owns the land."

In *Essex v. New England Tel. Co.*, *supra*, it was said that "a city may not arbitrarily exclude the wires and poles of a telegraph company from its streets, but may impose reasonable restrictions and regulations"; and in *Postal Telegraph-Cable Co. v. Richmond*, *supra*, it was assumed that "the occupation of its streets by a telegraph company engaged in interstate commerce, which has accepted the act of Congress of 1866, cannot be denied by a city." In the *Essex* case the town authorities had permitted the company, a Massachusetts corporation, to locate and construct its lines along the highways of the town, and for many years had acquiesced in their maintenance and operation. Consequently, the town was said to be estopped from asserting that locations had not been formally granted, and the company was held, under the circumstances, to have acquired the right to maintain those lines under the Federal law. *Postal Telegraph Cable Co. v. Chicopee*, 207 Mass. 341, 343, referred to above, was cited with approval.

Telephone companies, however, are not within the purview of the Federal act. *Richmond v. Southern Bell Tel. Co.*, 174 U. S. 761, 773-777. But even though Congress has not acted, a State is not permitted to interfere directly or by discrimination in the domain of power confided to the Federal government by the Constitution; and so it may not impose a direct burden on interstate commerce or discriminate against foreign corporations engaged therein. *Crutcher v. Kentucky*, 141 U. S. 47; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 33-37; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 290, 291; *Pennsylvania v. West Virginia*, 262 U. S. 553, 596, 597. Accordingly, the United States Supreme Court has held that where a State grants the use of its highways to domestic corporations engaged in intrastate transportation of a commodity (natural gas), the denying of that right to foreign corporations engaged in interstate commerce in the same commodity is a discrimination against interstate commerce which the court will restrain. *Oklahoma v. Kansas Nat. Gas Co.*, 221 U. S. 229, 262. See also *Buck v. Kuykendall*, 267 U. S. 307.

Following the reasoning of the *Oklahoma* case, in my opinion the Massachusetts statute must be construed as giving to foreign telephone companies desiring to construct lines in Massachusetts for the purpose of interstate communication the same right to use the public ways for that purpose which is accorded to domestic companies. They can have, however, no greater right, and are equally bound to make application for locations to the proper authorities. *Richmond v. Southern Bell Tel. Co.*, 174 U. S. 761, 770-773. Moreover, this right is limited to the use of such ways in interstate commerce. The power of a State to exclude a foreign corporation from doing a local business within its borders, separate from its interstate business, where Congress has not acted, is undoubted. *Paul v. Virginia*, 8 Wall. 168; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181; *Pennsylvania R.R. Co. v. Knight*, 192 U. S. 21; *The Minnesota Rate Cases*, 230 U. S. 352; *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68; *The Shreveport Case*, 234 U. S. 342; *Interstate Amusement Co. v. Albert*, 239 U. S. 560; *Wisconsin R.R. Comm. v. Chicago, Burlington & Quincy R.R. Co.*, 257 U. S. 563; *At-*

torney General v. Electric Storage Battery Co., 188 Mass. 239; *Barrows v. Farnum's Stage Lines, Inc.*, 254 Mass. 240. In my opinion, this power of the State extends over franchises in public ways for use in intrastate commerce although they are post roads, in the absence of action by Congress. Nor should the fact that such use has heretofore been made without objection estop the Commonwealth from asserting that power if it chooses so to do. *Attorney General v. Methuen*, 236 Mass. 564, 578, 579; *Attorney General v. Revere Copper Co.*, 152 Mass. 444; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 540, 541.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Pardons — Commutation of Sentence — Report submitted to the Legislature by the Governor.

A pardon, as generally known, secures the release of the convict with or without conditions attached to such release.

If there are conditions attached, it is the duty of the Governor and Council to order the convict remanded for the unexpired term if they find that he has violated the conditions.

A commutation of sentence is an exercise of the pardoning power.

Under G. L., c. 127, § 152, the Governor should report to the Legislature every exercise of the pardoning power.

JAN. 7, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You request my opinion whether you should include in the list of pardons submitted by you to the General Court the case of a prisoner whose sentence was commuted by you, with the advice and consent of the Council.

G. L., c. 127, § 152, provides, in part:—

“The governor shall annually transmit to the general court a list of the pardons granted by him with the advice and consent of the council during the preceding year.”

Mass. Const., pt. 2nd, c. II, § I, art. VIII, provides, in part:—

“The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council; . . . ”

In *Kennedy's Case*, 135 Mass. 48, 51, the court said:—

“The power of pardoning offences, as conferred on the executive authority by the Constitution of the Commonwealth, is exceedingly comprehensive, extending to all offences except those of conviction by the Senate upon impeachment. It is only limited in its exercise by the provision that pardons shall not be granted before conviction. *Perkins v. Stevens*, 24 Pick. 277. This power includes that of mitigating the sentence, as by diminishing its duration where imprisonment has been ordered, or by commutation, so that a milder punishment is inflicted. It includes also the right to grant conditional pardons, either to take effect upon the performance of some precedent condition, or to become void by a failure to comply with some subsequent condition.”

In *Opinion of the Justices*, 190 Mass. 616, 621, the justices said:—

"The commutation of a sentence is a pardon upon condition that the convict voluntarily submits to a lighter punishment."

In *Opinion of the Justices*, 210 Mass. 609, 610, 611, the justices said:—

"The words 'the power of pardoning offences' are comprehensive. They include not only that absolute release from the penalty which is referred to commonly as a pardon, but those lesser exercises of clemency which are described as conditional pardon, commutation of sentence and respite of sentence. . . .

. . . A commutation of sentence, which is the substitution of a lighter for a more severe punishment, is an exercise of the pardoning power and must be in accordance with the Constitution."

See also *United States v. Wilson*, 7 Pet. 150, 160.

It is thus clear that a commutation of sentence is an exercise of the pardoning power and is a pardon upon condition. It is not, however, commonly referred to as a pardon. The effect of the act which is commonly known as a pardon is to secure the release of the convict, with or without conditions attached to such release. If there are conditions imposed and they are violated, the duty is placed upon the Governor and Council by G. L., c. 127, § 156, to ascertain the facts and to order the convict to be remanded and confined for the unexpired term of the sentence, if it appears that he has violated the conditions of his pardon. A commutation of sentence does not necessarily involve the release of the prisoner. It may merely make the prisoner eligible for parole and his release is left to the discretion of the parole authority, which is not the Governor and Council, acting in accordance with the statutes governing the situation. If the prisoner is paroled and he violates the terms of the parole, the parole authority is empowered to ascertain the facts and to order the convict to be confined. See G. L., c. 127, §§ 128-150.

There is thus a sharp difference in effect between a commutation of sentence and what is commonly known as a pardon. Does the word "pardons" as used in G. L., c. 127, § 152, include commutations of sentences? The section appears in the General Laws under the heading "Pardons." But sections 154 and 157 refer to a pardon or commutation of sentence. Taking everything into consideration, I am constrained to the view that the General Court by the enactment of section 152 intended to require the Governor to report to it every exercise of the pardoning power, and that the answer to your question should be in the affirmative.

I suggest for your consideration, so that the Legislature might be fully advised as to the manner in which the pardoning power was exercised by you, the advisability of heading your report with the caption "Exercise of the Pardoning Power," and of so listing the cases thereunder as to show the number of absolute pardons, pardons with conditions as commonly understood, commutations of sentences and respites of sentences.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Accrediting of State Treasury Receipts — General Revenue and Special Funds.

Contributions and assessments for repairing, improving and constructing ways, paid by cities and towns in 1925 to the State Treasurer after the passage of St. 1925, c. 288, providing for crediting contributions to Highway Fund, are to be accredited to general revenue, as having been estimated in the anticipated revenue, subject to appropriation in the budget and supplemental budget of 1925 (St. 1925, cc. 211 and 347).

JAN. 12, 1926.

HON. CHARLES P. HOWARD, *Chairman, Commission on Administration and Finance.*

DEAR SIR:— You request my opinion as to whether or not the contributions and assessments paid into the State treasury by cities, towns and counties during the fiscal year 1925 for maintaining, repairing, improving and constructing ways should have been credited to the general fund in the treasury of the Commonwealth or to the Highway Fund created by St. 1925, c. 288.

Prior to the passage of St. 1925, c. 288, referred to above, G. L., c. 90, § 34, as amended, provided that the fees and fines received by the Registrar of Motor Vehicles should be paid into the Treasury of the Commonwealth to be expended, if appropriated, as therein directed.

St. 1925, c. 288, § 1, struck out said section 34, and inserted in place thereof the following:—

“The fees and fines received under the preceding sections, together with all other fees received by the registrar or any other person under the laws of the commonwealth relating to the use and operation of motor vehicles, shall be paid by the registrar or by the person collecting the same into the treasury of the commonwealth, and said fees and fines, together with all contributions and assessments paid into the state treasury by cities, towns or counties for maintaining, repairing, improving and constructing ways, whether before or after the work is completed, and all refunds and rebates made on account of expenditures on ways by the division, shall be credited on the books of the commonwealth to a fund to be known as the Highway Fund. Said Highway Fund, subject to appropriation, shall be used as follows:

.”

The remainder of said section 1 specified the purposes for which the fund was to be used. The act was approved on April 29, 1925, and took effect ninety days thereafter.

I am informed that the contributions and assessments for the year 1925 from cities, towns and counties for maintaining, repairing, improving and constructing ways had not been received when this act took effect, but it is represented to me that the estimated amount of such contributions and assessments to be received during the entire fiscal year of 1925 was used as a part of the bases for the budget and the supplemental budget of 1925, and was appropriated by the general appropriation act (St. 1925, c. 211) and the supplemental appropriation act (St. 1925, c. 347), by which all the estimated revenue, including these contributions and assessments from cities, towns

and counties for the year, was totally exhausted. The supplemental appropriation act, approved May 1, 1925, contains items of specific appropriation from the Highway Fund (items 216, 600a, 641a and 303a, totalling \$153,503.61). There was at that time a balance of receipts from motor vehicle fees and fines on hand which was more than sufficient to meet these specific appropriations.

The answer to your question requires the Attorney General to ascertain the intention of the Legislature, and that intention, when found, must be given effect. "The manifest intention of the Legislature, as gathered from its language, considered in connection with the existing situation and the object aimed at, is to be carried out." *Moore v. Stoddard*, 206 Mass. 395, 399; Attorney General's Report, 1921, p. 200.

In view of the action of the Legislature in appropriating anticipated revenue from the contributions and assessments referred to, without reference to the Highway Fund, it is my judgment that the Legislature could not have intended that those contributions and assessments should be placed in the Highway Fund, where they would be unavailable to meet the requirements of the two appropriation acts. I am of the opinion, however, that it was the Legislature's intention that the balance of the receipts from motor vehicle fees and fines then on hand, that is, the day that chapter 288 took effect, and fees and fines subsequently received should be placed in the Highway Fund, these fees and fines being more than sufficient to meet the appropriations made specifically therefrom, to wit: items 216, 600a, 641a and 303a of the supplemental appropriation act.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Registry of Probate — Record — Photostatic Copies.

The permanent records of the Probate Courts kept by the registers as required by G. L., c. 215, § 36, may lawfully take the form of bound volumes of photostatic copies, provided that it is practicable to use therefor paper of the sort required by G. L., c. 66, § 3, and the requisite durability can be achieved.

JAN. 21, 1926.

HON. CHARLES P. HOWARD, *Chairman, Commission on Administration and Finance*.

DEAR SIR:—You have requested my opinion whether the use of photostatic copies of decrees, orders, wills and like matters would satisfy the requirements of existing laws with respect to the permanent records which are to be kept by the various registries of probate.

The provisions of G. L., c. 215, § 36, are as follows:—

"Decrees and orders of probate courts shall be in writing, and the registers shall record in books kept therefor all such decrees and orders, all wills proved in the court, with the probate thereof, all letters testamentary and of administration, all warrants, returns, reports, accounts and bonds, and all other acts and proceedings required to be recorded by the rules of the court or by order of the judge."

These words are far from prescribing in detail and with exactness the method of recording. The word "record" looks more to the end to be achieved, namely, the preserving in durable and intelligible form

of the acts and proceedings in question. There is no satisfactory ground for assuming that R. S., c. 83, § 7, the earliest of the predecessors of G. L., c. 215, § 36, was intended to restrict the methods of recording to those made available by the progress of invention to the year 1836. I am of the opinion that a series of photostatic copies, properly arranged and bound into a permanent volume, constitutes a compliance with the fair meaning of the duty imposed upon the registers to "record in books kept therefor" the various matters which by G. L., c. 215, § 36, are required to be recorded.

The provisions of G. L., c. 4, § 7, cl. 26th, are as follows:—

" 'Public records' shall mean any written or printed book or paper, any map or plan of the commonwealth, or of any county, city or town which is the property thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the commonwealth or of a county, city or town has received or is required to receive for filing, and any book, paper, record or copy mentioned in sections five to eight, inclusive, and sixteen of chapter sixty-six."

There can be no doubt that these permanent records of the Probate Courts are intended to be public records, and that any construction of G. L., c. 215, § 36, that authorizes a method of recording which would withdraw these records from the definition given in the section last quoted above would be subject to grave doubt.

The word "print," in its primary significance, imports the use of pressure, the physical striking on to the paper or other material of the letters or designs. In that sense a photostatic copy is not a written or printed book or paper but is a copy made through photographic processes of a written or printed book or paper. The word "print," however, has its place in the language of photographers. "To print a positive picture from a negative" is the expression which is customarily used, and there is perhaps no other word than "print" which has been taken aptly to describe the process. With some hesitancy it is my view that a photostatic copy would be deemed "printed" within the meaning of G. L., c. 4, § 7, cl. 26th, and that the interpretation of G. L., c. 215, § 36, is therefore not varied thereby.

I direct your attention, however, to G. L., c. 66, § 3, which is as follows:—

"The word 'record' in this chapter shall mean any written or printed book, paper, map or plan. All public records other than maps and plans shall be entered or recorded on paper made of linen rags and new cotton clippings, well sized with animal sizing and well finished, and preference shall be given to paper of American manufacture marked in water line with the name of the manufacturer."

This provision, which is intended to secure durability to public records, would have to be complied with, whatever method of recording be selected. It is not for me, however, to pass upon the practical question whether the kind of paper which this section requires is suitable to be used in making photostatic copies or records.

Assuming that there is, as I have said above, a considerable degree of discretion which may be exercised in the choice of the method of recording, and that that discretion may be exercised in favor of the

use of photostatic copies, I do not understand you to ask, and I do not answer the question, to what person or body of persons that discretion is by law entrusted. The inquiry which is answered above appears to bear such a reasonable relation to the duties of your office as to permit the rendering of an opinion with respect thereto.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Boston Elevated Railway Company — Sale of Elevated Structures.

A bill authorizing the trustees of the Boston Elevated Railway Company, with the consent of the directors, to execute contracts for the purchase by governmental agencies of the elevated structures of the company and for the lease to the company of the property so acquired, not to become effective until accepted by vote of a majority of the company's stockholders, would be constitutional, if enacted.

FEB. 1, 1926.

Hon. JOHN C. HULL, *Speaker, House of Representatives.*

DEAR SIR:—You ask my opinion as to the constitutionality of a bill entitled "An Act relative to the purchase by the city of Boston and conveyance by the Boston Elevated Railway Company of elevated structures within the limits of said city." The bill contains the following provisions, with many details which it is not necessary now to state:—

First: The transit department of the city of Boston is authorized to execute with the company, with the consent of the directors, a contract for the purchase by the city of the elevated structures within the city, at a price to be determined, to be paid from the proceeds of an issue of bonds of the city, and another contract for the lease of the property so acquired, for a term ending with the termination of the present leases of tunnels and subways in the city, at a rental as therein provided.

Second: The Department of Public Utilities is similarly authorized to execute with the company, with the consent of the directors, a contract for the purchase by the Commonwealth of the elevated structures outside the city, at a price to be determined, to be paid from the proceeds of an issue of bonds of the Commonwealth, and another contract for the lease of the property so acquired, for a term ending with the termination of the present lease of the Cambridge subway, at a rental as therein provided; and it is provided that any excess or deficiency of revenues as compared with interest and sinking fund requirements shall be apportioned among the cities and towns constituting a district to be created.

Third: The company is required to use the amounts paid to it by the city and by the Commonwealth, for the property conveyed, to restore and maintain the reserve fund created by Spec. St. 1918, c. 159, to reimburse the Commonwealth for amounts paid to the company under that act for distribution among the cities and towns, and to use the balance for capital purposes.

Fourth: Upon the execution of the contracts with the city referred to above, the transit department is required to extend the Washington

Street tunnel to Sullivan Square, and is authorized to execute with the company, with the consent of the directors, a contract for the lease of the extension, for a term ending with the termination of the present lease of the tunnel, at a rental as therein provided; and there are suitable provisions for acquiring land or interests therein by eminent domain or otherwise, and for paying the cost of the extension from an issue of bonds of the city.

Fifth: Upon the completion of the extension, the intervening elevated structure is to be removed and the company to be relieved of all rental obligations with respect thereto.

Sixth: It is provided that the act is to take effect upon its acceptance by the city of Boston and other cities in the district and by a majority vote of the stockholders of the company.

Most of the provisions of this bill are similar to provisions to be found in Gen. St. 1919, c. 369, providing for the purchase by the Commonwealth of the Cambridge subway, or in St. 1923, c. 480, providing for the extension of the Dorchester tunnel. So far as these provisions fall within the scope of Spec. St. 1918, c. 159, they are consistent with its terms. The proposed act does not become effective until accepted by vote of a majority of its stockholders. Under those conditions the trustees of the company, with the consent of the directors, may clearly, in my opinion, contract to sell the elevated structures of the company in accordance with the provisions of the bill without violating the constitutional rights of any dissenting stockholders. See *Boston v. Treasurer & Receiver General*, 237 Mass. 403; *Durfee v. Old Colony & Fall River R.R. Co.*, 5 Allen, 230; *Attorney General v. Boston & Albany R.R. Co.*, 233 Mass. 460; V Op. Atty. Gen. 320; opinion to Joint Special Committee on Boston Elevated and Metropolitan Transportation District, September 28, 1925. Without passing upon matters of detail, I observe no constitutional defect in the main provisions of the proposed measure as outlined above.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Eminent Domain — Power of the Legislature to grant Authority to lease Property.

An act which authorizes a town to acquire by purchase or to take by eminent domain certain property, and to maintain and operate the same as a wharf or "to lease said property, in whole or in part, for any purpose," is unconstitutional.

FEB. 4, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have transmitted to me a copy of the engrossed bill of House 1058, entitled "An Act authorizing the town of Fairhaven to acquire the Union Wharf property in said town."

The substance of this bill is that the town of Fairhaven is authorized to purchase, for an amount not exceeding \$25,000, or, in the alternative, to take by eminent domain, a wharf property in Fairhaven known as Union Wharf; and is further authorized to maintain and operate the same as a wharf or "to lease said property, in whole or in part, for any purpose."

After an examination of the authorities I am constrained to advise

you that, in my judgment, this bill is unconstitutional, for the following reasons.

It is true that a statute which authorizes a taking may also provide that the municipal authorities may sell the lands taken at a later date, whenever they determine that such property is no longer needed for public use. But such a power, which is latent in every taking, is very different from a power to take land with a contemporaneous knowledge and purpose that a definite and separable part thereof is not then necessary for the public use.

The words of the statute which authorize the town authorities of Fairhaven, after the wharf has been taken, to lease said property, in whole or in part, for any purpose are not restricted as to time. These words form an integral part of the act, and are to operate contemporaneously with all its other provisions. There is nothing to require a determination that by reason of changed conditions the wharf, deemed necessary at the time of the taking, is no longer needed. The invalidity of such a statutory enactment is conclusively shown by the decision in the case of *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371, 374, *et seq.*

It was said by the Supreme Court of the United States, speaking through Mr. Justice Harlan, in *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 251:—

“It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle . . . grows out of the essential nature of all free governments.”

In *Salisbury Land & Improvement Co. v. Commonwealth*, *supra*, the court said, at page 377:—

“Private property cannot be taken directly or indirectly for a private end. It cannot be seized ostensibly for a public use and then diverted to a private use. Legislation which is designed or which is so framed that it may be utilized to accomplish the ultimate result of placing property in the hands of one individual for private enjoyment after it has been taken from another individual avowedly for a public purpose is unconstitutional. It would enable that to be achieved by indirect means which by plain statement would be impossible. These principles have been expounded at length in early decisions and recent opinions of this court with affluent citation of authorities.”

These fundamental principles, too well settled to be open to question, are also stated in the case of *Wright v. Walcott*, 238 Mass. 432, 434, as follows:—

“There are certain fundamental principles too well settled to be open to question. Moneys raised by taxation and all public funds can be expended only for public purposes. Private property cannot be taken by eminent domain or by contract of purchase except for a public use. It cannot be so taken or purchased from one person or set of persons with the design of handing it over directly or indirectly to another person or set of persons for their private advantage. The taking of private property except for ends which are of a public nature, even though accompanied by full compensation to the owner is contrary to fundamental principles of Ameri-

can jurisprudence and violative of the essential character of a free government. Legislation designed or framed to accomplish the ultimate object of placing property in the hands of one or more private persons, after it has been taken by the superior power of the government from another private person avowedly for a public use, is unconstitutional. *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371, and cases there reviewed and collected. *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242. *Opinion of the Justices*, 237 Mass. 597, 608, 609, and cases there collected. *Lynch v. Forbes*, 161 Mass. 302, 309. *Wheelock v. Lowell*, 196 Mass. 220, 225. *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 251. *Hairston v. Danville & Western Railway*, 208 U. S. 598, 606."

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Power of Legislature over Charitable Foundations.

A statute purporting to authorize an application of funds held upon a charitable trust to distinct and foreign purposes is unconstitutional.

House Committee on Rules.

FEB. 6, 1926.

GENTLEMEN:— You have asked my opinion whether a bill for legislation authorizing the trustees of the Haverhill Congregational Ministerial Fund to dispose of said fund would, if enacted, be constitutional.

"It is not within the power of the Legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of *cy pres*. *Cary Library v. Bliss*, 151 Mass. 364. *Crawford v. Nies*, 224 Mass. 474, 488." (*Opinion of the Justices*, 237 Mass. 613, 617.)

The trustees of the Haverhill Congregational Ministerial Fund are a corporation established by St. 1822, c. 32, for the purpose of holding in trust donations which might be made to the said trustees for the support and maintenance of the gospel ministry in the First Parish (Congregational) in the town of Haverhill. All funds so given are unequivocally devoted to the support of a regular, ordained, gospel minister, except that the surplus income over and above the sum of \$600 per annum may be applied "for other parochial purposes, if said parish, at a legal meeting holden for that purpose, so direct." St. 1822, c. 32, § 10. The purport of the present bill is to authorize a thorough deviation from those purposes. In my opinion, it will, if enacted, be unconstitutional.

Yours very truly,

JAY R. BENTON, *Attorney General*.

City of Boston — Authority of the Street Commissioners to regulate Traffic — Boulevard Stop Regulation.

The authority to regulate street traffic in the city of Boston is vested in the street commissioners by St. 1908, c. 447.

The provisions of G. L., c. 89, § 8, and G. L., c. 90, § 18, do not cut down the authority given by St. 1908, c. 447, except in so far as regulations adopted thereunder may be inconsistent with those provisions.

The so-called boulevard stop regulation for the highways of Boston would not necessarily be inconsistent with the provisions of G. L., c. 89, § 8, or of G. L., c. 90, § 18.

FEB. 10, 1926.

Hon. HERBERT A. WILSON, *Police Commissioner for the City of Boston.*

DEAR SIR:— You ask my opinion whether city officials can establish the so-called boulevard stop regulation for the highways of Boston without G. L., c. 89, § 8, having first been repealed, and without obtaining the approval of the Registrar of Motor Vehicles in accordance with G. L., c. 90, § 18.

The authority to regulate street traffic in the city of Boston is vested in the street commissioners by St. 1908, c. 447, which authorized the commissioners "to pass, and to amend or change from time to time, all regulations for such purpose, not inconsistent with law, which they shall deem needful to prevent the congestion and delay of traffic, and for other purposes." Under the authority of this statute a comprehensive code of street traffic regulations and rules for driving has been established.

G. L., c. 89, on the law of the road, provides in section 8 as follows:—

"Every driver of a motor or other vehicle approaching an intersecting way, as defined in section one of chapter ninety, shall grant the right of way, at the point of intersection to vehicles approaching from his right, provided that such vehicles are arriving at the point of intersection at approximately the same instant; except that whenever traffic officers are standing at such intersection they shall have the right to regulate traffic thereat."

G. L., c. 90, regulating the use of motor vehicles, provides in section 18, in part, as follows:—

"The city council or the selectmen and park commissioners, on ways within their control, may make special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, and may prohibit the use of such vehicles altogether on certain ways; provided, that no such special regulation shall be effective unless it shall have been published in one or more newspapers, if there be any, published in the town in which the way is situated, otherwise in one or more newspapers published in the county in which the town is situated; nor unless notice of the same is posted conspicuously by the town or park commissioners making the regulation at points where any way affected thereby joins other ways; nor until after the registrar shall have certified in writing, after a public hearing, that such regulation is consistent with the public interests; . . ."

The provisions in these sections do not cut down the authority given by St. 1908, c. 447, except in so far as regulations adopted thereunder may be inconsistent with the provisions of these sections. *Commonwealth v. Newhall*, 205 Mass. 344; *Commonwealth v. Gile*, 217 Mass. 18. G. L., c. 90, § 18, provides for special regulations as to the speed of motor vehicles and as to the use of such vehicles on particular ways, including the prohibition of such use. The regulation about which you inquire seems to be of a different sort, and therefore it is my opinion that section 18 would not be applicable to it. The proposed regulation, however, must not be inconsistent with the provisions of

G. L., c. 89, § 8. Without having a draft of the proposed regulation I cannot tell whether there is any inconsistency between the two. I do not see that such inconsistency is necessarily involved.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Clerk of the Supreme Judicial Court — Retirement Association — Compulsory Membership — Temporary Employment.

The clerk of the Supreme Judicial Court for the Commonwealth is a public officer and not an employee.

He cannot be required to become a member of the Retirement Association of the Commonwealth.

There is no provision of law prohibiting the temporary employment of a person over seventy years of age.

A person employed on several successive temporary requisitions is not eligible to membership in the Retirement Association.

Board of Retirement.

FEB. 10, 1926.

GENTLEMEN:— You request my opinion whether the clerk of the Supreme Judicial Court for the Commonwealth is a compulsory member of the Retirement Association of the Commonwealth.

G. L., c. 32, § 2, provides that "there shall be a retirement association for the employees of the commonwealth." Section 1, as amended by St. 1922, c. 341, § 1, defines "employees" as "persons permanently and regularly employed in the direct service of the commonwealth or in the service of the metropolitan district commission, whose sole or principal employment is in such service."

G. L., c. 32, § 2 (3), as amended by St. 1921, c. 439, § 1, provides, in part:—

"An official under fifty-five years of age when appointed or re-appointed by the governor for a fixed term of years, *may*, if his sole employment is in the service of the commonwealth, become a member of the association by making written application for membership within one year from the date of his original appointment or subsequent re-appointment to the same office."

The clerk of the Supreme Judicial Court for the Commonwealth is appointed by the justices of that court for a term of five years and may be removed by them. G. L., c. 221, § 1. The duties of the clerk are defined in the subsequent sections of that act.

In *O'Connell v. Retirement Board of the City of Boston*, 254 Mass. 404, 406, the court held that the clerk of the Municipal Court of the Roxbury District of the City of Boston "is not an employee but is a public officer clothed with official functions of a highly important nature." See also V Op. Atty. Gen. 547. It seems clear upon the authorities that the clerk of the Supreme Judicial Court for the Commonwealth is a public officer and not an employee, in the sense in which that term is usually used.

Does the term "employee," as defined in G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, include public officers? The use of the phrase "persons permanently and regularly employed" in place of the phrase "permanent and regular employees" does not in and of itself warrant the construction that public officers are included in the term "em-

employees." The distinction between a public office and a public employment has been so sharply recognized as to require, in my opinion, clear and unmistakable language to warrant the inclusion of public officers in the term "employees." See *Attorney General v. Drohan*, 169 Mass. 534; *Attorney General v. Tillinghast*, 203 Mass. 539. Moreover, section 1 of chapter 32, as amended, should be read in the light of section 2 (3) of that act, as amended by St. 1921, c. 439, § 1, which permits officials appointed by the Governor for a fixed term of years to become members of the Retirement Association, but does not require them to become members. Yet such officials are "persons" in the service of the Commonwealth.

I am therefore of the opinion that the clerk of the Supreme Judicial Court for the Commonwealth cannot be required to become a member of the Retirement Association of the Commonwealth.

Your next question is as follows:—

"May a person who is a temporary employee, whose employment was authorized for a definite time, be employed after reaching seventy years of age —

(a) In a regular State department;

(b) By a temporary commission created by an act of the Legislature to report upon a special subject?"

G. L., c. 32, § 2 (4), as amended by St. 1925, c. 12, provides for the retirement of any "member" who reaches the age of seventy. I know of no provision of law which prohibits the temporary employment of a person who has passed the age of seventy. I therefore answer this question in the affirmative.

Your next question reads as follows:—

"May a person who has been employed on a temporary requisition for three months' service, followed by another temporary requisition for a like length of service, and who has worked for several months under several such appointments, be considered an employee for the purposes of membership in the Retirement Association?"

Would it be consistent with the law for the Board of Retirement to adopt a by-law to include such persons as 'permanently and regularly employed' after a reasonable length of continuous service?"

G. L., c. 32, applies to persons "permanently and regularly employed." Section 3 (3) provides that "the board may make by-laws and regulations consistent with law." A person who is employed on several successive temporary requisitions is not, by the very terms of the requisition, "permanently and regularly employed." Such person is therefore not eligible to membership in the Retirement Association. The board cannot by a regulation or by-law treat a temporary employment as a permanent one. I therefore answer this question in the negative.

You further inquire whether there are any classes of officials exempt from membership in the Retirement Association in addition to those appointed by the Governor and Council and those elected by popular vote. Your question does not refer to any specific officials or any specific officers. The Attorney General will not undertake to determine in advance of any inquiry directed toward specific officers all possible problems which may arise. I therefore respectfully ask to be excused from answering that question.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Department of Public Works—Regulation of Billboards—Signs advertising Persons occupying or Business done on the Premises.

Under G. L., c. 93, § 30, as amended by St. 1924, c. 334, advertising devices otherwise lawful, indicating the person occupying the premises or the business done thereon, need not conform to the regulations of the Department of Public Works.

What signs advertise the business transacted on the premises is a question of fact, and the rule is, in general, broad enough to allow devices which indicate the manufacturer of goods sold on the premises.

FEB. 15, 1926.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR:—You have asked my opinion upon certain questions respecting the interpretation and effect of G. L., c. 93, § 30, relating to the regulation of billboards and other advertising devices, as amended by St. 1924, c. 334. The provisions of that section are as follows:—

“No person, firm, association or corporation shall post, erect, display or maintain on any public way or on private property within public view from any highway, public park or reservation any billboard or other advertising device, whether erected before August twenty-fifth, nineteen hundred and twenty, or not, which advertises or calls attention to any business, article, substance or any other thing, unless such billboard or device conforms to the rules and regulations and ordinances or by-laws established under the preceding section; provided, that this section shall not apply to signs or other devices erected and maintained in conformity with law and which advertise or indicate either the person occupying the premises in question or the business transacted thereon, or advertise the property itself or any part thereof as for sale or to let and which contain no other advertising matter.”

1. You ask whether the words “erected and maintained in conformity with law,” as found in G. L., c. 93, § 30, amended by St. 1924, c. 334, include within their significance conformity with the rules and regulations made by the Division of Highways under the authority of G. L., c. 93, § 29, as amended by St. 1924, c. 327. I think that they do not. Any other conclusion than this would take away from this portion of G. L., c. 93, § 30, all force and effect whatever.

2. You also ask whether the words “or the business transacted thereon,” found in said section 30, permit the erection of advertising devices which advertise the manufacturer of articles or products sold on the premises. What is the business transacted upon given premises, is a question of fact in each case. What devices advertise or indicate such business is a further question of fact in each case. In my opinion, this provision is broad enough to permit not only a device stating the general nature of the business but also a device which advertises or indicates a particular detail of the business which may be thought reasonably calculated to attract custom. The advertising of a particular commodity as exposed for sale upon the premises may well include matter indicating the manufacturer of the commodity. The proprietor of the business may consider that the manufacturer’s name constitutes an additional recommendation of the particular product. It is difficult to answer categorically a question which so largely involves varying considerations of fact, but so far as it is possible I answer your ques-

tion in the affirmative. There will be, however, a line in fact between devices which, as an incident to the advertising or indicating of the business done on the premises, also advertise the manufacturer of an article sold thereon and devices which only advertise the manufacturer and ignore the business. The latter type of device does not come within the scope of the permission.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Massachusetts Agricultural College — Trustees — President — Acceptance of Gift.

The president of the Massachusetts Agricultural College is without authority to accept gifts for the college; such power lies in the board of trustees.

FEB. 16, 1926.

Hon. CHARLES P. HOWARD, *Chairman, Commission on Administration and Finance*.

DEAR SIR:— You have asked my opinion upon the following matter:—

“The president of the Massachusetts Agricultural College informs me that a group of farmers wish to present a Ford truck to the college for the use of the Cranberry Station. He wishes me to ascertain whether or not he can legally accept the gift of the truck.”

The Massachusetts Agricultural College is a State institution, managed and administered on behalf of the Commonwealth by a board of trustees appointed under G. L., c. 15, § 20. The president of the college is elected by the trustees, who define his duties. G. L., c. 75, § 13. I am of the opinion that the president of the college has no authority to accept gifts for the use of the institution, but that the trustees are empowered so to do.

The college is not for all purposes an independent entity, but functions within the Department of Education as one of the many forms of the Commonwealth's activities.

The physical property which the college uses has its title vested in the Commonwealth, and gifts to the college are in effect gifts to the Commonwealth. The Commonwealth alone has power to accept or reject donations offered to it. Such power may, however, be delegated by the Commonwealth through the Legislature to its administrative subdivisions.

G. L., c. 75, § 7, provides:—

“The trustees shall administer property held in accordance with special trusts, and shall also administer grants or devises of land and gifts or bequests of personal property made to the commonwealth for the use of the college, . . .”

The board of trustees, as constituted under G. L., c. 15, § 20, is a branch of the administrative government of the Commonwealth, and, in view of the powers specifically conferred upon it by G. L., c. 75, it may be inferred that it has the power to receive unconditionally gifts of personal property, such as an automobile truck, for the use of the college, title to which vests in the Commonwealth. Attorney General's Report, 1922, p. 256.

The president of the college is elected by the trustees, and his duties are defined by them. The Legislature has conferred upon him no powers with relation to holding or administering property. The office itself carries with it no implied power to place the Commonwealth in the position of a donee of a preferred gift, and there is no legislative enactment indicating any intent to confer such authority upon him. He is not such an administrative officer of the Commonwealth as may accept gifts upon its behalf, and a gift to the college is in effect a gift to the Commonwealth.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Maintenance of Athletic Field by a City — Admission Fee.

A bill which provides that the director of the department of public property of the city of Lawrence, under the direction of its city council, may maintain an athletic field in said city and may permit the use of said field for athletic games and other entertainments of a public nature, at which an admission fee may be charged, but which does not provide that such field is to be used exclusively for rental purposes, would be constitutional.

FEB. 19, 1926.

Hon. ALVIN E. BLISS, *Senate Chairman, Committee on Cities*.

DEAR SIR:— You have requested my opinion as to the constitutionality and legality of Senate Bill No. 179, now before your committee, entitled "An Act relative to the maintenance of an athletic field in the city of Lawrence." This act provides as follows:—

"SECTION 1. The director of the department of public property of the city of Lawrence, under the direction of its city council, may maintain an athletic field, with suitable equipment, on land on Osgood Street and Winthrop Avenue, owned by the city and now known as Memorial Park, and may permit the use of said field for athletic games and other entertainments of a public nature, at which an admission fee may be charged, to such person or persons and upon such conditions as may be fixed by the said director, with the approval of the city council."

It does not appear in what manner this land was acquired by the city of Lawrence, whether by a taking under the right of eminent domain, purchase or gift.

In *Wright v. Walcott*, 238 Mass. 432, the court said:—

"Land acquired by a city or town by eminent domain or through expenditure of public funds, held strictly for public uses as a park and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court. It may be transferred to some other agency of government or devoted to some other public use by legislative mandate. The power of the General Court in this regard is supreme over that of the city or town. When title in fee is acquired in the land by the municipality for such a public use, there is no right of reversion to the original owner. He has been divested of every vestige of title when he parted with the fee. *Higginson v. Treasurer & School House Commissioners of Boston*, 212 Mass. 583. *Stewart v. Kansas City*, 239 U. S. 14, 16."

The Legislature may, under our Constitution, authorize the sale or lease of land held for a public purpose when the public purpose designated has been completely accomplished, or when through the lapse of time or changed conditions continued ownership of the land by the public agency is no longer necessary or needed for the public purpose for which the land was acquired. *Chase v. Sutton Mfg. Co.*, 4 Cush. 152; *Winnisimmet Co. v. Grueby*, 209 Mass. 1; *Bancroft v. Cambridge*, 126 Mass. 438; *Worden v. New Bedford*, 131 Mass. 23; *Dingley v. Boston*, 100 Mass. 544; *Davis v. Rockport*, 213 Mass. 279; *Wright v. Walcott*, *supra*; *Sweet v. Rechel*, 159 U. S. 380. But legislation designed or framed to accomplish the ultimate object of placing property under the control of one or more private persons after it has been taken by the superior power of the government from another private person avowedly for a public purpose, is unconstitutional. *Wright v. Walcott*, *supra*; *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371.

In the absence of any evidence that Memorial Park, referred to in the bill under consideration, was given to the city of Lawrence by devise, grant, bequest, in trust or upon condition, I assume that it was purchased or taken by eminent domain for park purposes. If the park is already under the control and management of park commissioners, so that the result of the bill is to work simply a change of control of said park land by taking it from one official who holds it for a public use and transferring it to another to hold in the same manner for precisely the same public use, there may well be a constitutional objection. To such a situation the case of *Cary Library v. Bliss*, 151 Mass. 364, seems applicable.

The bill under consideration does not involve any taking of property either from a private person or from the public. There is nothing in the bill which takes away from the city its legal title to the land. It merely authorizes the use of said land for athletic games and other entertainments of a public nature, at which an admission fee may be charged, to such person or persons and upon such conditions as may be fixed by the director of the department of public property of the city of Lawrence, with the approval of the city council.

The law seems settled in this Commonwealth that while a municipality cannot purchase or take land and buildings or erect buildings for business or speculative purposes, nevertheless, having such land and buildings, acquired in good faith for proper municipal purposes, it has the right to allow it to be used incidentally for other purposes, either gratuitously or for a compensation. Such a use is within its legal authority and is in fact common in many cities and towns. For example, operating a ferry, see *Davies v. Boston*, 190 Mass. 194; letting a public hall for profit, *Little v. Holyoke*, 177 Mass. 114, *Oliver v. Worcester*, 102 Mass. 489, 499; managing a farm, partly for the support of its poor, partly for the maintenance of its highway department and partly for the production of income, *Neff v. Wellesley*, 148 Mass. 487; operating a stone crusher for profit, *Duggan v. Peabody*, 187 Mass. 349, *Collins v. Greenfield*, 172 Mass. 78. In such cases, where the city does not devote the property exclusively to public purposes but lets it, or a part of it, for its own advantage and emolument by receiving rents or otherwise, it is of course liable, while it is so let, in the same manner as a private owner would be. See *Davis v. Rockport*,

supra. In practically all of the deciding cases the property was held and administered for some purely public purpose, the use of unneeded or unused portions of it for the profit of the municipality being merely incidental and a minor use.

The bill under consideration, while it does not in terms provide that the park referred to shall be used exclusively for income purposes, nevertheless, as it reads, that would seem to be the major purpose, and the money for the maintenance and equipment of the athletic field apparently is to be raised by general taxation. These features should be carefully considered, as they make the bill clearly distinguishable from the adjudicated cases. The difficulty lies not in the statement of the governing principles of law but in their application to particular facts. With some hesitancy I arrive at the conclusion that inasmuch as the bill does not provide that the said athletic field is to be used exclusively for rental purposes, and apparently may be used also for municipal purposes for the benefit of all the citizens, the use for profit may well be considered to be merely incidental. Under this view of the question I believe the bill is constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Retroactive Tax Laws.

A statute reviving a liability to tax under a prior law, while retroactive, is not for that reason unconstitutional.

Bills amending G. L., c. 63, § 52, and St. 1925, c. 343, § 13, examined and held to be free from constitutional defect.

FEB. 19, 1926.

HON. HENRY L. SHATTUCK, *Chairman, House Committee on Ways and Means*.

DEAR SIR:— You ask me to advise your committee relative to the form and constitutionality of House Bills Nos. 1085 and 1086, and at the same time to give the committee any suggestions that may occur to me as to the merit or demerit of the proposed legislation.

House Bill No. 1085 amends G. L., c. 63, § 52, which was under consideration by the court in the recent case of *W. & J. Sloane v. Commonwealth*, 253 Mass. 529. Section 52 provides, in substance, that if the excise imposed by section 32 on domestic business corporations, or that imposed by section 39 on foreign corporations, is declared unconstitutional by the Supreme Court of the United States or the Supreme Judicial Court of the Commonwealth, the whole corporation excise tax law enacted in 1919 shall be null and void and the prior law shall be revived, that all taxes which have become due under such prior law shall be assessed forthwith, and that the time for making such assessment and for applying to the court for abatement of taxes under section 32 or section 39 shall be extended for six months from the date of the determination.

The proposed substitute provides separately for the excise imposed by section 32 and that imposed by section 39. It revives the prior law only for the period beginning with the calendar year prior to the determination of the court. It extends the time for assessing taxes and enforcing rights for a period of a year instead of six months, and it provides that excises paid under the law declared unconstitutional shall be credited against taxes assessed under the prior law.

The liability to tax under prior law revived and made applicable for a period already passed by section 52, as it now is and in the proposed amended form, is, of course, retroactive; but that feature does not make it unconstitutional. "Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection and not impairing vested rights, are not forbidden by the Federal Constitution." *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 152. See also *Stockdale v. Insurance Companies*, 20 Wall. 323, 331, 332; *Brushaber v. Union Pacific R.R. Co.*, 240 U. S. 1, 20; *Forbes Boat Line v. Board of Commissioners*, 258 U. S. 338. The limitation of the right to recover taxes assessed under the law held unconstitutional to the period beginning with the calendar year prior to the decision does not affect the constitutional rights of the taxpayer, which, as the court has several times held, are sufficiently protected by section 77. *W. & J. Sloane v. Commonwealth*, *supra*; *International Paper Co. v. Commonwealth*, 232 Mass. 7; *Lever Brothers Co. v. Commonwealth*, 232 Mass. 22; *Burrill v. Locomobile Co.*, 258 U. S. 34.

House Bill No. 1086 amends St. 1925, c. 343, § 13, which contains provisions similar to section 52 made applicable to the tax imposed on banks and trust companies. The proposed amendment is similar in form to the amendment made by House Bill No. 1085, except that taxes under the prior law, when revived, are to be assessed for the year 1926 and subsequent years instead of from and after the calendar year preceding the date of the decision, and taxes assessed under the invalid law are to be credited for a corresponding period.

In my opinion, these bills, if enacted, would be constitutional, and they seem to me to be in proper form and reasonably adapted to cure defects and difficulties which became apparent in connection with the proceedings instituted by W. & J. Sloane.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Taxation — Exemption of Veterans.

A statute amending G. L., c. 59, § 5, cl. 23rd, adding to the class of veterans thereby given a partial exemption from local property taxation, would be constitutional, if enacted.

FEB. 24, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have transmitted to me for examination and report Senate Bill No. 172, entitled "An Act granting to certain veterans a partial exemption from local property taxation."

This bill proposes to amend G. L., c. 59, § 5, cl. 23rd, exempting soldiers and sailors who served in the War of the Rebellion from payment of a poll tax and to the amount of one thousand dollars from taxation of their property and the property of their wives or widows if they are not entitled to exemption under clause 22nd, with certain provisos. The amendment includes in the class of persons entitled to the one thousand dollar exemption "soldiers and sailors who served in the military or naval service of the United States in the Spanish war or in the Philippine insurrection or the China relief expedition and were honorably discharged or honorably released therefrom."

"Reasonable classification so far as concerns taxation or exemption from taxation may be made by the Legislature." *Massachusetts General Hospital v. Belmont*, 233 Mass. 190, 201. The payment of military aid out of State funds to persons who have served in the army or navy of the United States is a public use justifying such expenditure. *Opinion of the Justices*, 211 Mass. 608. Partial exemption from taxation has been granted to soldiers and sailors, under our statutes, since 1894. The proposed amendment merely adds to the class of soldiers and sailors entitled to the benefits of one of the exemptions provided.

In my opinion, the bill, if enacted into law, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Power of Legislature over Charitable Foundations — Change of Name of School — Validation of Acts of Charitable Corporation — Alteration of Number and Qualifications of Trustees — Contract Clause — State Legislation prior to the United States Constitution — Power of Donor to release Conditions.

Charitable trusts held by municipalities are, in the absence of express restriction on the gift, subject to a certain amount of statutory regulation with respect to the mode of administration.

Statutes purporting to vary the substance or express administrative provisions of a charitable trust are ordinarily unconstitutional.

A statute purporting to change the name of a school founded by a private donor, who expressly provided for its name, varying the apparent purpose of the school from "agricultural" to "vocational" is unconstitutional.

A statute changing the name of such a school, so as to include the word "academy" rather than "school," may not, under given circumstances, be unconstitutional.

The charter of a corporation established in 1784, without reservation of right to amend, cannot be altered without the consent of the corporation.

A statute purporting to "validate" the acts of a charitable corporation done under a name other than the corporate name is at least valid as a release of any right of the Commonwealth to complain thereof.

Where, prior to the adoption of the United States Constitution, the Legislature altered a charitable foundation by an act changing the number of trustees from that provided for by the donor, the Legislature may now, with the corporation's consent, further alter the number of trustees.

Where, under such circumstances, the original donor had by his will requested the abolition of a requirement as to the residence of the trustees, the Legislature may, with the consent of the corporation, alter the charter to comply with such request.

Committee on Education.

MARCH 2, 1926.

GENTLEMEN: — You have asked my opinion whether House Bill No. 301 and House Bill No. 351, §§ 1 and 2, both relating to certain charitable foundations, would, if enacted into law, violate the conditions of the original gifts. I assume that your ultimate question is whether the bills, if enacted, would be constitutional.

I take up first House Bill No. 301. This purports to authorize the change of name of Smith's Agricultural School, an institution carried on by the city of Northampton, under the will of Oliver Smith, to Smith Vocational School. The will, the provisions of which were accepted by the then town of Northampton in 1847, is emphatic in providing that the name of the institution, for the establishment of which a substantial sum of money was given, should be "Smith's Agricultural School." Although it provides for the establishment, "on the premises," of a "School of Industry," the dominant emphasis of the relevant portion of the will is upon the "Art and Science of Husbandry and Agriculture." The name reflects, and was intended to reflect, this dominance.

Whether or not changed circumstances, coming with the passage of time, now would warrant a court of equity in making the change which this bill seeks to effectuate, is not the present question. It is whether the Legislature can do it. The power of the General Court over charitable trusts held by municipalities is considerable. *Opinion of the Justices*, 237 Mass. 613, 618. In respect to the mechanics of administration, the donor who confides his trust to a city or town without express restrictions subjects it to a certain amount of regulation flowing from the general power of the Legislature over the public affairs of the trustee of his selection. *Ware v. Fitchburg*, 200 Mass. 61. But a measure which undertakes to vary the substance of the trust, or even an administrative provision which is express and unequivocal, will ordinarily pass the bounds of this power. *Cary Library v. Bliss*, 151 Mass. 364. In my opinion, this bill is of such a character, and, if enacted, will be unconstitutional. *Opinion of the Justices*, *supra*, 617.

House Bill No. 351 purports to alter the charter of a corporation established in 1784, St. 1784, c. 32. This cannot be done without the consent of the corporation. *Opinion of the Justices*, 237 Mass. 619, 622. The bill is deficient in that it is not made conditional upon such consent. As, however, this may be remedied by amendment, I will give my opinion upon its various provisions as if such amendment had been made.

1. The bill purports to change the name of the corporation from "The Trustees of Derby School" to the "Trustees of Derby Academy." The difference between the words "school" and "academy" is not a wide one, and the former word is not more appropriate to the expressed purposes of the particular institution. The deed by which the school was founded did not directly provide for the name of "Derby School" but rather that the trustees should secure an act of incorporation under the name of the "Trustees of Derby School," a condition which has been fulfilled. The change from a school to an academy, whatever the significance of such a change may be thought to have been, was undertaken by St. 1797, c. 9. Under these circumstances, I should hesitate to say that the change of the corporate name now contemplated would violate the obligation of any contract between the original donor and the trustees or corporation, or would so modify the charity itself as to amount to a usurpation of judicial power.

2. The bill purports to validate all acts of the corporation done under the name of the Trustees of Derby Academy after June 17, 1797, to the same extent as if done under the name of the Trustees of Derby School, and to confirm as the property of the corporation, the Trustees

P.D. 12.

of Derby Academy, all property, real and personal, now standing in the name of the Trustees of Derby School or the Trustees of Derby Academy. These provisions can be construed as intended merely to release whatever rights the Commonwealth might otherwise have to complain of the business of the corporation having been done under an erroneous name, and to authorize specifically the future dealing with the corporate property under the name which the bill confers. Thus construed, they would be constitutional. It is therefore unnecessary to consider whether, given some broader construction calculated to affect the rights of third persons, they would be unconstitutional.

3. There is a provision in the bill changing the number of trustees, and removing a limitation hitherto existing as to the residence of the trustees. There was no express provision in the original deed as to the number of trustees, although the conveyance was in fact to ten named persons and contained provision for the filling of vacancies. The Legislature, in the charter of 1784, undertook to deal comprehensively with the subject, and provided for a board of not more than eleven nor less than nine, of whom five should constitute a quorum. The provision superseded the implications of the deed at a time when the Constitution of the United States had not been adopted. It cannot, therefore, be attacked upon the ground of the Contract Clause. It furnished a new starting point for the future, creating a contract with the corporation, in the sense in which a charter is a contract, but creating no contract in any sense with the original donor. I have not been advised of the existence of any subsequent donors. In my opinion, this administrative feature is now subject to further change by the Legislature, with the consent of the corporation. As to the removal of the limitation respecting the residence of the trustees, this comes in response to the specific request of the founder, in the codicil to her will, which request must release, if anything can release, her personal right to have the charity conducted, in this respect, upon the original terms. See *Cary Library v. Bliss*, 151 Mass. 364, 379.

Upon the facts which have been presented, although several aspects of House Bill No. 351, §§ 1 and 2, are not free from doubt, I am not prepared to say that the measure, if enacted, will not be held constitutional.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Taxation — Corporate Franchise Tax — Foreign Telephone Company.

The tax imposed by G. L., c. 63, § 56A, on foreign telephone companies is sufficiently definite so that it is not open to the objection that legislative power is unlawfully delegated to the Commissioner.

There is not such discrimination in the tax imposed, by reason of its application to foreign telephone companies only, as to constitute a denial of the equal protection of the laws.

To the Honorable Senate.

MARCH 15, 1926.

GENTLEMEN:— You have requested my opinion as to the constitutionality of G. L., c. 63, § 56A, inserted in said chapter by St. 1923, c. 310. The section is as follows:—

“A foreign telephone company carrying on part of its business outside of the commonwealth may, within the time when its franchise

tax return under this chapter is due to be filed, request determination of the value of its corporate franchise subject to taxation in the commonwealth by a method other than that hereinbefore provided and hereinafter referred to as 'the statutory method.' Such a foreign telephone company shall within thirty days thereafter file with the commissioner, under oath of its treasurer, a statement showing in detail the value of its corporate franchise as aforesaid, and such other information as the commissioner shall require for assessment of the tax. The commissioner shall in such case ascertain the value of such franchise as aforesaid and to that end may determine such value by a method other than 'the statutory method' but nothing herein contained shall be construed to prevent the application of 'the statutory method' in case the commissioner shall deem such method equitable."

G. L., c. 63, §§ 53-58, impose a tax upon the corporate franchise of certain corporations, not taxable under the corporation excise tax law, including foreign telephone, telegraph, railroad, street railway and electric railroad corporations. The tax is measured by the value of the corporate franchise less certain deductions, which are different in the cases of different classes of corporations, specified in section 55. In the case of a foreign telephone company the deductions allowed are "so much of the value of its capital stock as is proportional to the number of telephones used or controlled by it, or under any letters patent owned or controlled by it, without the commonwealth"; and "the value of its works, structures, real estate, machinery, poles, underground conduits, wires and pipes subject to local taxation within the commonwealth" (clauses third and fourth). The tax so imposed is a tax upon the corporation on account of property owned and used by it within the State. *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 552; *Massachusetts v. Western Union Telegraph Co.*, 141 U. S. 40, 45. In enacting section 56A the Legislature no doubt had in mind that a tax levied on a foreign telephone company under section 55 and clauses third and fourth might result in an unconstitutional burden on such a corporation. *Fargo v. Hart*, 193 U. S. 490; *Union Tank Line Co. v. Wright*, 249 U. S. 275; *Wallace v. Hines*, 253 U. S. 66. A somewhat similar alternative method for determining value for the purpose of laying excise taxes on foreign business corporations is to be found in G. L., c. 63, § 42.

In considering the question of the constitutionality of section 56A there appear to be two possible lines of inquiry:

First, whether the tax imposed is so defined that it may not be open to the criticism that legislative power is delegated to the Commissioner; and

Secondly, whether, in applying the provision to foreign telephone companies alone, there is some unconstitutional discrimination in favor of or against such corporations.

I interpret the term "value of its corporate franchise subject to taxation in the commonwealth," which by section 56A is to be ascertained by the Commissioner, to mean value of its corporate franchise employed within the Commonwealth. So interpreted, the tax is imposed upon property subject to taxation by the Commonwealth. *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Postal Telegraph Co. v. Adams*, 155 U. S. 688; *Adams Express Co. v. Ohio*, 166 U. S. 185, 223-225; *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 163;

Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453; *Union Tank Line v. Wright*, 249 U. S. 275; *Air-Way Corporation v. Day*, 266 U. S. 71; *Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission*, 266 U. S. 271. In my opinion, the tax imposed by the statute is sufficiently definite so as not to be open to the objection of an unlawful delegation of legislative power. The New York tax law for many years imposed an annual franchise tax upon foreign and domestic corporations to be computed upon the basis of the amount of its capital stock employed within the State, without further defining the method by which the value of the stock so employed was to be determined. Laws of New York, 1880, c. 542; Tax Law, § 182. I conclude, therefore, that so far as the first question is concerned the section is not unconstitutional.

The second inquiry is whether there is such discrimination in the tax by reason of its application to a foreign telephone company only as to constitute a denial of the equal protection of the laws under the United States Constitution. Concerning this question the Supreme Court of the United States has recently said:—

“It is unnecessary to say that the ‘equal protection of the laws’ required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy.”

Royster Guano Co. v. Virginia, 253 U. S. 412, 415. In *Beers v. Glynn*, 211 U. S. 477, 484, the court said:—

“The power of the State in respect to the matter of taxation is very broad, at least so far as the Federal Constitution is concerned. . . . It may tax one class of property by one method of procedure and another by a different method.”

See also *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U. S. 232, 237. Tax laws classifying foreign corporations and imposing a particular tax different from other taxes upon foreign corporations of a certain class have several times been upheld. *Michigan Central R.R. v. Powers*, 201 U. S. 245, 293; *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322; *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132. It is my opinion that in this aspect, while the question may be open to some doubt, section 56A is not unconstitutional.

I therefore advise you in response to your request that, in my opinion, G. L., c. 63, § 56A, is constitutional.

Very truly yours,

JAY R. BENTON, Attorney General.

Insurance — Contracts — Service Agreements.

A contract to make repairs caused by accident may be a contract of insurance and not a service agreement when the element of hazard enters into the terms of the undertaking.

MARCH 15, 1926.

HON. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR:— You have requested my opinion as to whether or not an agreement issued by the Eastern Auto Body Service Corporation, which you have submitted to me for examination, is a contract of insurance within the meaning of G. L., c. 175, § 2.

By the foregoing statute a contract of insurance is defined to be —

“An agreement by which one party for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest.”

The instant agreement recites in its provisions that it is not a policy of insurance but is a “service agreement.” Its true character, however, must be determined from analysis of its terms. Various contracts of a similar nature have been considered by me and by my predecessors in office, and the general principles applicable to the distinction between contracts to render service and contracts of insurance have been set forth at length in many opinions (Attorney General’s Report, 1924, p. 142; 1921, p. 143, and others there cited).

An essential element of a contract of insurance is hazard. An insured receives indemnity from loss by reason of the happening of events without his control or the control of the insurer. If a contract be merely an agreement to perform work for another at the option of the latter, or to make ordinary repairs upon an instrumentality of another as they may become necessary by the usual operation of such instrumentality, and not when created by accident resulting from the intervention of some cause foreign to the usual operation, it is not a contract of insurance. I Op. Atty. Gen. 544, 547. If, however, a contract calls for indemnity in money or the making of repairs, in the event of damage to an instrumentality of one of the contracting parties, which can only be made necessary by the happening of an accident, the contract may be one of insurance.

The service contracts which have been the subject of previous opinions by the Attorney General and his predecessors, and have been said not to be contracts of insurance, have lacked the element of hazard and have differed in their terms from the instant agreement in important particulars.

In the agreement submitted to me the Eastern Auto Body Service Corporation promises, in consideration of the payment of a sum of money, to make certain enumerated kinds of repairs during one year to a designated automobile of the other party to the contract, and to make such repairs regardless of the cause thereof, whether accident, collision, negligence or of whatever character. A large proportion of the enumerated kinds of repairs which the corporation agrees to make are of a sort which more commonly are made necessary by damage caused by the accidental application of external violence than by the ordinary operation of an automobile. The removal of dents in the body, in the metal part of the top, in the doors, in the hood, in the

fenders, on the gasoline tank and brackets, which are enumerated repairs required by the contract, are, as a matter of common knowledge, more likely to result from accident than from the ordinary wear and tear of the mere operation of an automobile. The replacement of glass in an automobile, "that may be broken, resulting from any act, event or fact whatsoever other than wilful destruction," which is one of the enumerated repairs that the corporation agrees to make, is a form of repair which almost invariably is made necessary by damage resulting from force accidentally applied to a car, rather than from its usual operation. Clause (3) of the instant agreement, relative to towing, provides for the rendering of service not merely at the option of the assured but when the car is disabled, whether by causes incident to its ordinary operation or by "accident or collision."

In view of the intimate connection between accidental violence and the kinds of damage as to which the corporation is to make the holder of the agreement whole by performing the necessary and stipulated repairs, I am constrained to say that such an element of hazard enters into the contract that it is plainly distinguishable from other service contracts which have been held, by reason of the lack of this characteristic, not to be contracts of insurance. The agreement under consideration provides for virtual reimbursement for loss to the other contracting party by the performance of acts valuable to him, namely, the making of repairs. It is supported by a valid consideration. Although possibly it is somewhat broader in its scope, providing, as it perhaps does, for repairs made necessary by ordinary usage as well as by accident, yet, read as an entirety, it is virtually a contract of insurance not unlike the type commonly known as collision sustained, except that it provides only for the making of certain repairs instead of for the payment of money to the insured.

I am of the opinion that the contract which you have submitted to me is one of insurance, within the meaning of G. L., c. 175, § 2.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Agriculture — Inspection of Apples — Foreign Law.

An inspector of apples from another State is without authority to inspect apples grown in such State when stored within the Commonwealth.

MARCH 16, 1926.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:—You request my opinion as to the authority of an inspector representing the New Hampshire Department of Agriculture to make inspection of New Hampshire apples in market and storage houses within this Commonwealth.

I am unaware of any statute of Massachusetts or of the United States which confers such authority upon inspectors of the New Hampshire Department of Agriculture. No such power is given by G. L., c. 94, §§ 104–111, as amended, nor by U. S. Compiled Statutes of 1918, §§ 8574–8, commonly known as the United States Apple Grading Law. In the absence of specific statutory authority, no foreign inspector possesses any such power as you refer to in your letter. Such an inspector might have access to local market and storage houses and

might inspect apples therein lawfully if permission so to do were given by the owners of the buildings and of the apples.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Motor Vehicle — Transportation of Intoxicating Liquor — Forfeiture.

A motor vehicle conveying intoxicating liquor in bottles or other receptacles is not a "vessel" under G. L., c. 138, § 64, but may be an "implement of sale" thereunder.

Gen. A. F. FOOTE, *Commissioner of Public Safety.* MARCH 18, 1926.

DEAR SIR: — You request my opinion upon the following questions: —

"May an automobile used for the transportation or sale of liquors, contrary to the laws of the Commonwealth, be deemed, within the meaning of the law, an implement for the sale of such liquors or a container thereof, and therefore subject to forfeiture and disposition as an implement or container?"

Or may an automobile when especially equipped for the transportation or sale of liquors, contrary to the laws of the Commonwealth, be deemed, within the meaning of the law, an implement for the sale of such liquors or a container thereof, and therefore subject to forfeiture and disposition as an implement or container?"

G. L., c. 138, § 64, provides: —

"The officer to whom the warrant is committed shall search the premises and seize the liquor described in the warrant, the casks or other vessels in which it is contained, and all implements of sale and furniture used or kept and provided to be used in the illegal keeping or sale of such liquor, if they are found in or upon said premises, and shall convey the same to some place of security, where he shall keep the liquor and vessels until final action is had thereon."

I will take up first the question whether a motor vehicle may be considered a "vessel," under the provisions of the above statute. A vessel is "a hollow receptacle of any form or material, but especially one capable of holding a liquid, as a pitcher, bottle, vase, kettle, or cup." *Standard Dictionary.*

The bottles, cans, containers or other receptacles in which the liquor is held are the "vessels in which it is contained." Intoxicating liquor found in receptacles in or upon a motor vehicle will not transform such a vehicle into a vessel in which said liquor is contained, under the meaning of the statute.

It is conceivable, however, that a motor vehicle might be constructed or equipped with tanks or other receptacles, as part thereof, capable of holding liquor in volume, in which case such a vehicle could "be found to be an implement of sale or container," or vessel, within the intendment of the statute. *Commonwealth v. Certain Intoxicating Liquors*, 253 Mass. 581.

Whether motor vehicles may be "implements of sale . . . used or kept and provided to be used in the illegal keeping or sale of . . . liquor," is the other part of the inquiry under consideration.

An implement is defined as "an instrument used in work." *Standard Dictionary.* Also, "that which fulfils a want or use." *Davis v. Anchor Mutual Fire Ins. Co.*, 96 Ia. 70.

Whether a motor vehicle is an implement of sale or vessel used in the illegal keeping or sale of intoxicating liquors is a question of fact for the court or jury, upon all the evidence in the particular case. *Commonwealth v. Certain Intoxicating Liquors, supra.*

A succinct statement of the law on the points raised in your letter is found in the language of Judge Crosby, who wrote the opinion just cited above. He stated as follows:—

“The various provisions of the statute plainly show that this is a proceeding *in rem*; it relates to the liquors, containers and implements of sale. The question in issue was whether the truck was used as an implement of sale or container used in the illegal keeping or sale of intoxicating liquor. . . .

The contention that the truck could not be found to be an implement of sale or a container cannot be sustained. The evidence before the jury is not before us and we are unable to say that it did not justify the finding.”

Yours very truly,
JAY R. BENTON, *Attorney General.*

License — Storage of Gasoline — State Fire Marshal.

Where notice of a hearing on an application for a license to store gasoline in the city of Boston was not given as required by G. L., c. 148, § 14, as amended by St. 1925, c. 335, § 1, the State Fire Marshal has authority, under G. L., c. 148, §§ 30, 31 and 45, on appeal from an order of the board of street commissioners granting the license, to rescind the action of the board because of the want of proper notice.

MARCH 18, 1926.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR:—You ask my opinion in regard to a petition filed by the Jenney Manufacturing Company with the board of street commissioners of Boston for a license to keep and store gasoline in a structure within the city limits. The provisions for granting such a license are contained in G. L., c. 148, § 14, as amended by St. 1925, c. 335, § 1, which provides, in part, as follows:—

“No building or other structure shall, except as provided in section fifteen, be used for the keeping, storage, manufacture or sale of any of the articles named in section ten, except fireworks, firecrackers and torpedoes, unless the aldermen or selectmen shall have granted a license therefor for one year from the date thereof, after a public hearing, held in the case of cities by the aldermen or any committee thereof designated by them, notice of the time and place of which hearing shall have been given, at the expense of the applicant, by the clerk of the city or by the selectmen, by publication, not less than seven days prior thereto, in a newspaper published in the representative district, if any, otherwise in the city or town, wherein the land on which such license is to be exercised is situated, and also by the applicant by registered mail, not less than seven days prior to such hearing, to all owners of real estate abutting on said land, and unless a permit shall have been granted therefor by the marshal or by some official designated by him for the purpose; . . .”

G. L., c. 148, § 30, gives to the State Fire Marshal, within the Metropolitan District, the powers given by section 14 and other specified sections with respect to the granting of licenses and permits. Section 31, as amended by St. 1921, c. 485, § 5, authorizes the Marshal to delegate the granting and issuing of licenses or permits to other designated officers. Section 45 authorizes the Marshal to hear and determine all appeals from acts and decisions of persons acting or purporting to act under his authority. I understand that in the city of Boston the board of street commissioners is authorized to act under authority delegated to them in accordance with the provisions of section 31.

You state that the board of street commissioners ordered that notice be issued for a hearing on the petition on October 26, 1925, that the Commonwealth, through the Department of Public Works, owns real estate adjoining the property with respect to which the license was sought, and that notice was not given by the applicant by registered mail not less than seven days prior to the hearing, as required by the statute. The board of street commissioners granted the license and an appeal was taken to you. You ask whether you have authority on the appeal to rescind the order of the board of street commissioners granting the license, because of non-compliance by the applicant with the requirement for giving notice by registered mail to abutting owners.

In my opinion, your authority to rescind the action of the board for the reason assigned cannot be questioned, and I so advise you. See V Op. Atty. Gen. 718; Attorney General's Report, 1921, p. 319; 1923, p. 186; 1924, p. 87.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Arbitrary Discrimination — Exemption of Individual from Operation of General Law.

A statute conferring on an individual the privilege of exemption from the operation of a general law is unconstitutional, because of arbitrary discrimination.

A bill exempting a named individual from the operation of the civil service law and rules would be unconstitutional, if enacted.

MARCH 20, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have referred to me for examination and report House Bill No. 798, entitled "An Act providing for the appointment of Dennis J. O'Donnell, Junior, as a member of the regular police force of the city of Newton."

The bill purports to authorize the city of Newton "to appoint Dennis J. O'Donnell, Junior, a member of its regular police force without civil service examination, notwithstanding any provision of the civil service laws and the rules and regulations made thereunder."

It is a settled principle of constitutional law that a statute conferring on a particular individual the privilege of exemption from the operation of a general law applicable to other persons similarly situated is unconstitutional. Such a statute violates the fundamental principle that the law must apply equally to all and that there shall be no arbitrary discrimination between different classes of persons. It is in violation of the principles underlying the system of govern-

ment established by the Constitution of the Commonwealth as proclaimed in the Declaration of Rights, more particularly in the following provisions:—

“ARTICLE VI. No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; . . .

ARTICLE VII. Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: . . .

ARTICLE X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. . . .”

Holden v. James, 11 Mass. 396; *Simonds v. Simonds*, 103 Mass. 572; *Brown v. Russell*, 166 Mass. 14, 21–25; *Commonwealth v. Hana*, 195 Mass. 262, 266, 267; *Bogni v. Perotti*, 224 Mass. 152, 156, 157; Attorney General’s Report, 1924, p. 26; cf. *Opinion of the Justices*, 166 Mass. 589. See also *Lewis v. Webb*, 3 Me. 326; *Milton v. Bangor Railway & Electric Co.*, 103 Me. 218; *Hamann v. Heekin*, 88 Ohio St. 207; 12 C. J. 1117. It is also in violation of the provision in the Fourteenth Amendment to the Constitution of the United States guaranteeing to all persons the equal protection of the laws. *Yick Wo v. Hopkins*, 118 U. S. 356, 369–374; *Gulf, Colorado & Santa Fé Ry. Co. v. Ellis*, 165 U. S. 150, 155, 165; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 102–112; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558–563; *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417; *Truax v. Raich*, 239 U. S. 33; *Truax v. Corrigan*, 257 U. S. 312, 332–339. See also *Commonwealth v. Interstate, etc., St. Ry. Co.*, 187 Mass. 436, 438.

The proposed act is a special act purporting to exempt the individual named from the operation of the civil service laws and rules. The civil service rules have the force of laws. *Opinion of the Justices*, 138 Mass. 601; *Opinion of the Justices*, 145 Mass. 587, 590; *Attorney General v. Trehy*, 178 Mass. 186, 188; *Ransom v. Boston*, 192 Mass. 299, 304. In my opinion, it is beyond the constitutional authority of the Legislature to grant to any individual exemption from the operation of the law, and the rules and regulations of the Commissioner which have the force of law, respecting the civil service.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Civil Service — Suspension — Separation from the Service.

Where a fireman was not suspended indefinitely but his suspension was expressly made for a definite period, with loss of pay, he is not actually separated from the service, within the meaning of the Civil Service Rules.

MARCH 22, 1926.

Hon. PAYSON DANA, *Commissioner of Civil Service*.

DEAR SIR:—You request my opinion as to whether or not a civil service employee who was suspended for a definite period of time,

in accordance with G. L., c. 31, § 43, is thereby actually separated from the service. You state that a permanent member of the Cambridge fire department was suspended under G. L., c. 31, § 43, from November 9, 1925, until April 1, 1926, with loss of pay, for the reason that he was intoxicated while on duty. The chief of the fire department has now requested his reinstatement, and you desire to know whether or not you can properly consider that when the fireman was suspended he was separated from the service, and therefore, under Civil Service Rule 23, section 3, you are given a discretion either to allow or to refuse such reinstatement.

G. L., c. 31, § 43, provides, in part, as follows:—

“Except as otherwise provided in this chapter, every person holding office or employment in the classified public service of the commonwealth, or of any county, city or town thereof, shall hold such office or employment and shall not be removed therefrom, lowered in rank or compensation or suspended, or without his consent transferred from such office or employment to any other, except for just cause, and for reasons specifically given him in writing within twenty-four hours after such removal, suspension, transfer or lowering in rank or compensation.”

It is to be noted that this statute uses the words “removed . . . or suspended,” showing clearly that the Legislature did not intend the two terms to be synonymous. To “suspend” merely means, according to Bouvier, a temporary stop for a time, and accordingly “suspended” is defined as temporarily inactive or inoperative, held in abeyance, caused to cease for a time.

Civil Service Rule 23, section 3, provides as follows:—

“With the consent of the Commissioner, upon good cause shown, an appointing officer may reinstate in the same position or in a position in the same class and grade any person who has been separated from the service; provided, however, that the Commissioner shall not allow reinstatement of a person discharged for cause.”

This expressly refers only to a person who has been “separated” from the service.

In the case under consideration the fireman was not suspended indefinitely, but his suspension was expressly made from November 9, 1925, until April 1, 1926, with loss of pay. Had he been indefinitely suspended, the question might present more difficulty; but in view of the fact that his suspension was for a definite period, I am of the opinion that he is not actually separated from the service within the meaning of the civil service rule above quoted, and that therefore you have no discretion either to allow or to refuse his reinstatement solely on the ground that he was separated from the service.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Power of Legislature over Charitable Foundations — Enlargement of Powers of Charitable Corporations as to the Holding of Property — Enlargement of Purposes of Such Corporations.

There is no constitutional objection, ordinarily, to a statute enlarging the capacity of a charitable corporation to hold property.

A charter granted in 1890 may be altered without the consent of the corporation, except as to matters infringing upon the terms of the charitable foundation or invading the judicial province with respect to administration *cy pres*.

Where the founder of a school, which later obtained an act of incorporation, prescribed with some particularity as to the characteristics of the school, it may be observed with respect to a statute purporting to authorize the corporation to run a school having additional and different characteristics —

- (a) That as a mere enlargement of the corporate powers, it may be constitutional, but that this construction is of questionable soundness;
- (b) That as anything further, authorizing the conducting of a single school in such way as to affect materially the characteristics prescribed for the institution by the donor, it would be unconstitutional.

MARCH 22, 1926.

Hon. JOHN C. HULL, *Speaker, House of Representatives.*

DEAR SIR:— On behalf of the House committee on rules, you have asked my opinion relative to the constitutionality, if enacted, of a proposed measure amending the charter of the Tabor Academy, a corporation chartered by St. 1890, c. 153. There has been submitted with your request a bill accompanying a "petition of Donald W. Nicholson relative to the powers of the corporation known as The Tabor Academy," and also what purports to be an alternative draft of suggested changes in the charter. I assume that you desire my opinion upon both these proposals. There has also been provided a copy of the will and codicil of the founder.

Each suggested amendment contemplates an increase in the amount of property which may be held by the corporation to a sum which is apparently left wholly indefinite and unlimited. Viewing this feature entirely apart from the other aspects of the proposals, I perceive no constitutional objection. The circumstance that such unlimited authority is comparatively unusual commends itself only to considerations of policy.

In view of the date at which this institution was incorporated, there is no objection to be raised under U. S. Const., art. I, § 10, to the alteration of its charter, within the limits of the proposed amendments, by legislative enactment and without the consent of the corporation, unless those amendments infringe upon the provisions made by the donor of the charity or invade the exclusive province of the court to administer charitable funds *cy pres*. See Attorney General's Report, 1921, p. 63; *Opinion of the Justices*, 237 Mass. 613.

Mrs. Tabor's will manifests an intention to found and endow an academy for the education of both sexes, which should be available to the young people of her native village of Marion Lower Village, rea-

sonably meeting the wants "of all classes of the community amid which it is located," and which also should gradually enlarge to draw as students "youth of all portions of the country who may desire to participate in its advantages." To these ends she invested the trustees, whom she required to procure an act of incorporation, with wide discretionary powers. The charter, granted in 1890, conforms with fair accuracy to the will and codicil.

The codicil provides that no tuition fee shall be required of any of the inhabitants of the town of Marion, "it being my will that as to them the advantages of said school shall be free to all pupils having the requisite qualifications for entering it." One of the principal objects of the proposed amendments manifestly is to enable the corporation to hold property received by it in the future free of this provision—unless otherwise specified by the donors of such future property—and thus conduct an institution which will be free to inhabitants of the town of Marion only to the extent that the present property of the corporation can be said to support the privilege. The amendments made by the bill which has been submitted are in the following terms:—

"And said corporation is authorized to take and hold any other and further estate, real or personal, in addition to the amount stated in this section, which may be acquired by said corporation by gift or otherwise together with all accumulations of the same and to appropriate the same and the income thereof (1) for purposes of education in connection with an institution of learning or other educational foundation in accordance with all the restrictions imposed upon said property when received by said corporation or (2) for the use and benefit of the Tabor Academy, or either the boys' or girls' department thereof, when thus designated by the donor and any property received by said corporation and so designated to be for the use of Tabor Academy, or any department thereof, shall be held by said corporation and applied for the benefit of said academy, or the specified department thereof, the same to be, unless the contrary is declared in the gift, free from any preferences in the will of Elizabeth Tabor favoring the town of Marion or its inhabitants."

The alternative draft of changes is along the same general lines but in some respects more drastic.

I would not wish to say, upon what I have before me, that upon the production of proper evidence a case could not be made out warranting a court of equity in permitting the trustees to do some, if not all, of the things which these measures contemplate. That is, however, a judicial question, to be decided in a cause to which the Attorney General may well be an active party charged with the usual duties pertaining to his office with respect to charitable trusts. It seems unwise to anticipate to any great extent in this opinion the issues of such a cause. It seems unlikely that the trustees, with or without the enactment of these amendments, will deem it safe to proceed along such lines without obtaining the instructions of a court of competent jurisdiction. I therefore indicate my views upon these amendments as follows:

If they can be construed as merely enlarging the corporate purposes so as to make the proposed conduct not *ultra vires* of the corporation,

they may be constitutional. Grave doubt, however, is cast upon the correctness of such a construction by the circumstance that, as a practical matter, it will be difficult, if not impossible, to take steps pursuant to such enlarged powers without materially affecting the characteristics of the institution which Mrs. Tabor founded and which this corporation administers. If they are to be construed as purporting fully and directly to authorize the trustees to act along the lines indicated, it seems to me that, upon the whole, they either authorize action which might be permitted by a court of equity under the *cy pres* doctrine or else go further and attempt to vary material features of the trust in a way which would lie beyond the power of the court, and in either event are unconstitutional. There is one other possibility, that they can somehow be construed as authorizing conduct which is already within the general implications of the will and codicil, but in that case they are unnecessary.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Power of the Legislature — Special Law — Colleges.

A special law giving to an institution the right to use the word "college" when such institution has not the power to confer degrees is in contravention of G. L., c. 266, § 89, and unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

MARCH 23, 1926.

Mr. JOSEPH L. LARSON, *Chairman, House Committee on Education*.

DEAR SIR:—The committee on education has requested my opinion as to the constitutionality of House Bill No. 1224, if enacted, and has called my attention specifically to G. L., c. 266, § 89, in connection therewith.

The proposed act is entitled "An Act authorizing the Congregation of the Sisters of St. Joseph, of Boston, to establish the Regis College for Young Women."

It is in its nature a special and not a general law. It provides that the Congregation of the Sisters of St. Joseph, a religious and educational corporation, is authorized to conduct and maintain a school for the higher education of young women, to be called Regis College for Young Women. The directors of the corporation are authorized to establish courses in instruction, but they are not empowered to grant degrees.

G. L., c. 266, § 89, a general law, provides in the last sentence thereof as follows:—

"Any individual, school, association, corporation or institution of learning, not having power to confer degrees under a special act of the general court, using the designation of 'university' or 'college' shall be punished by a fine of one thousand dollars; but this shall not apply to any educational institution whose name on July ninth, nineteen hundred and nineteen, included the word 'university' or 'college.'"

We have no constitutional provision in this Commonwealth which prohibits the enactment of special laws of the character of the proposed act. It is a principle of statutory interpretation that a special

law directly in contravention of the provisions of a general law is to be treated as creating an exception to the terms of the general law. *Ackerman v. Green*, 201 Mo. 231; *Jones v. Broadway Co.*, 136 Wis. 595; *State v. Johnson*, 170 N. C. 685; *Jersey City v. Hall*, 79 N. J. L. 559; *Hawkins v. Bare & Carter*, 63 W. Va. 431. Such a mode of interpretation applied to the proposed act would, in my opinion, have the effect of making inapplicable to the college authorized therein, or to the corporation, the prohibitory and penal provisions of G. L., c. 266, § 89, even although the intent of the Legislature in this respect is capable of expression in a more definite form.

The Fourteenth Amendment to the Constitution of the United States provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Corporations have been held to be "persons" within the meaning of the amendment, and it is a denial of the equal protection of the laws to discriminate in legislation between corporations of the same class. A denial of the equal protection of the laws exists both as to privileges conferred and as to liabilities imposed, the effect of privileges given to some being the same in relation to others of the class as burdens placed upon designated individuals.

As regards the granting or withholding of charter powers, the Legislature may discriminate between corporations of the same class as much as it will, but when the effect of such discrimination be to grant to a corporation a privilege, exception or immunity from the operation of a general law enacted under the police power and applicable to all other corporations of the same class, the Legislature is violating the constitutional provisions as to equal protection of the laws.

Corporations as to which a reasonable difference exists in character or situation may be dealt with differently, and the Legislature has broad powers in making classifications based on such difference for the purpose of providing different treatment. There is nothing, however, in the proposed act itself which indicates an attempt at reasonable classification whereby the particular corporation therein referred to should be segregated in a class by itself to receive the privilege of exception from a general penal statute applicable to all other corporations. If no reasonable ground for such classification exists, the constitutionality of the proposed bill, if enacted, could not be sustained.

The Legislature could relieve the corporation in question from the prohibitions of chapter 266 by giving to it in the act the power to confer degrees, but I am of the opinion that without the grant of such power the instant bill, if enacted, would violate the constitutional provisions of the Fourteenth Amendment.

Very truly yours,

JAY R. BENTON, *Attorney General*.

License for the Sale of Gasoline — Public Ways — Curb Pumps.

A curb pump is a structure used for the sale of gasoline, and its use must be licensed under St. 1925, c. 335.

A license issued by the street commissioners of the city of Boston permitting the use of part of a public street for the storage and sale of merchandise is distinct from the license required by St. 1925, c. 335, and the issuing of one does not preclude the necessity of obtaining the other.

MARCH 26, 1926.

Gen. A. F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR:— You ask my advice on questions regarding the power of the State Fire Marshal, or persons designated by him, to license the use of curb pumps for the storage or sale of gasoline within the lines of public ways.

You ask whether a curb pump is subject to the restrictions of St. 1925, c. 335, amending G. L., c. 148, § 14, as a “building or other structure . . . used for the keeping, storage, manufacture or sale” of gasoline if the only gasoline contained in it is that which may remain in the pipes of the pump when not in operation or such as flows through the pipes in delivery of gasoline to a purchaser. The word “structure” is defined broadly as any production or piece of work artificially built up, or composed of parts joined together in some definite manner. *Century Dictionary*. *Stevens v. Stanton Construction Co.*, 153 App. Div. 82; *Nash v. Commonwealth*, 174 Mass. 335. While such a pump may not be used, strictly speaking, for the keeping or storage of gasoline, it seems clearly to be used for the sale of gasoline, and therefore, in my opinion, its use must be licensed under St. 1925, c. 335.

You ask whether a person holding a license issued to him by the street commissioners of the city of Boston under St. 1907, c. 584, to use duly specified parts of a public street in that city for the storage and sale of merchandise, including gasoline, may lawfully store or sell gasoline in or from appliances or structures suitable for such storage or sale within such specified spaces without a license or permit therefor under the provisions of St. 1925, c. 335. The Attorney General has heretofore on several occasions pointed out that the requirement of a license for the erection and maintenance of a garage and the requirement of a license for the storage of gasoline are separate and distinct, and that the issuing of one does not preclude the necessity of obtaining the other. V Op. Atty. Gen. 718; Attorney General's Report, 1921, p. 319; 1922, p. 202. See also *Foss v. Wexler*, 242 Mass. 277. For the same reasons the license required by St. 1907, c. 584, is distinct from the license required by St. 1925, c. 335. My answer to this question is therefore in the negative.

The answer just given largely disposes of your remaining question: whether the Fire Marshal, or persons designated by him, may lawfully issue a license or permit to the owner of the soil underlying a public way for the use within the limits of such way of a curb pump for the storage or sale of gasoline. Such a license may properly be granted, but it will not authorize the obstruction of the way or obviate the necessity of obtaining a license under St. 1907, c. 584, for the use of parts of public streets in the city of Boston for the storage and sale of merchandise. Cf. *Commonwealth v. Packard*, 185 Mass. 64, 67; Attorney General's Report, 1923, p. 186.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Regulation of Traffic by Cities and Towns — Approval by Registrar of Motor Vehicles.

A regulation of a city providing that no vehicle should go upon certain streets between 8 A.M. and 2.30 P.M. when public schools are in session does not require the approval of the Registrar of Motor Vehicles, under the provisions of G. L., c. 90, § 18.

MARCH 26, 1926.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR:—You ask my opinion arising out of the following situation.

It appears that the board of aldermen of the city of Newton recently made a regulation providing that no vehicle of any description should go upon certain streets in that city between 8 A.M. and 2.30 P.M. on any day that the public schools of said city are in session.

Thereafter, this regulation was submitted to a deputy registrar of motor vehicles for certification in writing, after a public hearing, that this regulation was consistent with the public interests. The deputy, apparently thinking that the provisions of G. L., c. 90, § 18, applied to the making of this regulation, gave his approval.

From this decision a citizen of Newton has appealed to the Division of Highways for an annulment of this decision, under G. L., c. 90, § 28.

You ask my opinion as to whether or not it was necessary, before this regulation excluding all vehicles from a certain street in Newton should become effective, to obtain the certificate of the Registrar of Motor Vehicles, in writing, after a public hearing, that the regulation was consistent with the public interests.

It appears that you have on file in your department an opinion of the Attorney General which answers the question raised by you. IV Op. Atty. Gen. 7.

I also call your attention to the case of *Commonwealth v. Newhall*, 205 Mass. 344, in which, in an exhaustive opinion, Mr. Justice Hammond reviews the statutes regarding the operation of automobiles in this Commonwealth and their relation to other statutes that have to do with the regulation of street traffic regulations and rules for driving in general.

Soon after the general appearance of automobiles upon the public ways of the Commonwealth it became apparent that, by reason of their great speed, danger was likely to arise, and the Legislature began to act. The first statute is found in St. 1902, c. 315. In 1908, the Legislature, thinking that the laws as to automobiles and motor cycles should be codified, directed the Highway Commission, with the assistance of the Attorney General, to perform the work and report to the then next Legislature. Res. 1908, c. 127. The resolve called for a complete consolidation and arrangement of the laws of the Commonwealth relating to automobiles and motor cycles, so that the same might be concise, plain and intelligible. This commission made its report to the Legislature of 1909, and thereafter St. 1909, c. 534, was passed. Section 17 of that chapter was practically the same as it now appears in G. L., c. 90, § 18. The present law, so far as is pertinent to your inquiry, reads as follows:—

“The city council . . . , on ways within their control, may make

special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, and may prohibit the use of such vehicles altogether on certain ways; provided, that no such special regulation shall be effective . . . until after the registrar shall have certified in writing, after a public hearing, that such regulation is consistent with the public interests; . . .”

The original law, as passed in 1909, was exactly the same, except that the words “the Massachusetts highway commission” appeared in place of the word “registrar.”

Mr. Justice Hammond, in his opinion, points out that there existed, not only this new codification of the law, which related specifically to the regulation of automobiles and motor cycles, but also various statutes which authorized the municipal authorities to pass ordinances, by-laws and regulations relative to street traffic or to the movement, stopping and standing of all vehicles. These two groups of statutes are separate and distinct.

In the opinion of the Attorney General already referred to (IV Op. Atty. Gen. 7), the facts were practically the same as those presented at this time. The city of Lawrence passed an ordinance regulating the use of streets and highways in that city, and it related to vehicles of all kinds. The city authorities then referred the matter to the Highway Commission, and the question arose as to whether or not the approval of the Commission was required by St. 1909, c. 534, § 17 (now G. L., c. 90, § 18). In conclusion, the Attorney General ruled as follows:—

“In my opinion this provision was not intended to require that regulations relating to the use of public streets and general regulations of traffic thereon should be approved by the Massachusetts Highway Commission and is applicable only to special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, including their exclusion therefrom. Since the particular ordinance submitted to said commission involves a general regulation of traffic, and is not a special regulation applicable only to motor vehicles, it follows that the Massachusetts Highway Commission is not required to certify in writing that such ordinance is consistent with the public interests.”

I concur in this finding, and therefore advise you that the approval of the Registrar was not necessary to make the Newton regulation effective, and that the pending appeal is not properly before you.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Impairment of Contract — Boston Consolidated Gas Company.

Changes in the purpose and object of a corporation or in its capital stock cannot be made without the express or implied consent of the stockholders.

A bill which proposes merely to repeal provisions of an earlier statute fixing a maximum limit as to the price to be charged for gas and the rate of dividends, if enacted, would be constitutional.

APRIL 2, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR:—You have referred to me for examination and report House Bill No. 493, entitled “An Act repealing a certain act regulating the price of gas in the city of Boston and certain neighboring municipalities.” Section 1 repeals St. 1906, c. 422, and provides that the Boston Consolidated Gas Company shall thereafter be subject to the provisions of the general law as to all matters theretofore regulated by that chapter. Section 2 provides that the act shall not take effect unless and until its provisions are accepted by vote of the board of directors of that corporation and an attested copy of such vote is filed with the State Secretary.

The Boston Consolidated Gas Company was organized in accordance with St. 1903, c. 417, providing for the consolidation of certain existing gas companies through the incorporation of the Boston Consolidated Gas Company, which was authorized to acquire their properties and stock. The provisions of this act were accepted by the incorporators, and the corporation was organized under date of December 10, 1903. By St. 1905, c. 421, the act of 1903 was amended, and the Boston Consolidated Gas Company was further required to file with the Board of Gas and Electric Light Commissioners an agreement to reduce the maximum price of gas to be charged by it to ninety cents per thousand cubic feet.

St. 1906, c. 422, fixed the standard price to be charged by the Boston Consolidated Gas Company for gas supplied to its customers at ninety cents per thousand feet and the standard rate of dividends to be paid by the company to its stockholders at seven per cent per annum, and provided that the price and rate so fixed should not be increased except as therein provided. The act further provided that if during any year the maximum net price was less than the standard price, the company might during the following year pay dividends exceeding the standard rate, in a specified ratio. At the end of ten years it was provided that the Board of Gas and Electric Light Commissioners should have authority, upon the petition of the company or of city or town officials, to lower or raise the standard price to such extent as might justly be required. The act was to be void unless the corporation should accept its provisions by authority of its board of directors. I understand that this act was duly accepted by the board of directors.

G. L., c. 164, §§ 93 and 94, authorize the Department of Public Utilities, upon complaint of city or town officials or customers or upon petition of a gas company, and after public hearing, to fix the price of gas.

For the purposes of this discussion it may be assumed that the act of 1906 constituted a contract between the corporation and the Commonwealth in regard to the price of gas and the rate to be paid on its stock. *Boston v. Treasurer and Receiver General*, 237 Mass. 403, 413; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660–673; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Minneapolis v. Minneapolis St. Ry. Co.*, 215 U. S. 417, 426, 430, 431; II Op. Atty. Gen. 261; III Op. Atty. Gen. 400; Attorney General's Report, 1924, pp. 25, 26. If the nature of the contract was such that the directors alone, without ratification by the stockholders, could not bind the

corporation to comply with its terms (*Nashua R.R. v. Lowell R.R.*, 136 U. S. 356, 384), the contract at any rate became valid by subsequent acquiescence. *Blandford v. Gibbs*, 2 Cush. 39.

With respect to the bill which you have referred to me there may be a possible question whether it constitutes an attempt to abrogate a contract involving rights of the stockholders of the corporation, which the directors would not have power to approve, and which therefore, in order to be valid, must be approved by the stockholders. The rule has been stated to be that "changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members," i.e., the stockholders of the corporation. *Railway Co. v. Allerton*, 18 Wall. 233, 235. Acts of such nature are beyond the power of the directors alone. *Nashua R.R. v. Lowell R.R.*, 136 U. S. 356, 384; *Commercial National Bank v. Weinhard*, 192 U. S. 243, 249; Attorney General's Report, 1922, pp. 23, 27. The act before me, however, proposes merely to repeal provisions of the earlier statute, which, in so far as they fix the maximum limit of the price of gas and of the rate of dividends, were a burden on the corporation, and which, in so far as they conferred a possible benefit by permitting the corporation to petition the Board of Gas and Electric Light Commissioners to raise the standard price of gas, are contained in the general laws, to which by the proposed act the corporation is made subject. To agree to provisions of that kind must be clearly within the power of the directors.

It is my opinion, therefore, that the bill, if enacted, will be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Mass. Const. Amend. LXVI — Massachusetts Agricultural College.

The intention of Mass. Const. Amend. LXVI was to systematize the administration of the State's business by placing the activities in not more than twenty departments, and to give the General Court full power to work out the scheme of organization.

A bill amending G. L., c. 15, § 4, by adding a provision that "nothing in this chapter shall be construed as affecting the powers and duties of the trustees of the Massachusetts Agricultural College as set forth in chapter seventy-five," is not in conflict with the terms of Mass. Const. Amend. LXVI, properly interpreted.

Committee on State Administration.

APRIL 3, 1926.

GENTLEMEN:—You have asked my opinion as to the constitutionality, in view of Mass. Const. Amend. LXVI, of a proposed act amending G. L., c. 15, § 4, defining certain of the powers and duties of the Commissioner of Education. The proposed act is as follows:—

"Nothing in this chapter shall be construed as affecting the powers and duties of the trustees of the Massachusetts Agricultural College as set forth in chapter seventy-five."

Chapter 15 relates to the Department of Education, and chapter 75 relates to the Massachusetts Agricultural College.

Mass. Const. Amend. LXVI is as follows:—

“On or before January first, nineteen hundred twenty-one, the executive and administrative work of the commonwealth shall be organized in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the governor or the council, shall be placed. Such departments shall be under such supervision and regulation as the general court may from time to time prescribe by law.”

This provision contains three requirements. The first relates to the process of organizing the executive and administrative work of the Commonwealth, which was to be done by establishing not more than twenty departments and which had to be completed by January 1, 1921. The second requirement is that every executive and administrative office, board and commission, except officers serving directly under the Governor or the Governor and Council, must be placed in some one of those departments. The third requirement is that those departments shall be subject to the supervision and regulation of the General Court through its legislative acts.

In discovering the meaning of a constitutional provision adopted in convention, the proper interpretation of which is in doubt, the debates in the convention on the adoption of the provision may be an important source of information, and the record of such debates may properly be examined for the purpose of understanding how it came into existence and how it appears then to have been received and understood by the convention. *Loring v. Young*, 239 Mass. 349, 368. An examination of the debate in the convention on the subject of the sixty-sixth amendment will afford some illumination as to the understanding of the convention concerning the object to be accomplished by that amendment.

The committee having in charge the administration of the State's business reported a resolution for the adoption of an amendment in three sections, as follows:—

“1. The executive branch of the government of the Commonwealth shall include all executive and administrative functions, offices, boards and commissions. The appointment of executive or administrative officers shall be classed as an executive function. The executive and administrative work of the Commonwealth shall be organized in not less than seven nor more than fifteen executive departments as herein provided. Every executive and administrative office, board and commission now or hereafter established, excepting the Civil Service Commission and offices coming directly under the Governor or the Council, shall be placed in one of such departments.

2. The Governor shall recommend to the General Court for the year nineteen hundred and nineteen, a plan for organizing such departments in accordance herewith; such plan may include the abolition or consolidation of any such offices, boards or commissions, except constitutional offices, or any changes in the powers or duties thereof, and shall include the establishment of an office, board or commission as the head of each department, with such powers as the General Court may provide. Such head, unless his election is provided for by the

Constitution, shall be appointed by the Governor with the consent of the Council, and shall be removable in such manner as may be provided by law. The General Court shall thereupon provide by law for organization of the executive departments in any manner consistent with the provisions hereof: *provided*, that if the General Court fails to pass such a law at its first session after the adoption of this amendment an organization in conformity herewith shall be established by an order passed by the Governor and Council, which shall have the effect of law. The organization of departments hereunder may from time to time be changed by law.

3. Heads of such executive departments shall upon request made to the Governor by either branch of the General Court attend such branch in person and furnish information on departmental matters as requested, unless the Governor shall state in writing that he deems it incompatible with the public interest that such information be given." (III Debates in the Constitutional Convention, p. 1021.)

In explaining the proposed amendment it was stated that the committee intended to leave to the General Court the determination of the powers of heads of departments, whether they should be responsible for the finances of the department and whether they should have general supervision over it, and that the General Court might want to make one provision for one department and another for another, particularly where there were quasi judicial powers to be exercised. It was stated as the opinion of the committee that all the details of the plan should rest with the General Court. It was further stated that the object was simply to prohibit in the Constitution the countless establishment of various commissions. The primary purpose was said to be to reduce the number of commissions, to provide for their supervision and regulation, to put a constitutional limit on the number of departments, and to systematize the business of the Commonwealth. III Debates, pp. 1029, 1086, 1099-1105. There was much discussion of the matter and a great diversity of opinions. Several amendments were offered, including one to strike out the second and third sections. The amendments were all rejected and then the resolution itself was rejected by the convention. On the following day the convention voted to reconsider, and a substitute resolution containing the substance of section 1 was proposed and passed. III Debates, pp. 1095, 1102, 1103, 1106.

Following the ratification of this amendment by the people in 1918, the Legislature of 1919, in compliance with its mandate, passed an act entitled "An Act to organize in departments the executive and administrative functions of the Commonwealth." Gen. St. 1919, c. 350. By section 1 of this statute fifteen new departments were established, together with the Metropolitan District Commission, and it was provided that "all executive and administrative offices, boards, commissions and other governmental organizations and agencies, except those now or by virtue of this act serving directly under the governor or the governor and council, are hereby placed in the said departments and said commission, as hereinafter provided." It was provided in section 8 that reports required by law to be made by agencies affected by the act should be made by the head of the department in which the agency was placed. In part III the executive and administrative departments, including these new departments, were dealt with in turn,

some existing offices, boards and commissions were abolished, and some were placed in one or another of the departments, with differing provisions as to their relations and their control in the departments. Some of the departments were placed in charge of a commissioner and some in charge of a board of commissioners. In some an advisory board was provided and in many the work of the department was subdivided into different divisions. The Department of Banking and Insurance was organized with three separate divisions, each in charge of an independent commissioner, and the Department of Civil Service and Registration was placed in charge of two independent officers. Many subordinate activities were incorporated in the different departments, with explicit provision for their supervision. As to others, the only provision was that they were placed in some department. Such was the provision regarding the trustees of the Massachusetts Agricultural College. Section 56 provided that they and other boards and commissions "are hereby placed in and shall hereafter serve in the said department (of education)." Sections 57 and 58 (now G. L., c. 15, §§ 1 and 4) defined the powers and duties of the commissioner under whose supervision and control the department was placed. By section 60 (now G. L., c. 15, § 5) it was provided that the commissioner might also appoint agents, clerks and other assistants, with certain exceptions which in the consolidation of the provision in the General Laws were made to include the institutions under the department.

A strict construction of Mass. Const. Amend. LXVI would be satisfied by a mere grouping of the various governmental agencies under departmental titles. While doubtless the amendment is not to be construed so narrowly, in my opinion it was not intended by its adoption to provide that all agencies combined in the different departments should necessarily lose their independence and be subject to the supervision of the heads of those departments. The intention, as I conceive it, was to systematize the administration of the State's business by placing the activities in a limited number of departments, and to give the General Court full power to work out the scheme of organization. This view is borne out, it seems to me, both by the debates in the convention and by the action of the Legislature in fulfilling the constitutional mandate, which may properly be regarded as "contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 297. See also Mass. Law Quarterly, vol. IV, p. 366; Report of Commission on State Administration and Expenditures, 1922, House Document No. 800.

The Massachusetts Agricultural College was made a State institution by Gen. St. 1918, c. 262, and the trustees of the corporation were made the trustees of the State institution with the powers and duties which they had before held. In the consolidation of the laws this act was carried over into G. L., c. 75, which contains provisions empowering the trustees to manage and administer the college and its property, and provides that they shall direct expenditures and make a complete accounting of receipts and expenditures.

As I have stated, Gen. St. 1919, c. 350, pt. III, § 56, provided that the trustees of the Massachusetts Agricultural College, with other boards and commissions, should be placed and should serve in the Department of Education. Section 57 provided that the department should be under the supervision and control of the Commissioner of

Education and the Advisory Board, and section 58 provided that the Commissioner should be the executive and administrative head of the department (G. L., c. 15, §§ 1, 4). These latter provisions may present a seeming inconsistency with the provisions of G. L., c. 75, conferring on the trustees the power to manage the college. If so, the difficulty would be solved by the passage of the proposed legislation. In my opinion, the provisions of the bill as to which you have asked my advice are not in conflict with the terms of Mass. Const. Amend. LXVI as it should properly be interpreted, and the bill, if enacted, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Initiative and Referendum — Additional Information to Voters as to Measures submitted.

The Legislature has authority to provide that the Attorney General shall prepare for the Secretary of the Commonwealth a brief statement of information on measures submitted to the people under the initiative and referendum.

APRIL 3, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have requested me to consider House Bill No. 1178, entitled "An Act relative to supplying additional information to voters as to measures submitted under the initiative and referendum."

This bill amends G. L., c. 54, § 53, which section provides that the election commissioners and registrars of voters, within a certain specified time before the biennial State elections, shall send to the Secretary of the Commonwealth revised mailing lists of voters, and the Secretary shall send to each voter, with copies of the measures, arguments for and against measures to be submitted under Mass. Const. Amend. XLVIII, which amendment refers to the initiative and referendum. The amendment proposed under the act which is being considered provides that the Attorney General shall prepare brief statements of the proposed measures.

Mass. Const. Amend. XLVIII, General Provisions, pt. IV, provides that the Secretary of the Commonwealth shall cause to be printed and sent to each registered voter the full text of every measure to be submitted to the people, "and shall, in such manner as may be provided by law, cause to be prepared and sent to the voters other information and arguments for and against the measures."

In G. L., c. 12, § 9, it is provided that "he (the Attorney General) shall, when required by either branch of the general court, attend during its sessions and give his aid and advice in the arrangement and preparation of legislative documents and business."

The only question for consideration, therefore, is: Has the Legislature the right to add new duties to the already many duties of the Attorney General?

In *Commonwealth v. Kozlowsky*, 238 Mass. 379, 386, the court said:—

"Its (Attorney General's) powers and duties continued as a part of the common law of the Commonwealth save as changes have been made by the General Court and in the customs of the Commonwealth. . . . It often has been recognized that the powers of the Attorney

General are not circumscribed by any statute, but that he is clothed with certain common law faculties appurtenant to the office."

It is evident that in the act under consideration the Attorney General's duties are not circumscribed but are added to. The Attorney General has often by acts of the Legislature served as a member of a board or commission, and has been requested to perform certain acts and duties by the Legislature. It is apparent from the decisions that the Legislature has the right to add to the specific duties of the Attorney General. It is evident that it is proper for the Legislature to make provision so that the voters shall receive desired information on all measures that go on the ballot.

Therefore, in my opinion, the proposed bill, if enacted, would be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Constitutional Law—Power of the Legislature—Payment to One who stood in Loco Parentis to a Deceased Soldier.

The Legislature may not lawfully authorize the payment of a sum of money to one who stood *in loco parentis* to a deceased soldier when it cannot be said that the Legislature, in the exercise of a reasonable judgment, could have determined that the payment was for the purpose of discharging a moral obligation on the part of the Commonwealth.

APRIL 7, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR:—You have submitted to me for examination and report House Bill No. 906, entitled "Resolve in favor of Mary Leahan of Boston."

The object of this resolve is to pay the sum of \$100 to a woman, after an appropriation has been made, for the purpose, as the bill recites, of discharging the moral obligation of the Commonwealth. The resolve sets forth the essential facts which the Legislature has deemed to constitute the moral obligation, namely, that the beneficiary supported and educated one Edward H. Leahan, who died in the military service October 4, 1918. The relationship, if any, between the beneficiary and the deceased is not recited, but the payment is stated to be in lieu of the State bonus on account of the deceased's military service, to which the beneficiary would have been entitled had she legally adopted the deceased. The precise character of the deceased's military service is not set forth, but it may be presumed that it was of such a character as to have entitled him to the benefit of the bonus under Gen. St. 1919, c. 283, as amended. It may likewise be assumed that the beneficiary stood *in loco parentis* to the deceased during his life.

Under those principles of constitutional law which validate the original soldiers' bonus act it would not have been unreasonable for the Legislature to have included in such act, among those persons who were to be entitled to the bonus upon a soldier's death, persons who had in fact occupied the position and discharged the duties of a parent to the soldier, and it cannot be said that it is now unreasonable for the Legislature to say that there is a moral obligation upon the part

of the Commonwealth to pay such bonus to such a person after the soldier's death, if he left no dependent nor heir at law.

It does not, however, appear by the terms of the instant resolve that the deceased soldier left none of the dependent relatives who, by the provisions of Gen. St. 1919, c. 283, § 3, are entitled to the amount of the bonus, nor does it appear that he left no heirs at law who by the terms of the said act are entitled to the amount of the unpaid bonus when the soldier dies without such dependents. In the absence of a statement of facts relative to the non-existence of such dependents and heirs at law, it cannot be said that the pronouncement of the Legislature as to the existence of a moral obligation on the part of the Commonwealth, in this particular instance, is a reasonable one.

If any such dependents or heirs at law are living, they have a valid legal claim against the Commonwealth for the amount of the bonus. If a payment were made under the instant resolve to the named beneficiary, unless the intent of the bill be to prevent any further payments, and then, if one or more of the persons entitled by existing law to a like amount were to present a claim, it would have to be honored, and, together with the sum disbursed by virtue of the instant resolve, it would make the payment a total amount of \$200 as bonuses for the military service of this particular soldier, as against \$100 in all cases following the terms of the original act. Gen. St. 1919, c. 283, as amended, is a law of general application. To vary the beneficiaries under such a law by special legislation, such as the instant bill, so as to cut off those otherwise entitled, by paying the bonus of \$100 to a person outside the classes mentioned in the general act and to no other, if that be the meaning of the instant bill, would work such a denial of the equal protection of the laws required by the Fourteenth Amendment to the United States Constitution as to be manifestly unconstitutional. The same result—unequal protection of the laws—is produced under either mode of interpreting the legislative will as to the aggregate amount to be paid out. No moral obligation can reasonably be said to exist in such a situation. Since the recitals of the resolve do not indicate that a pronouncement of the existence of a moral obligation on the part of the Commonwealth toward this beneficiary or to any other person can reasonably be made, the payment would appear to be in the nature of a gratuity such as may not be given from the public treasury, and I am constrained to express the opinion that the instant resolve, if enacted, would not be constitutional.

Very truly yours,

JAY R. BENTON, *Attorney General*.

City of Boston—Highways—Boulevard Stop Regulation.

A regulation of the street commissioners of the city of Boston requiring every vehicle and street car, except emergency vehicles, to be brought to a full and complete stop before entering or crossing certain streets is not inconsistent with G. L., c. 89, § 8, regarding right of way at an intersecting way.

APRIL 8, 1926.

HON. HERBERT A. WILSON, *Police Commissioner for the City of Boston*.

DEAR SIR:—You have called my attention to an opinion rendered you on February 10, 1926, relative to the so-called boulevard stop

regulation for highways in Boston, and enclosed a copy of the proposed regulation, which is as follows:—

“Every vehicle and street car except emergency vehicles shall be brought to a full and complete stop before entering or crossing these streets, provided, however, that when the intersection is controlled by a police officer or by a signalling device, all vehicles shall comply with orders or directions of such officer or device.”

You ask whether, in my opinion, this regulation is inconsistent with G. L., c. 89, § 8, which provides as follows:—

“Every driver of a motor or other vehicle approaching an intersecting way, as defined in section one of chapter ninety, shall grant the right of way, at the point of intersection to vehicles approaching from his right, provided that such vehicles are arriving at the point of intersection at approximately the same instant; except that whenever traffic officers are standing at such intersection they shall have the right to regulate traffic thereat.”

In my opinion, the regulation is not inconsistent with the statute. The requirement that vehicles shall be brought to a full and complete stop before entering or crossing a boulevard may be enforced without diminishing the effect of the statutory requirement, which would still be applicable to vehicles traveling on boulevards, that they shall grant the right of way at cross streets to vehicles approaching from the right.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Constitutional Law—Impairment of Contract—Boston Elevated Railway Company.

It is the duty of the Attorney General to deal with questions of law only, and it is not within his province to determine questions of fact.

The duty of the Attorney General to advise a committee of the Legislature is limited by statute to the consideration of the legal effect of proposed legislation pending before such committee.

The requirement in St. 1923, c. 480, § 2, that reasonable and adequate passenger service over a certain branch shall be furnished by the Boston Elevated Railway Company cannot be construed as diminishing the right of the trustees to determine the character and extent of the service to be furnished, under Spec. St. 1918, c. 159, § 2.

A bill requiring the Boston Elevated Railway Company to construct a street railway station would violate the provisions of Spec. St. 1918, c. 159, and would impair the obligation of the contract executed under St. 1923, c. 480, § 5, and for both reasons would be unconstitutional.

APRIL 8, 1926.

To the Committees on Metropolitan Affairs and Street Railways, Sitting Jointly.

GENTLEMEN:—You have called to my attention certain provisions of St. 1923, c. 480, providing for the extension of rapid transit facilities in the Dorchester district of Boston, and House Bill No. 251, pur-

porting to amend that statute by providing for a station at or near Harrison Square, and you have propounded certain questions concerning the existence of an obligation to furnish such a station.

The scope of your questions requires me to state that it is the duty of the Attorney General to deal with questions of law only, and that it is not within his province to determine questions of fact (I Op. Atty. Gen. 275 and 462; II Op. Atty. Gen. 153 and 405); and furthermore, that the duty of the Attorney General to advise a committee of the Legislature is limited by statute to the consideration of the legal effect of proposed legislation pending before such committee. G. L., c. 12, § 9; III Op. Atty. Gen. 111; Attorney General's Report, 1921, pp. 140, 143; *cf.* *Opinion of the Justices*, 148 Mass. 623; *ibid.*, 208 Mass. 614; *ibid.*, 217 Mass. 607.

Spec. St. 1918, c. 159, § 2, provides, in part:—

“They (the board of trustees) shall have the right to regulate and fix fares, including the issue, granting and withdrawal of transfers, and the imposition of charges therefor, *and shall determine the character and extent of the service and facilities to be furnished*, and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any other state board or commission.”

St. 1923, c. 480, contains the following provisions:—

Section 2 requires the transit department of the city of Boston to extend the Dorchester tunnel, bringing the tunnel to the surface on the westerly side of the tracks of the New York, New Haven and Hartford Railroad Company at a point between Dorchester Avenue and Columbia Road, and to construct a line of surface railway parallel to the location of the railroad tracks to the Harrison Square station, and from that point along the location of the Shawmut branch to Mattapan. The department is also required to “lay out and construct suitable areas, enclosed or otherwise, stations and shelters at or near Columbia road, Savin Hill avenue and at such other points as may be agreed upon between the company (Boston Elevated Railway Company) and the department.” After the completion of the line of surface railway, it is provided that “thereupon reasonable and adequate passenger service over said Shawmut branch shall be furnished by the lessee of the premises.”

Section 4 requires the department to prepare and file a plan showing the proposed route, with stations, etc., and provides that after the execution of the contract with the company, referred to in section 5, no changes shall be made without the written consent of the company.

Section 5 authorizes the department to execute a contract with the company, upon the terms and conditions prescribed therein, for the use of the premises and equipment by the company, for a term extending to the termination of the present lease of the Dorchester tunnel, at a rental of 4½% on the fair and reasonable cost of the premises and equipment as determined by the Department of Public Utilities, with a certain proviso.

Section 14 provides that the provisions of the act, except section 4, shall take effect upon its acceptance by the city and by the company by vote of its board of directors.

On several different occasions the Attorney General has ruled that

the provisions of Spec. St. 1918, c. 159, quoted above, constitute a contract between the company and the Commonwealth. Attorney General's Report, 1922, p. 23; 1923, p. 34; 1924, p. 25.

The obligations of the company under St. 1923, c. 480, in my opinion, are enlarged only and are governed by the contract authorized by section 5, which I understand has now been executed. Provision was made in section 14 for acceptance of the act by the directors because of the provision in Spec. St. 1918, c. 159, § 3, that no contracts for the operation or lease of additional lines involving the payment of rental beyond the period of public control should be made without their consent. The requirement in section 2 that "thereupon reasonable and adequate passenger service over said Shawmut branch shall be furnished by the lessee of the premises," cannot be construed as diminishing the right of the trustees to "determine the character and extent of the service and facilities to be furnished," granted by Spec. St. 1918, c. 159, § 2. I am informed that no station at or near Harrison Square was agreed upon between the company and the department, that the plan filed by the department did not show the location of a proposed station at that point, that the company has not consented to such a change in the plan, and that the Department of Public Utilities has determined the fair and reasonable cost of the premises and equipment without including therein the cost of such station.

You ask whether House Bill No. 251, if enacted into law, would require the construction and maintenance of a street railway station at Harrison Square. Such seems to be the purport of the provisions of this bill. It is my opinion, however, that in that respect the bill is unconstitutional, both because it violates the provisions of Spec. St. 1918, c. 159, giving to the trustees the right to determine the character and extent of the service facility to be furnished, and the provisions giving to the directors a right to pass on contracts for operation or lease of additional lines involving the payment of rental beyond the period of public control, and because it impairs the obligation of the contract which, I am informed, has been executed between the company and the department in accordance with the authority given by St. 1923, c. 480, § 5.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Estate Tax — Federal Statute.

While a tax law must prescribe the rule under which the tax is to be laid, it may be measured by a standard fixed by some other law or under its authority.

An act imposing a tax on the transfer of the estate of deceased residents, equal to the amount by which eighty per cent of the estate tax payable to the United States under the Federal Revenue Act of 1926 exceeds the aggregate amount of all estate, inheritance, legacy and succession taxes paid to the several States in respect to the decedent's property, would be constitutional.

APRIL 12, 1926.

HON. HENRY L. SHATTUCK, *Chairman, House Committee on Ways and Means*.

DEAR SIR:—You ask my opinion as to the constitutionality of provisions contained in section 7 of House Bill No. 1363. This bill is

entitled "An Act to establish an estate tax," and it proposes, by section 1, to impose a tax on the transfer of the estate of deceased residents of the Commonwealth, the amount of which shall be the amount by which eighty per cent of the estate tax payable to the United States under the Federal Revenue Act of 1926 exceeds the aggregate amount of all estate, inheritance, legacy and succession taxes paid to the several States in respect to the decedent's property.

Title III of the Federal act, in section 301 (a), imposes a graduated tax on the transfer of the net estate of decedents; and in clause (b) provides that the tax so imposed shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any State or Territory or the District of Columbia, in respect to the decedent's property, not exceeding 80 per cent of the Federal tax.

Section 7 of the proposed act provides that the act shall be null and void in respect to persons dying subsequently, upon the repeal of the provision in the Federal act for a credit of taxes paid to the States not exceeding 80 per cent of the Federal tax, and that it shall be null and void, and all taxes paid thereunder shall be refunded, if that provision of the Federal act is declared void.

I see no constitutional objection to section 7. If the Federal provision is repealed or held invalid, no tax would be payable under section 1, and the act would have no practical future effect, regardless of section 7. If the Federal provision were held to be unconstitutional, I see no ground of invalidity in the provision for refunding taxes already paid. The meaning of the words "shall be declared void" might be more definite if the words "by the Supreme Court of the United States" were added.

There is, however, a question as to the constitutional validity of the tax imposed by section 1 which should not be overlooked, and I assume that your inquiry will permit me to offer a statement of my views thereon.

The Legislature is the sole repository, under the Constitution, of the power to make laws, and it cannot delegate that power to any other body. *Brodhine v. Revere*, 182 Mass. 598, 600; *Boston v. Chelsea*, 212 Mass. 127. For that reason, it cannot constitutionally provide that the substantive law of the Commonwealth shall change automatically so as to conform to prospective Federal enactments and official regulations. *Opinion of the Justices*, 239 Mass. 606, 610; Attorney General's Report, 1921, p. 171. For that reason, again, a tax law must prescribe the rule under which the tax is to be laid, though it need not prescribe the details. *Cooley on Taxation*, p. 50; *Nichols*, *Taxation in Massachusetts*, 2d ed., p. 16. But the Legislature may by enactment adopt a standard fixed by some other law or under its authority. *Opinion of the Justices*, 239 Mass. 606, 612. In *Clark & Murrell v. Port of Mobile*, 67 Ala. 217, a tax the amount of which was made to depend on foreign legislation was held invalid, but the weight of authority seems to hold the contrary. *People v. Fire Association of Philadelphia*, 92 N. Y. 311; *cf. Bliss v. Bliss*, 221 Mass. 201.

The tax imposed by the proposed act is measured by a standard fixed by Congress. In accordance with the authority cited above, it is my opinion that the bill, if enacted, would be constitutional. I express no opinion on the constitutionality of the Federal statute, as against the objection that it is lacking in geographical uniformity or that its

apparent object is not to raise revenue for the purposes of the Federal government but to enforce throughout the country a uniform policy of taxation of the passing of property by devolution.

Very truly yours,

JAY R. BENTON, *Attorney General*.

License — Storage of Gasoline — Board of License Commissioners in the City of Cambridge — State Fire Marshal.

The authority given to the board of license commissioners in the city of Cambridge by St. 1922, c. 95, to grant, suspend or revoke licenses was not intended to include the authority to disapprove the granting of a license by the Fire Marshal, given to the city council of a city or the selectmen of a town by G. L., c. 148, § 30.

APRIL 15, 1926.

Gen. A. F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR:— You ask my opinion in regard to the effect of St. 1922, c. 95, relative to the board of license commissioners in the city of Cambridge, upon the authority of the State Fire Marshal to issue licenses under G. L., c. 148, § 14, as amended.

St. 1922, c. 95, amends Spec. St. 1919, c. 83, establishing a board of license commissioners in the city of Cambridge. It contains the following provisions:—

“The authority now vested by law in cities or towns, or in the city of Cambridge or any official thereof, to grant, suspend or revoke any of the licenses hereinafter mentioned, shall upon its organization be exercised in said city by said board exclusively, except that nothing herein contained shall affect the authority of the state fire marshal in respect to the performance of his duties pertaining to the metropolitan fire prevention district.”

Among the licenses named are licenses to use a building or other structure for the keeping, storage, manufacture or sale of articles named in G. L., c. 148, § 10, except fireworks, firecrackers and torpedoes.

G. L., c. 148, § 30, gives to the Fire Marshal, within the Metropolitan District, the powers given by section 14 and other sections to license persons or premises and to grant permits for the storage and sale of the articles named in section 10. Thus by section 30 the powers given by section 14 to aldermen and selectmen to grant licenses for the use of a building or other structure for the keeping, storage, manufacture or sale of any of the articles named in section 10, except fireworks, firecrackers and torpedoes, are, within the Metropolitan District, to be exercised by the Fire Marshal; and by the express provision of St. 1922, c. 95, his authority in that respect is not affected by the terms of that act.

G. L., c. 148, § 30, contains the following provision:—

“Provided, that the city council of a city or the selectmen of a town may disapprove the granting of such a license or permit, and upon such disapproval the permit or license shall be refused.”

You ask my opinion whether this provision of section 30 is applicable to the action of the board of license commissioners in the city of Cambridge in refusing a license for the construction and maintenance of a garage in that city. I am informed that the Fire Marshal has dele-

gated to the board of license commissioners in the city of Cambridge, under G. L., c. 148, § 31, the power to grant licenses and permits in that city reposed in him by section 30, and that an appeal is pending before him upon their refusal to grant the license referred to in your inquiry. I assume that the action of the board may be interpreted as a refusal to exercise the delegated authority conferred by sections 30 and 31.

I am of the opinion that the authority given to the board of license commissioners in the city of Cambridge by St. 1922, c. 95, "to grant, suspend or revoke any of the licenses hereinafter mentioned" was not intended to include the authority to disapprove the granting of a license or permit by the Fire Marshal, given to the city council of a city or the selectmen of a town by G. L., c. 148, § 30, both because the words used in their natural sense are not sufficiently broad, and because it is expressly provided that the authority of the Fire Marshal shall not be affected thereby. I think that the action of the board in refusing to grant a license is to be construed not as an attempt to express such disapproval but as an exercise of the delegated power of the Fire Marshal under sections 30 and 31.

I therefore advise you that the Fire Marshal is authorized to hear the appeal and to grant a license under section 30 unless the city council should pass an order disapproving such grant.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Boston & Maine Railroad — Issue of Convertible Bonds — Department of Public Utilities.

Convertible bonds of a railroad corporation cannot be issued without the approval of the Department of Public Utilities, and such approval cannot be given unless the issue is authorized by statute. The authority given by St. 1925, c. 336, § 2, to the Boston & Maine Railroad to issue convertible bonds and additional stock may be construed to include authority to deliver in exchange for such bonds stock already issued.

An agreement to deliver stock not then owned by the corporation in exchange for a bond, or to pay the conversion value of the bond in the alternative, is not illegal under the stock-jobbing act (G. L., c. 259, § 6).

APRIL 22, 1926.

Hon. HENRY C. ATTWILL, *Chairman, Department of Public Utilities.*

DEAR SIR: — You have submitted to me a draft of an agreement between the Boston & Maine Railroad and trustees for the benefit of bondholders, relative to mortgage bonds which the railroad proposes to issue, and containing provisions for the conversion of those bonds into prior preference stock or the payment of the conversion value thereof. The material portion of said agreement is as follows: —

"(2) The Railroad agrees (except as otherwise expressly provided in this agreement) that if the holder of any bond herein referred to shall deposit said bond with the Corporate Trustee on and after January 1, 1930, and before January 1, 1940, accompanied by a written request for the conversion of said bond into stock as herein provided, the Railroad will thereupon, if it shall then be lawful for the Railroad

to do so under the provisions of State and Federal legislation then in force, issue in the name of such holder and deliver to the Corporate Trustee for such holder in exchange for the bond so deposited new and additional shares not previously issued of the seven per cent prior preference stock of the Railroad at the rate of Five (5) shares of such stock for each Five Hundred (500) Dollars in principal amount of bonds so deposited, said shares to be delivered forthwith by the Corporate Trustee to said holder. The Railroad further agrees that it will use its best efforts to obtain such further legislation and such approval by State and/or Federal authorities as may be necessary in order to make lawful as aforesaid the conversion of bonds into stock as aforesaid. The Railroad further agrees (except as otherwise expressly provided in this agreement) that if at the time of the deposit of any bond as aforesaid it shall not be lawful as aforesaid for the Railroad to issue shares in exchange therefor as aforesaid the Railroad will then within thirty (30) days after the deposit of said bond either

(a) deliver to the Corporate Trustee for such holder in exchange for said bond, at the rate aforesaid, shares of said prior preference stock previously issued, said shares to be delivered forthwith by the Corporate Trustee to said holder;

or at the option of the Railroad

(b) pay to the Corporate Trustee for the benefit of such holder a sum of money equal to the then conversion value of said bond determined as hereinafter provided, said sum to be paid and said bond then to be returned forthwith by the Corporate Trustee to said holder."

This proposed agreement follows St. 1925, c. 336, entitled "An Act authorizing the Boston and Maine Railroad to issue preferred stock and to make certain of its bonds convertible and relative to extending the maturity of certain outstanding bonds." Section 1 authorizes the issue of a new class of preferred stock, having an annual cumulative dividend rate not exceeding seven per cent, and callable and redeemable at not exceeding \$110 a share, the issuance and terms all being subject to the approval of the Department of Public Utilities. This stock, I understand, is the prior preference stock referred to in the agreement. Section 2 of the act is as follows:—

"Said Boston and Maine Railroad may also by vote of a majority of all its outstanding stock, with the approval of said department and by appropriate agreement with the holders of all or any part of any bonds of said corporation heretofore or hereafter issued provide and agree that such bonds shall be convertible at par at a future time at the option of such holders into shares of the new class of preferred stock hereby authorized upon such terms and conditions as may be fixed in such vote with the approval of said department, and upon the decision of said department approving such provision and agreement the shares of such preferred stock required for the conversion of said bonds shall be a part of the authorized capital stock of said corporation, and may be issued from time to time thereafter for the conversion of said bonds, but not otherwise, without any further authorization, order, or decree by said department."

You state that the agreement, in so far as it provides for the conversion of bonds into stock to be afterwards issued, is, you think, an appropriate agreement. It appears, however, that the authority of

the Federal government and of other States in which the Boston & Maine Railroad is incorporated, to issue new stock for the purpose of conversion into bonds, has not been obtained, and in order to cover the contingency that such authority may not be obtained the agreement contains the supplemental provisions that, in that event, the railroad may deliver in exchange for bonds presented for conversion either (a) prior preference stock previously issued, or at the option of the railroad (b) a sum of money equal to the conversion value of such bonds. You ask my opinion whether the department may legally approve the agreement containing these supplemental features.

Under G. L., c. 160, § 48, the bonds referred to in the agreement cannot be issued without the approval of the Department of Public Utilities. The provision requiring such approval is as follows:—

“Before any railroad corporation shall issue any shares of capital stock or any bonds, notes or other evidences of indebtedness payable at periods of more than one year after the date thereof, it shall apply to the department for its approval of the proposed issue to such amount as the department shall determine to be reasonable and proper . . . Any order of the department approving any such issue of stock, bonds, notes or other evidences of indebtedness may provide for the application of the proceeds thereof to such particular uses as the department shall by that order or by some subsequent order specify, and the corporation shall not apply such proceeds otherwise than as thus specified in such orders. The decision of the department as to the amount of stock reasonably necessary for the purpose for which such stock is proposed to be issued shall be based upon the price at which such stock is to be issued, and the department shall refuse to approve any particular issue of stock, if, in its opinion, the price at which it is proposed to be issued is so low as to be inconsistent with the public interest.”

It has been held that the approval so required goes not merely to the amount but to the issue itself, and that such approval cannot be given to an issue of convertible bonds unless the issue is authorized by statute. *Bulkeley v. New York, New Haven & Hartford R.R. Co.*, 216 Mass. 432, 433, 434, 440. Cf. *Brown v. Boston & Maine R.R.*, 233 Mass. 502, 512.

Accordingly, the provision made in clause (a) for the delivery in exchange for bonds of shares of prior preference stock previously issued, in my opinion, cannot be approved unless it is authorized by St. 1925, c. 336. Section 2 of that act, quoted above, provides for two things: first, the issuance of bonds which may be converted into shares of prior preference stock; and secondly, the issuance of additional shares of such stock required for the conversion of the bonds. The agreement with the bondholders for the issuance of convertible bonds may contain such terms and conditions as may be fixed by vote of a majority of the stockholders, with the approval of the Department of Public Utilities.

While the exchange of these bonds for stock already issued seems not to have been contemplated, nevertheless, as I read the wording of section 2 such a provision is not contrary either to the literal meaning of the section or to its spirit. The earlier part of section 2, authorizing the issuance of convertible bonds, contains the limitation only that

the conversion shall be "at par at a future time at the option of such holders into shares of the new class of preferred stock hereby authorized (i.e., in section 1)," and it also, as I have said, permits the terms and conditions of the agreement with the bondholders to be fixed by the stockholders, with the approval of the department. The latter part of section 2 provides simply for the issuance of such shares of the preferred stock not already issued as may be required for the conversion of the bonds, and provides that such shares may thereafter be issued for the purpose of conversion, but not otherwise. It is my opinion that the statutory authority contained in section 2 may properly be construed to include the making of an agreement such as that contained in clause (a).

The fact that the corporation, in order that it may proceed under clause (a), must purchase, hold and then deliver its own stock, in my opinion, does not introduce into the agreement any element of illegality. The rule is well established that a corporation under its general powers may purchase its own stock unless there is some positive provision of law to the contrary. The rule seems to be equally applicable to corporations engaged in public service and to corporations having the power to take by eminent domain, as well as to other corporations. *Dupee v. Boston Water Power Co.*, 114 Mass. 37, 43; *New England Trust Co. v. Abbott*, 162 Mass. 148, 152; *Leonard v. Draper*, 187 Mass. 536. Furthermore, the agreement in clause (a), in my judgment, is not open to attack under the stock-jobbing act (G. L., c. 259, § 6), because the stock the delivery of which is there provided for was not owned by the corporation at the time of the agreement. While the result might be otherwise if the corporation were bound by the agreement to deliver stock which at the time of the making of the agreement it did not own, in this case the presence of the alternative option would seem to remove any objection under the statute referred to. See *Pratt v. American Bell Telephone Co.*, 141 Mass. 225; *Barrett v. Mead*, 10 Allen, 337; *Wood v. Farmer*, 200 Mass. 209, 215.

The alternative agreement contained in paragraph (b), it seems to me, may properly be regarded as one of the "terms and conditions" which, when fixed by the vote of stockholders, may receive the approval of the department. In this connection it should be observed that this prior preference stock is callable and redeemable at a price which cannot exceed \$110 a share.

As to the alternative provisions contained in clauses (a) and (b) it should be observed that the question arises only on the authority of the department to approve an issue of convertible bonds which the department is authorized to approve upon terms and conditions fixed by the stockholders, and that there is no statutory limitation contained in G. L., c. 160, § 48, or elsewhere, upon the rate of interest which bonds requiring such approval shall carry or the price at which they may be issued or redeemed. The objection stated in *Bulkeley v. New York, New Haven & Hartford R.R. Co.*, 216 Mass. 432, 439, to an obligation requiring the approval of the department which has in it an inherent element of uncertainty and speculation is met by the fact that the convertible feature has already received the approval of the Legislature. There is no objection to the performance of the agreements set out in clauses (a) and (b) which is not inherent in the performance of the contract to convert bonds into stock. I therefore

conclude that it is within the power of the Department of Public Utilities to approve the form of agreement submitted, and I so advise you.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Motor Vehicle — Sale of Business by Dealer, Manufacturer or Repair Man — Rebate — Registration Fee.

A dealer, manufacturer or repair man who sells his business, and with it the motor vehicle registered under his distinguishing number, is entitled to a rebate under G. L., c. 90, § 2.

APRIL 27, 1926.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR:—You have requested my opinion upon the following question: Can a rebate be legally paid to a dealer, manufacturer or repair man who sells out his business and with it all the vehicles registered under his distinguishing number, in the same manner that a rebate is paid to an individual selling a car under the provisions of G. L., c. 90, § 2? The material part of G. L., c. 90, § 2, applicable to the question under consideration provides:—

“A person who before the first day of August in any year transfers the ownership or loses possession of any vehicle registered in his name, and who applies for the registration of another vehicle of less horse power or carrying capacity than that of the vehicle so transferred or lost, shall be entitled, upon payment of the proper fee set forth in section thirty-three, to a rebate equivalent to one half the difference between the fee for the higher and the fee for the lower horse power or carrying capacity; and a person under like conditions who does not apply for the registration of another vehicle, but who, on or before the first day of September in the same year, files in the office of the registrar a written application for a rebate shall be entitled to a rebate of one half the fee paid for the registration of such vehicle; . . . ”

G. L., c. 90, § 1, provides that the word “persons” shall have the following meaning unless a different meaning is clearly apparent from the language or context, or unless such construction is inconsistent with the manifest intention of the Legislature:—

“‘Persons,’ wherever used in connection with the registration of a motor vehicle, all persons who own or control such vehicles as owners, or for the purpose of sale, or for renting, as agents, salesmen or otherwise.”

It is clear that, by the definition quoted, dealers, manufacturers or repair men are included within its scope, and that they may be persons “who own or control such vehicles . . . for the purpose of sale . . . or otherwise.” I find nothing in the enactment which would indicate a legislative intent to make a distinction in the matter of a “rebate” between “an individual selling a car” and “a dealer, manufacturer or repair man who sells out his business and with it all the vehicles registered under his distinguishing number.”

I am therefore of the opinion that a “dealer, manufacturer or repair man” who “transfers the ownership or loses possession of any vehicle

(or vehicles) registered in his name" is entitled to a rebate, in accordance with the provisions of G. L., c. 90, § 2.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — County and Boston Retirement Systems.

An act requiring the retirement at seventy years of age of all employees, including public officers, except judges, would be constitutional.

Legislation applicable to a particular class will be sustained if there is a reasonable basis for the distinction, but not where it results in an arbitrary discrimination between classes.

Discrimination between public officers who have been treated as members of a retirement association, although they were not legally such, and other public officers, giving to the former the right to become members and excluding the latter, is arbitrary, and a bill making such discrimination would be unconstitutional.

MAY 3, 1926.

To the Honorable Senate.

GENTLEMEN:— You request my opinion as to the constitutionality, if enacted into law, of two engrossed bills relative, respectively, to county retirement systems and to the Boston retirement system, being, respectively, Senate Bill No. 307 and Senate Bill No. 317, as passed to be enacted by the House and Senate.

Senate Bill No. 307 is entitled "An Act establishing the status of certain officials and public officers in respect to certain county retirement systems." This bill proposes certain changes in the county retirement systems authorized by G. L., c. 32, §§ 20–25, inclusive. It will be convenient to state some of the important provisions of the law on that subject as it now is.

Section 20, as amended by St. 1924, c. 281, § 2, defines the meaning of certain words. The word "employees" is defined as follows:—

" 'Employees,' permanent and regular employees in the direct service of the county whose sole or principal employment is in such service, except teachers employed in any day school conducted under sections twenty-five to thirty-seven, inclusive, of chapter seventy-four."

Section 22 is as follows:—

"Whenever a county shall have voted to establish a retirement system under section twenty-one, or corresponding provisions of earlier laws, a retirement association shall be organized as follows:

(1) All employees of the county on the date when the retirement system is declared established by the issue of the certificate under section twenty-one may become members of the association. On the expiration of thirty days after said date, every such employee shall thereby become a member unless he shall have, within that period, sent notice in writing to the county commissioners or officers performing like duties that he does not wish to join the association.

(2) All employees who enter the service of the county after the date when the system is declared established, except persons who have already passed the age of fifty-five shall, upon completing ninety days

P.D. 12.

of service, thereby become members. Persons over fifty-five who enter the service of the county after the establishment of the system shall not be allowed to become members, and no such employee shall remain in the service of the county after reaching the age of seventy.

(3) No officer elected by popular vote, except in Worcester county, nor any employee who is or will be entitled to a pension from any county for any reason other than membership in the association may become a member.

(4) Any member who reaches the age of sixty and has been in the continuous service of the county for fifteen years immediately preceding may retire, or be retired by the board upon recommendation of the head of the department in which he is employed, and any member who reaches the age of seventy shall so retire.

(5) Any member who has completed thirty-five years of continuous service may retire, or be retired upon recommendation of the head of the department in which he is employed, if such action be deemed advisable for the good of the service."

Section 24, in subsection (2), provides for deposits in the retirement fund by members from their wages or salary, and contributions by the county. Section 25, in subsection (2), provides for the payment of annuity and pension funds to members of a county retirement system. These payments are of three classes: first, (A) refunds to members ceasing to be employees before becoming entitled to the benefits given upon retirement; secondly, (B) annuities from employees' deposits upon retirement; and thirdly, (C) pensions derived from contributions by the county upon retirement, based upon subsequent service, and also pensions based upon prior service, allowing a credit in certain instances for service before the system was established.

Under the retirement system thus authorized, all employees are required to leave the service after reaching the age of seventy, and employees who are members of the system upon their retirement receive the benefits provided by the statute, including, in certain instances, credit for prior service. As to membership, it is provided that all employees of the county on the date of the establishment of the system may become members, and shall unless written notice is given to the contrary; that all employees who enter the service of the county thereafter, except persons then over fifty-five, shall become members; that persons over fifty-five so entering shall not become members; and that no officer elected by popular vote, except in Worcester County, and no employee who is or will be entitled to any other pension from a county may become a member.

Section 1 of the proposed act amends section 20, as previously amended, in substance, by adding to the definition of "employees" the following: "Any officials or public officers whose compensation is paid by the county, whether employed or appointed for a stated term or otherwise, except, in counties other than Worcester, an official or public officer elected by the people."

Section 2 of the proposed act purports to validate the membership in any county retirement association of every person who "presumptively entered any such system," in so far as such membership was illegal or invalid because of his being an official or a public officer, and also to ratify all acts done by any such association or any officer thereof in connection with any such presumptive evidence, as if the

amendment introduced by section 1 of the proposed act had been in effect at the time.

Regarding the general effect of the proposed changes, it should be observed that they are of considerable importance. Whereas, under the decision of our court in *O'Connell v. Retirement Board of the City of Boston*, 254 Mass. 404, the term "employees," as used in a similar retirement act, did not include public officials, now, with respect to county retirement systems, such officials, whether employed or appointed for a stated term or otherwise, are to be included. No person over seventy years of age, if the bill is enacted into law, hereafter may be employed by a county for any sort of service unless (except in Worcester) he is elected by the people. All persons so employed must retire on reaching the age of seventy. But, with the exception hereafter stated, this presents no feature of unconstitutionality. It is settled that the occupant of a public office may be deprived of that office by act of the Legislature changing its tenure, in the absence of constitutional restriction, and that he has no cause of action on that account. *Taft v. Adams*, 3 Gray, 126, 130; *Opinion of the Justices*, 117 Mass. 603; *Donaghy v. Macy*, 167 Mass. 178; *Graham v. Roberts*, 200 Mass. 152, 157; *Opinion of the Justices*, 216 Mass. 605; *Attorney General v. Tufts*, 239 Mass. 458, 480.

Justices of district courts are paid by the counties, and therefore come within the terms of the provisions of the bill. As to them, the provisions are plainly unconstitutional, being in direct violation of Mass. Const., pt. 2nd, c. III, art. I. If the bill were enacted in its present form, however, it would not be held to be wholly invalid on that account, but the court would, in my judgment, apply the principle that the statute must be interpreted as intended to apply only to that class of persons to whom it would be constitutionally applicable. *Attorney General v. Electric Storage Battery Co.*, 188 Mass. 239; *Baltic Mining Co. v. Commonwealth*, 207 Mass. 381, 390. The bill, however, must, I think, be regarded as defective for this reason.

The observation should also be made that, while by the original statute the establishment of a county retirement system was made to depend upon the acceptance of such a system by the voters of the county (St. 1911, c. 634, § 2, G. L., c. 32, § 21), no opportunity is given them to vote upon the proposed amendment. To this feature of the bill I find, however, no constitutional objection. *Opinion of the Justices*, 138 Mass. 601, 603; *Graham v. Roberts*, 200 Mass. 152, 156.

The language of section 2 of the bill is somewhat obscure. It seems inapt to describe persons who could not lawfully become members of a retirement system as having "presumptively" entered that system. The natural presumption would seem to be that the members of the system were those who were legally entitled to become members. I infer, however, that the intention is to describe those persons who, although they were public officers and therefore, under the decision in the *O'Connell* case, were not authorized to join, nevertheless did not give notice in writing of their unwillingness to join, have paid their contributions and have been treated as members.

A distinction is thus drawn between public officers who have been treated as members and those who have not. The membership of the former is validated, so that they are entitled to all the benefits thereof from the beginning, including credit for prior service. But no pro-

vision is made for the latter class whereby they may have any of the benefits of membership, or even the privilege of becoming members thereafter. G. L., c. 32, § 22, providing that membership shall begin with the establishment of the system or the entry of the employee into service, cannot give them that privilege, since those provisions cannot be applicable to a person already in the service who now becomes an employee by definition. *Wilson v. Head*, 184 Mass. 515; *Wheelwright v. Tax Commissioner*, 235 Mass. 584. The possible presumption of a legislative intent that public officers who have not been treated as members are now to be regarded as having been members from the time of the establishment of the system or their entry into service, is rebutted by the fact that the Legislature has made that provision only for persons who are presumptively members.

Legislation applicable to a particular class, thereby distinguishing that class from other classes, will be sustained if a reasonable basis for the distinction can be found; but it will not be sustained where the distinction results in an arbitrary discrimination between classes. Classifications and distinctions must be based upon some sound reason, in order to avoid the objection that they are violative of the Fourteenth Amendment to the Constitution of the United States, guaranteeing to all persons the equal protection of the laws. *Yick Wo v. Hopkins*, 118 U. S. 356, 369-374; *Gulf, Colorado & Santa Fé Ry. Co. v. Ellis*, 165 U. S. 150, 155, 165; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 102-112; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558-563; *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417; *Truax v. Raich*, 239 U. S. 33; *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Truax v. Corrigan*, 257 U. S. 312, 332-339; *Brown v. Russell*, 166 Mass. 14; *Opinion of the Justices*, 166 Mass. 589; *Commonwealth v. Interstate, etc., St. Ry. Co.*, 187 Mass. 436, 438, 439; *Commonwealth v. Hana*, 195 Mass. 262, 266; *Massachusetts General Hospital v. Belmont*, 233 Mass. 190, 200-202; V Op. Atty. Gen. 56; Attorney General's Report, 1924, p. 25.

In my opinion, the discrimination contained in section 2 between those public officers who made deposits and were treated as members of the association and other public officers, whereby the former are given a right to the benefits of membership as if they had been members from the beginning, while the latter are not given that right and apparently have not even the privilege of becoming members hereafter, cannot be based on any sound and reasonable ground justifying such a distinction between persons none of whom, as the court has held, have hitherto been legally members. For this reason, the bill in its present form, if enacted, would, in my opinion, be unconstitutional, within the principle of the decisions cited above.

In giving this opinion I am assuming that there are public officers, paid by counties, who fall within the latter of the two classes. If in fact there are not, the bill, while it might perhaps be better phrased to avoid the appearance of discrimination, would not be open to the objection of unconstitutionality on that account.

Section 2 also purports to ratify and confirm acts done by a county retirement association in connection with the presumptive entrance of a public official into membership. The general principle is that a Legislature may by statute ratify the doing of an act which it could have authorized at the time, unless vested rights are impaired thereby.

Stockdale v. Insurance Companies, 20 Wall. 323, 331, 332; *United States v. Heinszen & Co.*, 206 U. S. 370; *Forbes Boat Line v. Board of Commissioners*, 258 U. S. 338; *Charlotte Harbor Ry. v. Welles*, 260 U. S. 8. Cf. Attorney General's Report, 1921, p. 167. I see no constitutional objection to this provision.

Senate Bill No. 317 is entitled "An Act establishing the status of officials and public officers paid by the City of Boston or the County of Suffolk or both in respect to the Boston retirement system, and relative to the retirement from the service of said city or county by certain officers thereof." This bill proposes certain changes in the Boston retirement system. It amends sections 2 and 9 of St. 1922, c. 521, as previously amended, establishing that system, and contains other provisions affecting it. Before summarizing the provisions of the bill it will be convenient to refer to the prior law.

Section 2 of St. 1922, c. 521, as amended by St. 1923, c. 381, § 3, and by St. 1925, c. 18, defines the meaning of certain words and phrases used in the act. The word "employee" is defined as follows:—

" 'Employee' shall mean any regular and permanent employee of the city of Boston or county of Suffolk (except teachers who, on September first, nineteen hundred and twenty-three, are employed by the city of Boston and are members of the state teachers' retirement association) whose employment is such as to require that his time be devoted to the service of the city or county, or both, in each year during one half or more of the ordinary working hours of a city employee, or any regular and permanent employee of this commonwealth whose compensation is wholly paid by the city of Boston or by the county of Suffolk, and the working superintendent and his employees of the index commissioners of the county of Suffolk."

Section 3 requires the retirement system to be established on February 1, 1923.

Section 5 provides for membership in the retirement system, and terminates the services of an employee who is not a member at the age of seventy. Following are significant portions of that section:—

"All persons who are employees on the date when this retirement system is established may become members of the system. Every employee in service on said date, except an employee then covered by any other pension or retirement law of this commonwealth, shall, on the expiration of sixty days from said date, be considered to have become a member of this retirement system unless within that period he shall have sent notice in writing to the retirement board that he does not wish to join the system. Employees declining to join this retirement system within sixty days from the establishment of the system may thereafter be admitted to membership but no employee shall receive credit for prior service unless he applies for membership or becomes a member of the retirement system within one year from the date of the establishment of the system.

.

On and after January first, nineteen hundred and twenty-six, the services of an employee, not a veteran of the Civil war, of the Spanish war or Philippine insurrection or the World war as defined in section fifty-six of chapter thirty-two of the General Laws, or not a member of

the judiciary or not a teacher, who attains or has attained the age of seventy and who is not a member of this system, shall terminate forthwith."

Section 6, as amended by St. 1924, c. 251, § 1, creates certain funds, made up from deductions from the compensation of members and contributions by the city.

Section 9, as amended by St. 1924, c. 251, § 2, provides for the retirement of members of the system. It contains the following provision:—

"A member of this retirement system who shall have attained age seventy shall be retired for superannuation within thirty days, except members of the judiciary, heads of departments and members of boards in charge of departments, and except that a school teacher shall be retired on the thirty-first day of August following his attaining the age of seventy."

Section 10, as amended by St. 1924, c. 251, § 3, provides for a retirement allowance for members of the retirement system, consisting of an annuity, a pension and an additional pension, with certain minimum and maximum provisions. The provisions establishing the annuity, pension and additional pension are as follows:—

"(a) An annuity which shall be the actuarial equivalent of his accumulated deductions at the time of his retirement, and

(b) A pension equal to the annuity, and

(c) If a member was an employee at the time the system was established and became a member within one year thereafter and has not since become a new entrant, an additional pension having an actuarial value equivalent to twice the contributions which he would have made during his prior service had the system then been in operation, together with regular interest thereon."

By the terms of clause (c) it will be observed that any employee who became a member of the system on or before February 1, 1924, is entitled to receive an additional pension based on the length of his prior service. This privilege was extended by St. 1924, c. 251, § 4, which permitted heads of city departments and members of boards in charge of city departments to become members on written application within sixty days after the act took effect, and provided that, after being so admitted, they should receive credit for prior service, notwithstanding any provision of St. 1922, c. 521. I am informed that June 22, 1924, the date mentioned in section 3 of Senate Bill No. 317, was sixty days after the effective date of the 1924 statute. The privilege was again extended by St. 1925, c. 90, which permitted employees who had not previously joined to become members by making written application for such membership within ninety days of the effective date of the act, and provided that an employee so becoming a member of the retirement system should receive credit for prior service, notwithstanding any provision of St. 1922, c. 521.

Section 1 of the proposed act amends St. 1922, c. 521, § 2 (b), defining the word "employee," so as to include in the class of employees "any official or public officer whose compensation is paid by said city or county or both, whether employed or appointed for a stated term or otherwise," except persons elected by the people,

court officers of the Supreme Judicial and Superior Courts appointed prior to February 1, 1923, and teachers who, on September 1, 1923, were employed by the city of Boston and were members of the State Teachers' Retirement Association.

Section 2 of the proposed act amends St. 1922, c. 521, § 9, so as to include in the class of members of the retirement system not subject to retirement for superannuation at seventy officials and public officers originally appointed prior to February 1, 1923, by the Governor, with the advice and consent of the Council, whose salaries are paid by the County of Suffolk or by the city of Boston, or by both, and members of the system who were originally appointed prior to that date by the justices of the Supreme Judicial or Superior Courts, and whose salaries are paid in like manner.

Section 3 of the proposed act purports to validate the membership in the retirement system of every person who "purportedly entered said system," either at any time by reason of becoming a "new entrant," or, prior to June 22, 1924, by any other method, whose membership was invalid by reason of the fact that he was at the time an official or a public officer. For the purpose of such validation the provisions of section 1 are made retroactive as if they had been in effect on and after February 1, 1923.

Section 4 of the proposed act permits persons appointed by the Governor, with or without the advice and consent of the Council, whose membership in the system is made legal and valid by sections 1 and 3, to withdraw from membership on written notice.

Section 5 provides that the act shall take effect upon its passage, differing in that respect from St. 1922, c. 521, St. 1924, c. 251, and St. 1925, c. 90, which provided for submission to the city council for acceptance.

The result of this bill, if enacted, will be that public officers whose compensation is paid by the city or county (with the enumerated exceptions), now for the first time made employees by definition, and hence subject to retirement for superannuation at seventy, will be entitled to the benefits of the retirement system if they attempted to do an act which they could not legally do by purporting to become members of that system, either as new entrants, or, prior to February 1, 1924, under St. 1922, c. 521, § 5, or, prior to June 22, 1924, under St. 1924, c. 251, § 4; but that persons who did not make the attempt to do that invalid act and persons who did make the attempt under St. 1925, c. 90, will not be entitled to receive those benefits. Among the benefits so conferred are the right to a pension and to credit for prior service, as explained above, and the right not to be retired for superannuation at seventy, if the person is of the class of public officers described in section 2 of the bill.

Because of this apparently arbitrary discrimination between classes, and for the reasons stated in discussing Senate Bill No. 307, it is my opinion that this bill in its present form, if enacted into law, would be unconstitutional.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Constitutional Law—Power of the Legislature—Payment to the Family of a Deceased Member of the House of Representatives.

The Legislature may lawfully authorize the payment of the balance of a yearly salary to the family of a deceased member of the House of Representatives if, in the exercise of its reasonable judgment, it determines that such payment is for a purpose which will promote the general public welfare.

MAY 18, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR:— You have submitted to me for examination and report House Bill No. 1485, entitled “Resolve in favor of the estate of the late Frederick A. Warren.”

The purpose of this resolve is to authorize the payment to the estate of a deceased member of the present House of Representatives the balance of his salary for the current year.

Payment of the nature authorized by this legislation is a pure gratuity and may not be made by the Legislature if it is merely an appropriation of public moneys for a private purpose. A gratuity of this nature may be, and often is, made for a purpose which can fairly be considered as serving the public good, and for this latter purpose the General Court has the right to grant money, and the distinction as to what are and what are not public purposes must in a large measure be left to the conscientious decision of the Legislature itself. *Opinion of the Justices*, 190 Mass. 611. If the public purpose to be served by the appropriation is not clear, the Legislature is bound to recite in the instrument of appropriation such words as will indicate the existence of facts and of a legislative reason for the determination that the purpose is in a true sense public and not private. Unless it can fairly be said that the judgment of the General Court in the premises was manifestly unreasonable, their expressed finding that the public good will be promoted by the payment authorized in their enactment in connection with certain facts therein set forth, the measure cannot be said to be unconstitutional. *Opinion of the Justices*, 240 Mass. 616.

In the instant resolve it is clearly stated that the payment authorized therein is made for the purpose of promoting the public good, and that the services of the deceased in the General Court were long and meritorious. There is a declaration of legislative purpose. Facts relating to it in connection with the deceased and his services are specified, although meagerly, and are presumably matters of public knowledge. It is therefore plain, and does not need merely to be inferred from the language of the bill, as was the case in the matter before the court in *Opinion of the Justices*, 240 Mass. 616, that these considerations actuated the Legislature in reaching a conclusion that the public good would be promoted by an “unstipulated reward” for the deceased’s services.

In my opinion, the proposed resolve, if enacted, would be constitutional.

Very truly yours,
JAY R. BENTON, *Attorney General.*

Constitutional Law — Time of Taking Effect of a Statute.

The Legislature has not the constitutional power to provide that an act shall take effect as of a date prior to its passage, although the act might be made to operate retroactively.

MAY 21, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR: — You have submitted to me for examination and report a Senate bill printed as House Bill No. 1479, entitled “An Act authorizing annual allowances to commissioned officers of the National Guard for uniforms.”

The purpose of this bill is to provide for the payment, as of April first in each year, of an allowance, to each commissioned officer in the National Guard who served for the year preceding, of a maximum of thirty-five dollars for uniforms. The bill is of such a character that a retroactive effect given to its terms by general provisions would not make it unconstitutional. The bill, however, provides specifically in section 2: “This act shall take effect as of April first of the current year.” It was not passed to be enacted until May 19th. It has an emergency preamble declaring it to be an emergency law, necessary for the immediate preservation of the public convenience.

It is provided in Mass. Const. Amend. XLVIII, under the heading *The Referendum, I*, that —

“No law passed by the general court shall take effect earlier than ninety days after it has become a law, excepting laws declared to be emergency laws and laws which may not be made the subject of a referendum petition.”

The plain implication of the provisions under the heading *II Emergency Measures* is that such laws are to take effect upon their passage. Furthermore, Mass. Const., pt. 2nd, c. I, § I, art. II, provides: —

“No bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revisal.”

It further provides that if he approves he shall signify his approbation by signing it, and if not, then if two-thirds of both branches of the Legislature upon reconsideration so vote, it “shall have the force of a law.” See also G. L., c. 4, § 1; *Opinion of the Justices*, 3 Mass. 567; *ibid.*, 3 Gray, 601, 606, 607; *Kennedy v. Palmer*, 6 Gray, 316; *McLaughlin v. Newark*, 57 N. J. L. 298.

Because of its inconsistency with the constitutional provisions cited above, I am of the opinion that, irrespective of the question whether the Legislature has the power to declare that a bill shall take effect as of a date prior to its passage, the enacting clause of the instant bill is beyond the power of the Legislature. The difficulty is, however, one which may readily be cured by amendment, since, as I have said, the nature of the bill is such that it may properly be made to operate retroactively. *Spaulding v. Nourse*, 143 Mass. 490; *Adams v. Adams*, 211 Mass. 198.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Constitutional Law — Eminent Domain — "Taking."

The word "taking," as used in Mass. Const. Amend. XXXIX, may be construed in a comprehensive sense as including acquisition of private property for a public use by purchase as well as by eminent domain.

MAY 22, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR:— You have referred to me for examination and report House Bill No. 1480, entitled "An Act relative to the widening of Bridge Street in the city of Haverhill."

This bill, in section 1, authorizes and directs the county commissioners of the County of Essex to lay out, widen and construct Bridge Street in the city of Haverhill, and provides that for that purpose they may "take in fee by eminent domain under chapter seventy-nine of the General Laws by one or more takings, or by purchase or otherwise, the land and property" therein specified and described, the same being stated to be more land and property than are needed for the actual construction of the street, and no more in extent than would be sufficient for suitable building lots on the street; and it is also provided that after appropriating for the street so much of the specified and described land and property as is needed therefor, the county commissioners may sell the remainder. Provision is made in the following sections for payment of the costs and expenses, not to exceed fifty thousand dollars, assessment upon and payment by the city of Haverhill of two-thirds of the cost, payment of the remaining cost by the county, and the issuing of bonds and notes by the county and the city. Section 5 provides that the act shall take effect upon its acceptance by the county commissioners, provided that such acceptance occurs during the current year.

Mass. Const. Amend. XXXIX makes the following provision:—

"The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the Commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: *provided, however*, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions."

The provision in section 1 authorizing the county commissioners to take in fee by eminent domain, or by purchase or otherwise, the land and property specified, which is stated to be more than is needed for the actual construction of the street, since the property which is not needed for the street is not to be acquired for a public purpose, is beyond the power of the Legislature unless it is authorized by Mass. Const. Amend. XXXIX; and it is not so authorized unless it is a "taking in fee," within the meaning of the words as used in the amendment. The meaning of the word "taking," as used in a statute authorizing a railroad to "purchase or otherwise take in fee" land for a

station, was carefully considered by the court in *Saltonstall v. New York Central R.R. Co.*, 237 Mass. 391, 394, 395, in which the court indicated its view to be that the word "taking," used in its comprehensive sense, may include acquisition of private property for a public use either by purchase through private negotiation or by seizure through the exercise of eminent domain. The court there pointed out that an agreement of parties for purchase, effected under the terms of statutory language similar to that used in section 1 of this bill, must have been made in view of knowledge by all concerned that the right to exercise eminent domain was present as an element to be taken into account in the bargaining, and that the right to acquire title to property for public use by negotiation rather than by resort to a formal taking relates to the means rather than the end, and does not affect the use to which the property is to be put when acquired nor the rights of others arising from such use.

Mass. Const. Amend. XXXIX amends Mass. Const., pt. 1st, art. X, which provides expressly that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," and contains other provisions which are regarded as a source of the rule that the expenditure of public money must be for a public purpose. *Lowell v. Boston*, 111 Mass. 454, 461, 462. The effect of Mass. Const. Amend. XXXIX necessarily is to make an exception to each of these constitutional principles. I see no reason for limiting the exception to the rule which requires the expenditure of public funds to be for public uses to those cases only where land is taken rather than acquired by agreement with the owner. The primary purpose of Mass. Const. Amend. XXXIX was to do away with all constitutional obstacles to the acquisition of property by public authority under the circumstances to which the amendment relates. The accomplishment of such acquisition by negotiation rather than by a formal taking, as the court has stated, relates to the means rather than the end. In my opinion, therefore, while the question cannot be free from doubt, the word "taking," as used in Mass. Const. Amend. XXXIX, may properly be construed in a comprehensive sense as including all forms of acquisition.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Weekly Wages paid by Check — Valid Set-off under G. L., c. 149, § 150.
Payment of weekly wages by check, if the employee assents thereto, is permitted under G. L., c. 149, § 148. It is not a valid set-off under G. L., c. 149, § 150.

MAY 27, 1926.

Gen. E. LEROY SWEETSER, *Commissioner of Labor and Industries*.

DEAR SIR:— You state that a railroad company to which the provisions of G. L., c. 149, § 148, as amended, are applicable has announced its intention to discontinue payment of wages of employees in currency and to make payment by check. You inform me that "some of the employees reside in remote townships of the State, where, it is alleged, it will not be possible for them to be paid according to these requirements of the statute, and others, because of the nature of their duties, may not be able to reach the banks with which arrangements

have been made by the railroad company for the cashing of pay checks, within the period fixed by law." You request my opinion upon the following questions:—

“1. If payment of wages by check is tendered to employees on seventh day after wages are earned and facilities are not available to cash the check, or nature of employment prevents this from being done until the eighth or ninth day after they are earned, is it a violation of G. L., c. 149, § 148?

2. Is payment of wages by check permitted by this statute?

3. Is payment by check a ‘valid set-off’ as alluded to in G. L., c. 149, § 150?”

G. L., c. 149, § 148 (as amended by St. 1921, c. 51, St. 1923, c. 36, St. 1924, c. 145, and St. 1925, c. 165) and § 150, in those portions applicable, provide as follows:—

“SECTION 148. Every person engaged in carrying on . . . within the commonwealth a . . . railroad . . . shall pay weekly each employee engaged in his business, . . . the wages earned by him to within six days of the date of said payment if employed for six days in a week or to within seven days of the date of said payment if employed seven days in the week, . . . No person shall by a special contract with an employee or by any other means exempt himself from this section. . . .

SECTION 150. . . . On the trial (on complaint of the Department of Labor and Industries for violation of § 148) no defence for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of the payment of the wages so earned by him, shall be valid.”

Section 148 does not specifically require the payment of wages in cash or forbid the issuance of checks in payment thereof.

In its legal import, the term “payment” means the full satisfaction of a debt by money, but that is payment which the parties contract shall be accepted as payment. *First National Bank v. Watkins*, 154 Mass. 385, 387; *Hill v. Fuller*, 188 Mass. 195, 200.

When a debt is payable in dollars, it is payable in whatever the laws of the United States declare to be legal tender. *Miller v. Lacy*, 33 Tex. 351. A check on a bank, handed by the debtor to the creditor and deposited by the creditor in his bank, is not cash payment. *Breck v. Barney*, 183 Mass. 133, 137.

A check is not in itself money. It is an order for the payment of money. G. L., c. 107, § 208. *Bullard v. Randall*, 1 Gray, 605, 606; *Minot v. Russ*, 156 Mass. 458, 459. If taken, treated and received in payment as money, it may be regarded as the equivalent of a money payment (*Wall v. Lakin*, 13 Met. 167; *Cushman v. Libbey*, 15 Gray, 358, 361); but not otherwise (*Dennie v. Hart*, 2 Pick. 204).

A check is merely evidence of a debt due from the drawer, and its mere receipt is not payment of the debt for which it is delivered. *Taylor v. Wilson*, 11 Met. 44, 51; *Feinberg v. Levine*, 237 Mass. 185, 187; *National Wholesale Grocery Co. v. Mann*, 251 Mass. 238, 250; *Key-*

stone Grape Co. v. Hustis, 232 Mass. 162, 165; *Ansin v. Mutual Life, Ins. Co.*, 241 Mass. 107, 111; *Shea v. Manhattan Life Ins. Co.*, 224 Mass. 112. It is only conditional payment. *Weddigen v. Boston Elastic Fibre Co.*, 100 Mass. 422; *Houghton v. Boston*, 159 Mass. 138; *Goodwin v. Mass. Loan etc. Co.*, 152 Mass. 189, 201. A certified check, if certified for the benefit of the drawer, is not payment. *Minot v. Russ*, 156 Mass. 458.

The acceptance of a check implies an undertaking to use due diligence in presenting it for payment (*Houghton v. Boston*, 159 Mass. 138, 142; G. L., c. 107, § 209) and in giving notice of dishonor; and if the party for whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment. *Taylor v. Wilson*, 11 Met. 44; *Small v. Franklin Mining Co.*, 99 Mass. 277. If a check is given and received by agreement of the parties, in settlement of a debt, it is payment. *Barnard v. Graves*, 16 Pick. 41; *Getchell v. Chase*, 124 Mass. 366.

Presentment for payment and receipt of the amount would be evidence of acceptance upon the terms on which it was given (*Illus. Card & Nov. Co. v. Dolan*, 208 Mass. 53, 54), and payment on presentation would relate back to the date when the check was given (*Hunter v. Wetsell*, 17 Hun [N.Y.], 135).

Whether a check is payment, and is to be considered as money, depends upon the understanding of the parties to the transaction. If an employee declines to accept the check at the time payment is due under the statute, the check is not a payment.

Section 150, pertaining to trials for violation of section 148, forbids any defense other than those therein recited, namely, an attachment by trustee process, a valid assignment, a valid set-off against the same, absence of employee from regular place of labor at time of payment, or an actual tender to the employee at time of payment.

A set-off is a cross claim or demand which a defendant holds in his own right against a plaintiff, recoverable in an action of contract, which, because so unconnected with the plaintiff's claim, could not be shown at common law in payment or reduction of the amount due. The right to set-off exists only by statute. *Cook v. Mills*, 5 Allen, 36, 37; *American Bridge Co. of New York v. Boston*, 202 Mass. 374, 375. The nature of such a claim is described in G. L., c. 232, §§ 1-11, as a claim, express or implied, for property sold, for money paid, for money had and received, for services performed, and for an amount which is liquidated or may be ascertained by calculation. It is substantially a cross action; an independent claim. *Cutter v. Middlesex Factory Co.*, 14 Pick. 483, 484; *Goldthwait v. Day*, 149 Mass. 185, 187. Payment is not ground for set-off, and is available only by way of plea. *Jewett v. Winship*, 42 Vt. 204. Delivery of a check as payment, therefore, is not a claim in set-off.

A tender is the offer of everything which the creditor is entitled to receive in satisfaction of a debt, so that the creditor may reduce it to possession. *Sands v. Lyon*, 18 Conn. 18. The debtor cannot require the creditor to call upon a third party for the money any more than the creditor can compel the debtor to make a tender to a person whom he should appoint, instead of himself. By depositing the money in the hands of a stakeholder who agrees to perform the service, the debtor does not relieve himself of responsibility on account of the debt. The

debt is not extinguished by the tender. *Town v. Trow*, 24 Pick. 168. The general rule is, that an offer of a bank check for the amount due is not a good tender (38 Cyc. 146), nor a deposit in a bank, if the obligation is not payable at such depository (p. 152). A tender of a check, therefore, if not agreed to, is not a tender of payment of wages at the time of payment.

In describing the requirement of a weekly payment of wages, the court said, in *Mutual Loan Co. v. Martell*, 200 Mass. 482, 485, that "it has been deemed important that they be received by the employee regularly and promptly after they are earned." Insomuch as this may be said to be an expression of one of the intents of the statute, the enforced acceptance of a check in payment of weekly wages is in opposition to the principle of the statute, in that it subjects the employee to certain legal responsibilities with respect to the presentation of the check and to delay in the prompt receipt of money for wages earned, where facilities for cashing the check are unavailable or where the nature of the employment prevents presentation.

Although there is no obligation to pay in lawful money if the employee is willing to accept a check, the use of a check, instead of currency, gives rise to the question whether, in each instance, depending upon the intention and conduct of the parties, the check was given and received as payment, within the meaning of the statute. The employee, in my opinion, is entitled to be paid his wages in cash unless he agrees to be paid in some other medium.

Answering your interrogatories, I am of the opinion, therefore, that payment of wages by check, if accepted in payment, tendered at time of payment and cashed on a later date, is not a violation of G. L., c. 149, § 148; if not so accepted and cashed, it is; that payment of wages by check is permitted under the provisions of G. L., c. 149, § 148, if the employee assents thereto; that payment by check is not a "valid set-off" under the provisions of G. L., c. 149, § 150.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Constitutional Law — County Retirement Systems.

A bill amending G. L., c. 32, § 20, as amended by St. 1924, c. 281, § 2, by including public officers in the definition of employees, validating the membership in any county retirement system of public officers who had theretofore presumptively entered the system, and giving to other public officers the opportunity to become members, would be constitutional, if enacted.

MAY 28, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have referred to me for examination and report Senate Bill No. 307, entitled "An Act establishing the status of certain officials and public officers in respect to certain county retirement systems."

This bill, in section 1, amends G. L., c. 32, § 20, as amended by St. 1924, c. 281, § 2, in its definition of the word "employees" by substituting the following definition:—

" 'Employees,' any persons permanently and regularly employed in the direct service of the county whose sole or principal employment is in such service, except teachers employed in any day school con-

ducted under sections twenty-five to thirty-seven, inclusive, of chapter seventy-four, and also any officials or public officers whose compensation is paid by the county, whether employed or appointed for a stated term or otherwise, except, in counties other than Worcester, an official or public officer elected by the people."

Section 2 validates the membership in any county retirement association of every person who "presumptively" entered the system in so far as such membership was invalid by reason of his being a public officer, and ratifies the acts of any county retirement association in connection therewith. Section 3 provides that any public officer who has not presumptively entered such system shall be admitted to membership on request, if otherwise eligible, and thereupon shall, upon retirement, be entitled to pension benefits for prior service.

Senate Bill No. 307 as originally passed to be enacted was returned by Your Excellency at the request of the Senate, and my opinion was requested as to its constitutionality. In response to that request I stated my opinion to be that the bill was defective because, literally interpreted, it included justices of district courts within its terms requiring retirement at the age of seventy, and was unconstitutional because of certain discriminations made between public officers who have heretofore been treated as members of the retirement association and other public officers. The bill as originally passed to be enacted has since been amended by adding section 3, which, in my opinion, removes the objection based on unconstitutional discrimination, but no change has been made in the definition of the word "employees," which, as I have stated, if literally interpreted must include justices of district courts.

As I stated in my opinion to the Senate, the bill, if enacted with such a definition of the word "employees," would not be held to be wholly invalid on that account, but the court would, in my judgment, apply the principle that the statute must be interpreted as intended to apply only to that class of persons to whom it would be constitutionally applicable. This principle of construction is well established, and the bill, if enacted, therefore, would necessarily receive the construction that justices of district courts are not included within the definition of the word "employees." Apparently this is in accordance with the intention of the Legislature. I see no urgent reason, therefore, why the bill in its present form should not receive Your Excellency's approval.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Compulsory Automobile Liability Security — Commissioner of Insurance — Classification of Owners of Motor Vehicles for Purposes of Liability Insurance — Rates for Policies and Bonds.

Fleet rates, so called, may not be established.

Classification based upon the locality in which a motor vehicle is kept is not necessarily unreasonable.

Classification based upon a merit rating plan, so called, is not necessarily unreasonable if sufficient data is available to the Commissioner to enable him to establish such classification with reasonable accuracy and certainty.

The Commissioner of Insurance is not required to establish schedules of charges for premiums on bonds differing in amount from those established for policies.

JUNE 7, 1926.

Hon. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR: — You have asked my opinion upon certain questions relative to the duties imposed upon you by law to establish classifications of motor vehicle liability insurance risks and a schedule of premium charges, under the provisions of St. 1925, c. 345, and G. L., c. 175, § 113B.

Such classifications and schedule are to be used and charged by all companies authorized to transact liability insurance on motor vehicles or to transact a surety business, under G. L., c. 175, § 47, cl. 4, and § 105, which propose to issue bonds for the owners of motor vehicles, under St. 1925, c. 346, commonly known as the Compulsory Automobile Insurance Law.

1. The first set of facts to which you direct my attention and your question as to the law applicable thereto are as follows: —

“(a) It is now the practice of some of the liability insurance companies to issue automobile liability policies at what is termed a ‘fleet’ rate; that is, a given insured owning a certain number of motor vehicles receives automobile liability insurance at a lesser rate or for a lesser premium in the aggregate than an insured who owns only one car.”

“(1) Under the provisions of the said statutes may the Commissioner lawfully approve ‘fleet’ rates, as outlined in (a), *supra*?”

St. 1925, c. 345, § 2, provides, in part: —

“The said commissioner shall examine said classifications and premium charges to determine whether such classifications are fair and reasonable and such premium charges are adequate, just, reasonable and non-discriminatory.

He shall, after a full hearing and due investigation, establish such classifications of risks as shall be fair and reasonable and such schedule of premium charges as shall be adequate, just, reasonable and non-discriminatory which shall be used and charged by all such companies for such motor vehicle liability policies and bonds issued or executed in connection with the registration of motor vehicles or trailers for the first year to which section one A of said chapter ninety shall apply, and shall be in force until modified, altered or revised by the said commissioner under section one hundred and thirteen B of chapter one hundred and seventy-five of the General Laws or, in the event of a petition for review under section three, until otherwise ordered by the court.”

The terms of the various sections of St. 1925, c. 346, which by amendments to G. L., c. 175, deal with the same classifications and schedule that the Commissioner is required to make under St. 1925, c. 345, § 2, do not alter, but confirm in specific language, the character of the classification and schedule which he is to establish under the former statute. The classification of risks is to be “fair and reasonable,” and the schedule of rates or premium charges is to be “adequate, just, reasonable and non-discriminatory.” These provisions are in harmony with the general principles of law governing classification for proper purposes by legislative authority. When established by the Commis-

sioner, the classification is, by the terms of the statute, to be used and the rates made are to be charged by all companies for motor vehicle liability policies and bonds until changed or modified by the Commissioner.

Apart from the particular statutes under consideration, rate fixing for premium charges on insurance policies and necessary classification for that purpose have been held a proper exercise of the general police powers inherent in a State Legislature. The classification must not be unreasonable nor arbitrary and must rest on a real difference in subject-matter, having some relation to the classification made and the objects sought to be obtained by the legislation. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. An administrative board or commissioner, acting under legislative authority, may exercise the power given to them or him to make classifications, but only within the same limitations as apply to the Legislature. St. 1925, cc. 345 and 346, which to a certain extent must be read together in determining the legislative intent of each, expressly set out, in terms aptly stating the general principles of law, the mode in which the Commissioner is to use his authority in connection with the powers of rate fixing which have been entrusted to him. An application of these principles of law determines the answer to your first question.

It has been held in previous opinions of Attorneys General that the practice of insurance companies in charging premiums to insureds of the same general class, based solely on the amount of business furnished by the insureds, was an improper one, because a discrimination was made upon no reasonable basis and was in violation of statutes forbidding the giving of special favors by companies to insureds or prospective buyers of policies. Attorney General's Report, 1920, p. 133; 1923, p. 143. I assume, from the facts stated in your letter, that a "fleet" rate, so called, discriminates between insureds of the same class, and permits the payment of a smaller premium charge per car to such insureds as take out a policy or policies covering more than one car than is exacted from the owner of a single car, solely by reason of the difference in the number of cars insured. The duty of determining the facts in regard to the various situations arising from the sale of policies rests upon you, but I am of the opinion that the establishment of a rate for premium charges of a lower amount than that allowed for a single car of the same general class, based solely upon the fact that one insured had more cars covered than did the other, would not, as a matter of law, be "reasonable," within the meaning of the statute.

I answer your first question in the negative.

2. Your second statement of facts and the question based thereon are —

"(b) The premium rates now charged for automobile liability insurance are fixed not only with reference to the type of motor vehicle but also with reference to the locality in which the vehicle is usually kept."

"(2) Do the said statutes require as a matter of law that the premium charges be uniform throughout the Commonwealth for a given classification or may the rates be established with respect to the territory in which the vehicle is usually kept, assuming that the Commissioner finds that there is a reasonable basis in fact for territorial rating?"

It cannot be said that a mode of classification of risks based upon the locality in which a motor vehicle is kept would necessarily be unreasonable. It may be that the customary keeping of a motor vehicle in a rural district has a tendency to make the hazard of its use less great than one habitually kept in a city. Such a mode of classification is not prohibited by the statutes.

3. Your third statement of fact and question are —

“(c) Some companies grant automobile liability insurance to a particular insured at a reduced rate or premium under what is called a ‘merit rating plan’; that is, to an insured who has what the company considers a favorable record for careful operation of a motor vehicle.”

“(3) Under the said statutes may the Commissioner lawfully establish premium charges which will be subject to variation at the option of the companies if in their judgment the insured qualifies under a ‘merit rating plan,’ as described in (c), *supra*?”

If, as a matter of fact, it be possible to ascertain with reasonable accuracy from sufficiently reliable data that motor vehicle operators possessing certain well defined attainments, experience and demonstrated skill in operation are, to a clearly defined extent, less hazardous risks than other operators, it could not well be said that a classification and schedule of premium charges, lower than for others, established by the Commissioner for cars driven solely by such operators, would be unreasonable or discriminatory.

If, however, as a matter of fact, in the judgment of the Commissioner data is not available or experience is not tabulated in sufficient quantities to demonstrate with reasonable certainty the lessening in hazard to the insurer by the driving of cars by such persons instead of others, the adoption of such a classification, with incidental lower premium charges, would be unfair, unreasonable and discriminatory.

To adopt a classification based merely upon the so-called merit rating plan of individual companies, not of general use or recognition, would not be a fair, reasonable or non-discriminatory mode of procedure on the part of the Commissioner. To establish a classification on a so-called merit rating basis which was not itself prescribed by the Commissioner but was an adoption by him of a system used by individual companies, resting only upon the judgment of such companies as to what did or did not constitute conduct or ability entitling an insured to the lower rate, could not be said to be fair, reasonable or non-discriminatory, within the meaning of the statute. Obviously, such an adoption of a merit rating plan set up and controlled by companies themselves would be open to great abuse, and would in reality substitute the opinion of others for the exercise of the judgment or discretion vested in the Commissioner by the statutes.

As your third question is worded I answer it in the negative.

4. Your fourth statement of fact and question based thereon are —

“(d) At the present time, I understand, no corporate surety company executes a bond as surety conditioned on the satisfaction by the principal of judgments rendered against him arising out of the operation of a motor vehicle. The condition of the bond and the coverage of the policy required of applicants for registration by said chapter 346 are substantially the same. The question has been raised whether under the provisions of said sections the Commissioner may lawfully

establish premium charges to be paid to a corporate surety company for executing a bond which are less than those established by the Commissioner for policies issued by an insurance company, having in mind the common practice of corporate surety companies ordinarily not to execute a bond as surety unless the principal deposits with it approved collateral or furnishes it with suitable indemnity agreements."

"(4) Do the said statutes require as a matter of law that the premium charges must be identical for policies and bonds, or may the Commissioner establish one rate of coverage under a policy in respect to a certain classification and a different rate for coverage under a bond executed in respect to a motor vehicle falling within the same classification?"

Although the facts which you set forth indicate that the practice relative to the execution of surety bonds is not the same as that which prevails in relation to the issuing of policies of insurance, in that the person covered by the bond is required to deposit collateral while the insured is not, I am of the opinion that the intent of the Legislature, as indicated by the language used in St. 1925, cc. 345 and 346, was that there should be a single schedule of premium charges applicable alike to companies issuing policies and those executing bonds, for the purposes of the Compulsory Automobile Insurance Law, so called. The condition of a bond and the provision of a policy issued for such purposes are, as you state, not dissimilar. The existence of the common practice of surety companies, to which you refer, was doubtless not unknown to the Legislature, and I am inclined to the view that, had the Legislature desired that different premium charges for similar risks under identical classifications should be created by the Commissioner, it would have so stated in the statutes under consideration.

The language employed by the Legislature in both statutes appears to indicate that it was not intended that insurance companies and surety companies should be treated differently in respect to the establishment of premium charges for the same kinds of risks, as to which the ultimate duty of payment by both sorts of companies is virtually the same. No explicit authorization is given to the Commissioner to differentiate between the two types of companies in regard to the premium charges for identical risks, and I am of the opinion that no implied authority inheres in the Commissioner in this respect from the statutes as they stand. Insurance companies and surety companies described in St. 1925, c. 345, § 1, are referred to together in section 2 as "such companies," and the classification and charges established are provided to "be used and charged by all such companies for such motor vehicle liability policies and bonds issued or executed in connection with the registration of motor vehicles." The words "policies or bonds" are repeatedly used throughout both statutes as if their premiums were to stand upon the same basis.

I answer your fourth question to the effect that the statutes do not contemplate different schedules of charges for premiums on bonds from those on policies.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Registration of Motor Vehicles — Partnerships — Application.

Under G. L., c. 90, § 2, the signing of an application for registration of a motor vehicle owned by a partnership may be in the partnership name by one of the partners, when the partnership has a usual firm name; but if no firm name is in use, all the partners must sign.

JUNE 14, 1926.

MR. ARTHUR W. DEAN, *Acting Commissioner of Public Works.*

DEAR SIR:— You have asked my opinion relative to the legality of a practice prevailing in the Registry of Motor Vehicles in regard to the registration of motor vehicles owned by partnerships. Your statement of the practice is as follows:—

“It has been the custom of the Registry to allow either or any partner in a co-partnership to sign the application, provided, of course, the co-partnership name is given in answer to question 13 on the registration blank. In case of a joint ownership both owners are required to sign.”

G. L., c. 90, § 2, provides:—

“Application for the registration of motor vehicles and trailers may be made by the owner thereof. The application shall contain . . . a statement of the name, place of residence and address of the applicant.”

No specific provision is made with relation to owners who are partnerships.

In *Crompton v. Williams*, 216 Mass. 184, the Supreme Judicial Court, in construing the requirement that an application for registration shall contain the name, place of residence and address of the applicant, under St. 1909, c. 534, § 2, held that an individual's use, in good faith, of the recognized trade name under which he did business, in his application and registration was a compliance with the statute. The court said:—

“A corporation, a partnership or an individual may adopt a trade name under which business can be transacted, actions instituted, or defended, and the title to property acquired and transmitted. . . . The plaintiff's application and the registration followed the name in which he did business.”

The court went on to say that the use of a fictitious name for the purpose of concealing identity would not be a compliance with the statute “because the record would not show, nor the certificate contain, a descriptive statement by which the true owner could be ascertained.”

Partnerships are commonly operated under a firm name. When the ownership of the vehicle is in a partnership which adopts and uses a partnership name, the signing of the application for registration with the partnership name by one of the partners is a sufficient compliance with the provisions of law relative to registration. When no such partnership name is in fact adopted and used by the firm, the names of all the partners should be signed to the application.

I am of the opinion that the practice, as described in your letter, which you are now pursuing is a proper one.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Teachers' Retirement Association — Effect on Payments of Death of Applicant for Retirement occurring before Action taken upon Application — Apportionment of Instalments.

The retirement of a member unqualifiedly eligible to retire because of age takes effect at the date fixed in his application, and requires no action of the retirement board in order to become effective; it is therefore not affected by the fact that the applicant for retirement dies before action by the board is taken upon such application.

The estate of such a member who dies after the date for retirement fixed by his application is not entitled to receive the member's assessments under G. L., c. 32, § 11 (4).

The estate, under such circumstances, the member having elected to receive an annuity under G. L., c. 32, § 10 (3) (a), is only entitled to the ratable proportion of the allowance for the period between the dates of retirement and death, with any sum held by the board in excess of the amount usable to found an annuity.

Under circumstances otherwise similar, but where the member had elected an annuity under G. L., c. 32, § 10 (3) (b), the estate would be entitled, in addition, to the sum used to purchase the annuity less the portion of any accrued instalment of the allowance which was derived from the annuity.

JUNE 15, 1926.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion upon certain questions relating to retirement allowances under the teachers' retirement system. The first two questions, which concern a single situation, are as follows: —

“If a member of the Retirement Association sixty years of age or over filed with the office of the retirement board a written application for retirement, on the form provided by the board, stating in the application a definite date on which retirement was to take effect, and died subsequent to that date but death taking place before the retirement board had taken any action on the application or established the retiring allowance to which the member was entitled, what amount is due the estate if the member elected an annuity to be paid in accordance with the provisions of G. L., c. 32, § 10 (3) (a)?

Shall the retirement board, after the death of the member, determine the retiring allowance to which the member was entitled on the retirement date designated by him and pay the estate a pro rata amount due for the period from that date to the date of death, or shall the retirement board return the member's contributions and interest and make no payment of pension to the estate?”

It is provided by G. L., c. 32, § 11 (4), that “if a member who is not receiving payments under paragraph (1) or (2) of this section” (which the member now in question was not) “dies before retirement, the full amount of his assessments, with regular interest thereon, shall be paid to his estate.” It is therefore necessary to ascertain whether at the date of his death the member had been retired.

The board, according to your statement of facts, had taken no action whatever upon the application for retirement. If some action on the

part of the board is, by the terms of the statute, a necessary step precedent to retirement, the member had not, therefore, been retired, and his estate is entitled to the benefit of G. L., c. 32, § 11 (4). The member was, however, eligible to retire, and had evidenced by his application an election to retire at a date selected by him. He died subsequently to that date, and if those facts, without any action by the board, had already brought about a retirement at that date, his death before the taking of such action did not vacate the retirement, and his estate is not entitled to payment under G. L., c. 32, § 11 (4). I am of the opinion that the latter view is correct.

In the original law, St. 1913, c. 832, there were provisions for retirement under several different sets of circumstances. Thus it was provided that any member on attaining the age of sixty years "may retire," section 6 (1); that any member at any time after reaching the age of sixty, if incapable of rendering satisfactory service, "may, with the approval of the retirement board, be retired" by the employing school committee, section 6 (1); and that any member on attaining the age of seventy years "shall be retired," section 6 (2). St. 1917, c. 233, § 2, added a provision that a member, under certain conditions, who before reaching the age of sixty, becomes disabled physically or mentally, "may, with the approval of the retirement board, be retired" by the employing school committee.

Nowhere in the law as it existed prior to the General Laws is to be found any further requirement of action by the retirement board to make retirement effective. The approval of the board was a condition precedent to retirement for disability; but retirement at age seventy was compelled by the direct force of the statute, and retirement at age sixty was a right of the member which his choice alone sufficed to put into operation.

The present case is governed by that portion of G. L., c. 32, § 10 (1), which is as follows:—

"Any member of the association shall, on written application to the board, be retired from service in the public schools on attaining the age of sixty, or at any time thereafter."

It will be noticed that the words "shall, on written application to the board, be retired," stand in substitution for the words "may retire" which were to be found in St. 1913, c. 832, § 6 (1). Presumptively, this change, occurring for the first time in the codification of the General Laws, was not intended to work a change in the nature of the right to retire. Cf. *Derinza's case*, 229 Mass. 435, 442; *Commonwealth v. Kozlowsky*, 238 Mass. 379, 387. Doubtless the commissioners considered it advisable to compel the teacher to manifest in writing his election to retire, and for that purpose altered the language so as to make such writing a prerequisite to retirement. But this conferred no added power upon the board. There was an important substantive change in G. L., c. 32, § 10 (1), traceable through the preliminary report of commissioners to consolidate and arrange the General Laws, vol. I, pp. 166-7, St. 1918, c. 257, § 113, and the statutes by which the operation of the last cited act was deferred; but it did not affect the aspect of this section now under consideration.

The member's retirement became effective at the date fixed in his application, and was not affected by his subsequent death. Had he

lived, his allowance would have been computed as of that date, and upon the basis of his then age. His estate can take nothing under G. L., c. 32, § 11 (4). Any other course would, in the long run, bring results in contradiction of any mortality table which might be used as the basis of computing annuities under G. L., c. 32, §§ 8 (4) and 10 (3).

If any quarterly instalment of the retirement allowance, under G. L., c. 32, § 10 (3) (4) and (5), had accrued prior to the member's death, it is now payable to his estate, in accordance with G. L., c. 32, § 33. Whether any proportion of a quarterly instalment, corresponding to a period of less than a quarter, can be paid is a question of more difficulty. The statute, by making express provision for quarterly payments, has made the annuity, viewed strictly as an annual sum, apportionable to that extent. See *Wiggin, Admr. v. Swett*, 6 Met. 194, 202. But there is no express provision for the payment, pro rata, of part of a quarterly instalment upon the death of a member between quarter days; and at common law annuities and like payments are not apportionable. *Wiggin, Admr. v. Swett, supra*; *Dexter v. Phillips*, 121 Mass. 178, 180.

The general policy of this Commonwealth with respect to apportionment is now expressed in G. L., c. 197, § 27 (see report of the Joint Special Committee on Consolidating and Arranging the General Laws, vol. II, p. 1846, Note), as follows:—

“A person entitled to an annuity, rent, interest or income, or his representative, shall have the same apportioned if his right or estate therein terminates between the days upon which it is payable unless otherwise provided in the will or instrument by which it was created; but no action shall be brought therefor until the expiration of the period for which the apportionment is made.”

Whether or not this provision is directly applicable to a retirement allowance may be a question, but it would probably dominate the interpretation of the statute which we are considering. One of my predecessors rendered an opinion to that effect with respect to the pension of a retired county employee. The conclusion is perhaps more easily reached because of the consideration that these allowances are plainly intended for the daily support of the recipients. See *Dexter v. Phillips, supra*, 180.

I am of the opinion that the member's estate is entitled to receive the ratable proportion of the allowance for the period between the date of retirement and the date of death. Also, of course, any sum held by the board in excess of the maximum amount which could be used to found an annuity. See G. L., c. 32, § 9 (2).

Your third and fourth questions also concern a single situation:—

“In case of the death of the member under conditions exactly as stated above, except that the member elected an annuity to be paid in accordance with the provisions of G. L., c. 32, § 10 (3) (b), what amount is due the estate?

Shall the retirement board determine the retiring allowance to which the member was entitled and pay a pro rata amount of pension due to the date of death and also the contributions with interest of the member which were used to purchase the annuity, or shall the retirement board make no payment of pension but return to the estate the contributions with interest?”

P.D. 12.

As stated above, the member is to be considered retired from the date fixed in the application. His estate is entitled to receive any sum held in excess of the maximum which could be used to found an annuity; a pro rata amount of the retirement allowance for the period between retirement and death; and the difference between the portion thereof which is paid by way of annuity and the whole sum used to purchase the annuity. G. L., c. 32, § 10 (3).

It follows, of course, that the board must determine the retirement allowance in each case.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Attorney General — Advice to County Commissioners — Representative Districts — Organization of Commissioners for the Purpose of Redistricting.

It is doubtful whether county commissioners are entitled to seek opinions of the Attorney General, but when they are acting in connection with the division of the State into representative districts he may properly render a personal opinion with respect thereto. Mode of organization of county commissioners, including the filling of vacancies, and of proceedings for the purpose of establishing representative districts, discussed.

JUNE 23, 1926.

The County Commissioners of Hampden County.

GENTLEMEN:— You request my opinion as to the manner in which your board should be organized for the purpose of dividing Hampden County into representative districts. There is serious doubt whether county commissioners fall within that class of "state departments, officers and commissions" to whom the Attorney General is the duly constituted legal advisor. See G. L., c. 12, § 3. However, inasmuch as in this instance you are, while acting only within your county, participating, nevertheless, in the constitutional process whereby the entire State is divided into districts for the election of representatives, who are State officers, it seems to me that I may properly express to you my personal views, for such weight as you may see fit to ascribe to them. Cf. V Op. Atty. Gen. 9, 12.

Mass. Const. Amend. XXI assigns the first Tuesday of August, next, as the date at which the county commissioners are to assemble and proceed to make the apportionment. Whatever action you may take prior to that date will be unofficial, preliminary and without any legal significance. It is the board of commissioners as it may be constituted when it assembles on that date which will exercise the power delegated by the Constitution.

You state that there are at present two commissioners and two associate commissioners, there being a vacancy, created by death, in the office of one commissioner. If, prior to the first Tuesday of August, you see fit to fill that vacancy in the manner authorized by G. L., c. 54, § 144, a different state of affairs will then exist from that upon which your present questions are predicated. It is therefore not possible to give at this time an unqualified reply to your inquiry.

G. L., c. 34, § 12, provides as follows:—

"In case of a vacancy, inability to attend, or interest in a question

before the commissioners, or if any part of a highway relative to which they are to act lies within the town where a commissioner resides, the members qualified to act shall give notice to one or both the associate commissioners, as the case may be, who shall then act as commissioners. They may, however, receive a petition, issue an order of notice thereon, or take a recognizance, whenever two members are competent to act. If they cannot otherwise organize, residence shall not disqualify."

It is my understanding of the legislative intent that the board should, whenever it assembles, be composed of three members present and participating in its deliberations. When there is an associate commissioner able to attend and not disqualified, no two commissioners should undertake alone to organize and act. If there is a single vacancy, within the meaning of the above section, among the commissioners, the remaining two commissioners should summon one of the associate commissioners to attend, and, assuming that both associate commissioners are able to attend and not disqualified, have absolute power to choose which one to call in attendance. The board should never be composed of more than three persons. Only in case there is only one commissioner able to act, should both associate commissioners act as commissioners.

The foregoing will perhaps cover most of the contingencies as to membership which are likely to arise. I ought perhaps to say, in addition, that while the remaining commissioners may perhaps feel that, in view of the importance of their duties with respect to redistricting, they ought to take the necessary steps to elect a third commissioner under G. L., c. 54, § 144, I nevertheless find nothing in the Constitution or statutes which leads me to believe that they are any more bound to do so than they would be if confronted only by the ordinary routine duties of their office.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Commissioner of Public Health — Duties in Relation to Buildings of the Norfolk State Hospital.

Under St. 1926, c. 391, the Commissioner of Public Health is empowered to condition and equip the Norfolk State Hospital but not to erect new buildings.

JULY 2, 1926.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You request my opinion as to whether or not, under the provisions of St. 1926, c. 391, § 4, you are limited to the repair and equipment of existing buildings at the Norfolk State Hospital, or whether you are allowed to make additions.

Said section 4 reads as follows:—

"For the purpose of providing immediate care and treatment for persons suffering from cancer, the department is hereby authorized to make use of the Norfolk state hospital and may suitably condition and equip the same. Subject to appropriation, there may be expended for the purposes of this section during the current fiscal year a sum not exceeding one hundred thousand dollars."

It is my opinion that by this section the Legislature did not intend that you should proceed to erect any new buildings, but that you should proceed to use the buildings as they now exist at the hospital. However, I do not believe that you are precluded from connecting the administration building with one of the pavilions if it is a fact, found by you after study, that this is necessary in order suitably to condition and equip the hospital properly to care for and treat persons suffering from cancer.

Yours very truly,

JAY R. BENTON, *Attorney General.*

National Guard — Band — Civilian Function — Uniform — Payment.

The commanding officer of a battalion has no right to "order" its band to play at a civilian function. But if such band has received special permission of its company commander or other competent authority, it may play at a civilian function wearing the uniform of the National Guard, provided such service is rendered by the personnel of said band upon their own voluntary venture and enterprise and not by virtue of an official order or command; and provided further, that compensation for such service, if any, is not to be paid from any State or Federal fund or appropriation.

JULY 8, 1926.

Brig.-Gen. JESSE F. STEVENS, *The Adjutant General.*

DEAR SIR: — You request my opinion as to the right of the commanding officer of a battalion of infantry to order the band of said battalion to play at a civilian function, wearing the uniform of the National Guard. You state that the particular question applies to the band of the 372nd Infantry, which does not rate a band, but certain members of the headquarters company who are musicians have provided their own instruments and have volunteered to act as a band for the battalion. These men are regularly enlisted men in the headquarters company and are not rated as bandmen.

The law of this Commonwealth governing the organization and duties of the militia is found in G. L., c. 33, as amended by St. 1924, c. 465. Section 15 vests in the commander-in-chief the authority to prescribe in orders the organization of the Massachusetts Volunteer Militia, the designation and location of all units, and the numbers, titles, grades and duties of all officers and enlisted men, as he deems the interest of the service demands; provided, that the organization shall not conflict with the laws of the United States relating to the organized militia. Section 79 (b) provides: —

"The national guard of Massachusetts shall consist of such regiments, corps or other units as the commander-in-chief may from time to time authorize to be formed, all to be organized in accordance with the laws of the United States affecting the national guard and the regulations issued by the secretary of war."

In the absence of an order of the commander-in-chief or of a regulation of the secretary of war designating the playing at civilian functions as a part of the duty of militia bands or bands of the National Guard, I am of the opinion that the commanding officer of the battalion has no right to "order" the band in question to play at a civilian function.

There remains to be considered the question as to whether or not this band can lawfully play at a civilian function voluntarily while wearing the uniform of the National Guard. The use of the uniform of the United States army, navy, marine corps, revenue cutter service, coast guard and national guard is strictly regulated. See. St. 1924, c. 219. St. 1924, c. 465, § 112, provides that the uniforms, arms, equipments and other property provided by the Commonwealth shall be used only for military purposes, under regulations prescribed by the commander-in-chief, who shall provide how and where such property shall be kept and used, and shall be returned when ordered by the commander-in-chief. Playing at civilian functions cannot ordinarily be said to be "military purposes," but section 119 provides that "no soldier shall wear or use, except upon military duty or by special permission of his company commander or other competent authority, any uniform or other article of military property belonging to the commonwealth." Section 112 must be construed and interpreted in the light of section 119. It is a general principle of statutory construction that a body of laws enacted at one time is to be construed so as to constitute, so far as practicable, an harmonious entity.

I am accordingly of the opinion that if the band in question has received special permission of its company commander or other competent authority it may play at a civilian function, wearing the uniform of the National Guard, provided such service is rendered by the personnel of said band upon their own voluntary venture and enterprise and not by virtue of an official order or command; and provided further, that compensation for such service, if any, is not to be paid from any State or Federal fund or appropriation.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Forest Warden — Dismissal.

A forest warden appointed by a board of selectmen of a town, which appointment has been approved by the State Forester, may be removed or dismissed at any time at the pleasure of the board of selectmen which appointed him. The board of selectmen can thereafter appoint another person as forest warden, but such appointment will not be effective unless approved by the State Forester.

JULY 12, 1926.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:— You request my opinion as to whether or not a forest warden is subject to dismissal at any time at the pleasure of the board of selectmen which appoints him.

G. L., c. 48, § 8, as amended by St. 1921, c. 274, provides as follows:—

"The mayor in cities and, except as provided in section forty-three, the selectmen in towns shall annually, in January, appoint a forest warden, and forthwith give notice thereof to the state forester, in this chapter called the forester. Such appointment shall not take effect unless approved by the forester. When so approved notice of the appointment shall be given by the mayor or selectmen to the person so appointed. Whoever having been duly appointed fails within seven days after receipt of such notice to file with the city or town clerk

his acceptance or refusal of the office shall, unless excused by the mayor or selectmen, forfeit ten dollars. The same person may hold the offices of tree warden, selectman, chief of fire department and forest warden. Upon the failure of the mayor of a city or the selectmen of a town to make such appointment in the month of January, the forester shall notify the mayor or selectmen so to do, and if the mayor or selectmen fail to comply within fourteen days after receipt of such notice, the forester may appoint as forest warden in such city or town a suitable person, who shall be a resident thereof."

Under this statute the power of appointment of the forest warden is vested in the board of selectmen in towns, but such appointment does not become effective unless approved by the State Forester. The power of removal is incident to the power of appointment. The general rule is, that where a power of appointment is conferred in general terms and without restriction the power of removal in the discretion and at the will of the appointing power, and without notice or a hearing, is implied and always exists, unless restrained and limited by some other provision of law or by appointment for a fixed term.

If the exercise of the power of appointment is subject to the approval of another board or officer, this does not invest the officer or board whose approval is required with the power to appoint or make it or him responsible for the acts of the appointee, and such board or officer, by virtue of the requirement of its approval of appointment, is not vested with any power to remove. The power of removal remains with the appointing power, in this case the board of selectmen.

The statute does not provide for a fixed term for forest wardens, nor is there any express limitation upon the power of removal of such appointee, nor is there any evidence that the forest warden is a civil service appointee. I am accordingly of the opinion that a forest warden appointed by a board of selectmen of a town, which appointment has been approved by the State Forester, may be removed or dismissed at any time at the pleasure of the board of selectmen which appointed him. The board of selectmen could thereafter appoint another person as forest warden. Such appointment, however, would not be effective unless approved by the State Forester.

Yours very truly,

JAY R. BENTON, *Attorney General.*

License to maintain Garage and keep Gasoline — Street Commissioners of Boston — State Fire Marshal — Appeals — Time for Appeal.

No appeal to the State Fire Marshal lies from the granting of a garage permit by the street commissioners of the city of Boston, under St. 1913, c. 577, and St. 1914, c. 119.

Appeals to the State Fire Marshal from the granting of gasoline licenses under authority delegated by the Marshal must be taken within a reasonable time.

What constitutes a reasonable time is ordinarily a question of fact, but may under some circumstances be dealt with as a question of law. A delay of a month and a half after the issuance of the license, of ten days after the commencement of the work, and of seven days after actual notice to the appellant, may not be unreasonable.

JULY 23, 1926.

Mr. GEORGE C. NEAL, *State Fire Marshal*.

DEAR SIR:— You have requested my opinion as to the extent of your authority to entertain and decide an appeal from a decision of the board of street commissioners of the city of Boston granting a permit to erect a public garage and to keep, store and sell three thousand gallons of gasoline in an underground tank upon the garage premises, under the following circumstances:

The hearing before the street commissioners upon the petition for the permit was duly held. The charitable corporations which now appeal from the granting of the permit, having their premises upon the opposite side of the street and therefore not being abutters (*Foss v. Wexler*, 242 Mass. 277, 281), were given no notice of the pendency of the application for the permit. The permit was granted May 15, 1926. Work on the premises, pursuant to the permit, was begun June 21, 1926, and on June 24, 1926, an officer of one of the appellants for the first time received actual information that the building activities which had been begun contemplated the erection of a public garage. After communications back and forth between various officers of the appellants and conferences between the appellants and their attorney, the appeal was filed at the office of the Fire Marshal on July 1, 1926. Between the dates of June 21st and July 1st the permittee incurred expense in excess of \$2,000, of which \$1,124.40 represented the cost of surveying, labor and the work of carpenters, and the balance represented a commission paid upon the negotiation of a construction loan. (I find nothing either in your letter or in the testimony making certain beyond all doubt whether the construction loan was dependent upon the work actually going through, and whether this commission is or is not an amount which the permittee will be out of pocket even if the permit is finally refused.)

Although but a single permit was granted by the street commissioners and a single appeal therefrom was filed, the appeal comes before you in contemplation of law as though two separate permits had been granted, one for the erection and maintenance of a garage and one for the storage and sale of gasoline; the first such permit being founded upon the authority of St. 1913, c. 577, as amended by St. 1914, c. 119, and the second being founded upon the authority delegated to the street commissioners by the Fire Marshal, pursuant to G. L., c. 148, §§ 14, 15, 28, 30 and 31.

As to so much of the permit as is founded upon the 1913 statute, the authority of the board of street commissioners is "directly and exclusively vested in them" (*Foss v. Wexler, supra*, 279), and you have, in my opinion, no authority to entertain an appeal therefrom. There is nothing in your letter to indicate that the premises are located in a residential district, and that you therefore have the appellate power conferred by the Boston zoning act. Section 3, sub-section 9. See *Marcus v. Commissioner of Public Safety*, 255 Mass. 5. It follows that although the decision of *General Baking Co. v. Street Commissioners*, 242 Mass. 194, is entirely applicable to this aspect of the permit, it is not really necessary to invoke the doctrine of that case, for the more fundamental reason that no appeal to the Fire Marshal

from the decision of the street commissioners is authorized, expressly or impliedly, by St. 1913, c. 577, as amended. Indeed, the decision in the General Baking Company case, even though possibly reaching the same result, would have had to have been based on somewhat different reasons if it had been thought that the decision of the street commissioners was subject to review upon an appeal.

As to so much of the permit, however, as relates to the keeping and storing of gasoline, your authority to review upon appeal is unquestioned (G. L., c. 148, § 45), and I assume that the appellants come reasonably within the description of persons "aggrieved." Neither in the general laws nor in any rules or regulations promulgated by your department is to be found any provision regulating the time within which an appeal under this section must be taken. It must, therefore, be taken within a reasonable time, and, if taken within a reasonable time, it is, in my opinion, a matter of indifference whether between the date of the permit and the date of the appeal actual expense of construction has been incurred by the permittee. The holder of the permit has no absolute right to rely, in incurring such expense, upon the permit until the time for appeal is passed.

What constitutes a reasonable time is ordinarily a question of fact, but may be dealt with as a question of law where no room for dispute remains. *Orr v. Keith*, 245 Mass. 35, 39. In the present case the appeal was filed a month and a half after the issuance of the permit, but within ten days after the beginning of actual work on the ground and within seven days after actual knowledge of the nature of the work was brought home to a responsible representative of one of the appellants. While the primary question is not the amount of expenditure made by the holder of the permit in purported reliance upon his permit, but rather what was a reasonable time within which the appellant should act under all the circumstances, the fact that no obvious, elaborate and expensive construction was being carried on by the holder of the permit may be considered as one of the circumstances under which the reasonableness of the appellant's conduct is to be determined. I cannot advise you that, as matter of law, the appeal was or was not filed within a reasonable time. This question remains a question of fact for your determination, and if you determine that the appeal was seasonably filed, you then have authority to decide whether or not so much of the permit as relates to the storage and sale of gasoline should be denied.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Civil Service — Veteran — Extent of Preference in Appointment — Extent of Preference as to Continuous Employment or Reinstatement.

A veteran of the Civil War is entitled to absolute preference in appointment over all persons not veterans.

Other veterans are entitled only to preference in certification upon the eligible list for appointment.

When men are laid off, for lack of work or other temporary cause, a veteran is not entitled to preference in reinstatement ahead of others similarly laid off.

JULY 26, 1926.

Hon. PAYSON DANA, *Commissioner of Civil Service.*

DEAR SIR:—You ask my opinion upon certain questions relative to the extent of the preference given to veterans by G. L., c. 31, § 24, and related provisions.

A draft of a reply to these questions was prepared shortly after receiving your letter. It seemed to me, however, that if the pending suit to which your letter refers, brought by Alphonse Bois against the officials of Fall River, were to be decided speedily by the full bench of the Supreme Court, I ought not to seek to anticipate by an opinion the outcome of that case, with its manifest bearing upon your questions. Upon making inquiry of the clerk of courts at Taunton I find that the bill of exceptions of the defendants in that case, filed after the decision of a single justice that the writ of mandamus should issue in accordance with the veteran's contention, was filed one day late. What effect this may have upon the progress of the case and whether it may prevent its being heard and decided by the full bench, I do not undertake to predict. But it is apparent that it will be some time before any such decision is rendered, and that in the meantime you may require my advice upon these questions for its bearing upon your own duties. The situation is in this respect different from that which is referred to in the opinion of my predecessor (Attorney General's Report, 1922, p. 65) declining to give an opinion upon a controversy pending in the courts between third parties, where the inquiry bore no direct relation to the duties of the officer by whom it was made.

You will perceive that the answers to your questions are not in accord with the views which your letter attributes to various justices of the Supreme Judicial Court sitting at *nisi prius*. I do not feel that I can adhere to those views in the absence of a compelling decision by the full court. I must leave to you the question of what weight you will give to this advice under these circumstances.

1. You ask whether a veteran, within the meaning of G. L., c. 31, § 24, is entitled to a preference in appointment or employment in the service.

In *Corliss v. Civil Service Commissioners*, 242 Mass. 61, it was held that under G. L., c. 31, § 23, applying to positions classified under the civil service, the preference given to veterans extends only to priority upon the eligible lists, and does not entitle a veteran to preference in appointment, except so far as the position of the veteran upon the eligible list may of itself tend to effectuate such preference. The court said, at page 64:—

“It is obvious that the statute contains no provision which compels the appointment and employment of a veteran. While he is given preference on the certified lists submitted by the civil service commission, it seems apparent that the statute leaves to the appointing power the right to exercise his discretion in selecting an appointee therefrom.”

The conclusion reached in the decision from which these words are quoted flows naturally from the fact that the Legislature omitted from Gen. St. 1919, c. 150, and from the corresponding provisions of the General Laws relating to veterans' preference, all expressions

which might be thought to confer a right to preferential appointment or employment. The veterans to whom R. L., c. 19, § 21, had applied had been given by the express words of that section a right to be "preferred in appointment or employment to all persons not veterans." The preference thus given to veterans of the Civil War was expressly preserved by Gen. St. 1919, c. 150, § 5. See *Corliss v. Civil Service Commissioners*, *supra*, p. 64.

G. L., c. 31, § 23, was amended by St. 1922, c. 463, entitled "An Act providing a preference to disabled veterans in civil service appointments." That act provided expressly that "a disabled veteran shall be appointed and employed in preference to all other persons, including veterans," while leaving unchanged the words of section 23 as applying to veterans not disabled. Another illustration is thus furnished of the fact that whenever it has been intended to confer a direct right to preference in appointment the Legislature has used words plainly calculated to bring about that result.

The provisions of G. L., c. 31, § 24, relating to the labor service of the Commonwealth and of cities and towns, differ in no presently significant respect from the provisions of G. L., c. 31, § 23, relating to positions classified under the civil service. The name of the veteran is to be placed on the eligible list for the place for which he registers ahead of all other applicants. "The names of eligible veterans shall be certified for labor service in preference to other persons eligible according to the method of certification prescribed by the civil service rules applying to civilians." If, as was the case in *Corliss v. Civil Service Commissioners*, *supra*, there are certified, pursuant to the civil service rules, names to a greater number than the number of vacancies, I am of the opinion that the person whose duty it is to employ the men called for may select for employment any of the men whose names are so certified. He is not required to give preference to any veteran.

2. You ask whether a veteran is entitled to a preference in reinstatement, when laid off for lack of work or any other temporary cause, such as the lack of money.

The answer to this question is governed in spirit by the answer given to the foregoing question. The statutes contain no language dealing expressly with this problem. There seems, however, to be no good reason for assuming that the Legislature meant to confer an absolute right to preference as to continuous employment upon men to whom it gave no absolute right to preference as to initial employment. Statutes extending special privileges are to be strictly construed. *Phillips v. Metropolitan Park Commission*, 215 Mass. 502.

In *Ransom v. Boston*, 193 Mass. 537, it was held that a veteran of the Civil War employed in the labor service of the city of Boston, who had been refused further employment although there was work to be done which he was able and ready to do, was entitled to the issuance of a writ of mandamus to "compel the respondents to perform the public duty to continue his employment which rests upon them." There is language in the decision in that case and in the case of *Ransom v. Boston*, 192 Mass. 299, indicating that the court considered that the veteran was entitled to preference as to continuous employment. It is to be borne in mind, however, that the evidence of the legislative intent to confer such a preference was to be found in the express words of R. L., c. 19, § 21 — "shall be preferred in

the appointment and employment"; words which are not to be found in the present law, and the omission of which it may be assumed was intentional and advised.

It is therefore my opinion that a veteran is not entitled to a preference under the circumstances referred to in your second question.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Armory—Use of Armory Land for raising Money.

Under existing law pertaining to armories, military authorities in charge have no right to permit the use of armory land for the purpose of regularly engaging in the business of parking automobiles for hire, even though the purpose is to raise funds for the benefit of the military units stationed in the armory.

JULY 28, 1926.

Brig.-Gen. JESSE F. STEVENS, *The Adjutant General*.

DEAR SIR:—You request my opinion as to the right of the military authorities to permit the use of Commonwealth land adjoining an armory for the purpose of raising money for the company funds of the units stationed in the armory. You state that the specific instance is the use of the large field owned by the State, adjoining the Commonwealth Armory, for parking purposes, with the object of raising funds as aforesaid. It does not appear to what use such funds are to be put; that is, whether they are to be devoted to "public" or "private" purposes.

G. L., c. 33, § 52, as amended by St. 1924, c. 257, provides, in part, as follows:—

"Armories provided for the militia shall be used by the militia for the military purposes or purposes incidental thereto designated by the commander-in-chief."

The statute permits military units stationed in an armory to use the armory, without charge, for social activities or athletics, subject to the rules and regulations promulgated by the military custodian of such armory and approved by the Governor and Council, provided such use does not interfere with its military use. The statute expressly sets forth the purposes for which armories may be used temporarily, all of which purposes are public in their nature. The use of an armory as a parking place for privately owned vehicles, for hire, does not appear among the uses expressly permitted.

Armories are provided from funds raised by taxation, and are to be used for public purposes only. Any use other than for the military purpose for which they are created should be closely scrutinized to determine whether such use is public. If the principal purpose of the use of an armory is private, an incidental benefit to the public will not alter the fact that the use is for private rather than for public purposes and hence is not authorized by the statute.

There can be no distinction between the armory building itself and the land to which it belongs. The term "building" includes the real estate on which it is situated, unless the general meaning is modified by the language of the context. Accordingly, the same rule must be applied to the "armory land" adjoining the armory as pertains to the structure itself.

The question, in its last analysis, is one of taxation. The principle of law is definitely established that taxes can only be laid for public purposes. The power to tax is based upon and derived from the inherent purposes of the State as a social organization that is to exist for the benefit of all. It accordingly follows that in the absence of constitutional permission to the contrary, taxation must be for public as distinguished from private purposes. Accordingly, a serious question is presented as to whether or not the State may engage in any enterprise of a private nature, especially if the carrying on thereof involves the use of public funds or other public property. Attempted legislation expressly authorizing the use of public funds in the carrying on of enterprises of a private nature or in assisting private business has generally been held invalid. See *Lowell v. Boston*, 111 Mass. 454; *Opinion of the Justices*, 155 Mass. 598; *ibid.*, 182 Mass. 605; *ibid.*, 204 Mass. 607; *ibid.*, 211 Mass. 624; *Byfield v. Newton*, 247 Mass. 46, and cases cited.

It has been quite generally recognized that it would be a perversion of the function of government for the State to enter as a competitor into the field of industrial enterprise with a view to profit, it being obvious that in such case the private competitor would be compelled to pay taxes for the establishment and maintenance of a rival. This is contrary to our theory of government. Public money can only be used for a public purpose. In time of war, public exigency, emergency or distress the providing of food and other common necessities of life is a public function. See Mass. Const. Amend. XLVII. Even the police power of the State to regulate a business does not include the power to engage in carrying it on.

Obviously, the facts presented in your question are to be differentiated from the right of the Commonwealth or a municipality to sell or lease property no longer needed for the public purpose for which it was acquired.

The statute under consideration does not authorize armories to be used for any *private* purpose whatever. See Attorney General's Report, 1921, p. 69.

I am accordingly of the opinion that under the existing law pertaining to armories the military authorities have no right to permit the use of armory land for the purpose of regularly engaging in the business of parking automobiles for hire, even though the purpose is to raise funds for the benefit of the military units stationed in the armory.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Burial Permit — Death Certificate — Medical Examiners.

When a death certificate does not comply with the requirements set forth in G. L., c. 114, § 45, as amended by St. 1922, c. 176, in that it does not properly state the cause of death, a town clerk or board of health may properly refuse to issue a burial permit. The same requirements apply to certificates of medical examiners in this regard as are required of other officials.

The medical examiner can certify as to the cause and manner of death to the best of his knowledge and belief.

A medical examiner has no right to delay filing the certificate until judicial inquiries have been concluded and certified.

JULY 29, 1926.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR:—You request my opinion as follows:—

“1. Can a town clerk or board of health refuse to issue a burial permit as provided in G. L., c. 114, § 45, as amended by St. 1922, c. 176, when the death certificate does not properly state the cause of death?”

2. Are medical examiners any exception to the provisions of law which require a death certificate to be filed before a burial permit is issued, which contains a statement of the cause of death, so stated that it may be classified in accordance with the International Classification of Causes of Death, as required by G. L., c. 46, § 9, and c. 38, § 7?

3. Does the cause of death required by G. L., c. 38, § 7, mean anything more than what, in the opinion of the medical examiner, is the cause and manner of death, or can he delay filing the certificate referred to until the judicial inquiries have been concluded and certified?”

1. G. L., c. 46, § 1, provides that each town clerk shall receive or obtain and record in separate columns the following facts relative to . . . deaths in his town:—

“In the records of deaths, date of record, date of death, name of deceased, sex, color, condition (whether single, widowed, married or divorced), supposed age, residence, occupation, place of death, place of birth, names and places of birth of the parents, maiden name of the mother, disease or cause of death, defined so that it can be classified under the international classification of causes of death, place of burial, name of the cemetery, if any, and if deceased was a married or divorced woman or a widow, her maiden name and the name of her husband.”

The above provisions of law are mandatory. Section 9 requires a physician or registered hospital medical officer forthwith, after the death of a person whom he has attended during his last illness, at the request of an undertaker or other authorized person or of any member of the family of the deceased, to furnish for registration a standard certificate of death, stating to the best of his knowledge and belief the name of the deceased, his supposed age, the disease of which he died, defined as required by section 1, where the disease was contracted, the duration of his last illness, when last seen alive by the physician or officer and the date of his death. A penalty of fifty dollars is imposed upon any physician or any such officer neglecting or refusing to make such certificate or making a false statement therein.

G. L., c. 114, § 45, as amended by St. 1922, c. 176, provides that no undertaker or other person shall bury or otherwise dispose of a human body in a town until he has received a permit from the board of health or its agent appointed to issue such permits, or, if there is no such board, from the clerk of the town where the person died. It is expressly provided that:—

“No such permit shall be issued until there shall have been delivered to such board, agent or clerk, as the case may be, a satisfactory written statement containing the facts required by law to be returned and recorded, which shall be accompanied, in case of an original interment, by a satisfactory certificate of the attending physician, if any, as

required by law, or in lieu thereof a certificate as hereinafter provided. If there is no attending physician, or if, for sufficient reasons, his certificate cannot be obtained early enough for the purpose, or is insufficient, a physician who is a member of the board of health, or employed by it or by the selectmen for the purpose, shall upon application make the certificate required of the attending physician. If death is caused by violence, the medical examiner shall make such certificate. The board of health or its agent, upon receipt of such statement and certificate, shall forthwith countersign it and transmit it to the clerk of the town for registration. The person to whom the permit is so given and the physician certifying the cause of death shall thereafter furnish for registration any other necessary information which can be obtained as to the deceased, or as to the manner or cause of the death, which the clerk or registrar may require."

It is to be noted that the town clerk or board of health is expressly required not to issue a burial permit unless a "satisfactory" written statement "containing the facts required by law to be returned and recorded," accompanied by a "satisfactory" certificate of the attending physician, if any, as required by law, has been delivered to such board, agent or clerk, as the case may be. I am accordingly of the opinion that when the death certificate does not comply with these requirements, in that it does not properly state the cause of death, a town clerk or board of health may properly refuse to issue a burial permit, and I so answer your first question.

2. The duties of medical examiners are set forth in G. L., c. 38, § 6. It is therein provided that "medical examiners shall make examination upon the view of the dead bodies of only such persons as are supposed to have died by violence." Section 7 requires that medical examiners "shall in all cases certify to the town clerk or registrar in the place where the deceased died his name and residence, if known; otherwise a description as full as may be, with the cause and manner of death." G. L., c. 114, § 45, as amended by St. 1922, c. 176, governing the issuance of burial permits, expressly provides that "if death is caused by violence, the medical examiner shall make such certificate." It accordingly follows that the same requirements apply to certificates of medical examiners in this regard as are required of other physicians, and I so answer your second question.

3. G. L., c. 38, § 7, requires that the medical examiner in making his certificate to the town clerk or registrar, as therein required, shall certify "the cause and manner of death." I am of the opinion that this cannot be construed to mean anything more than that the medical examiner certifies the cause and manner of death to the best of his knowledge and belief. Obviously, he can do no more than that at the time. Further investigation may disclose that the cause and manner of death were different. The law provides the proceedings governing inquests and what is required in connection therewith (G. L., c. 38, §§ 8-13, as amended by St. 1923, c. 362, § 53). I am accordingly of the opinion that a medical examiner has no right to delay filing the certificate referred to until judicial inquiries have been concluded and certified, and I so answer your third question.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Local Boards of Health — Bakeries — Revocation of Approval of Building Plans and Equipment — Appeal.

Under G. L., c. 111, § 48, no appeal lies to the Department of Public Health or to the Superior Court unless a permit has been refused. The health department of the city of Boston cannot revoke its approval of a new bakery, granted under G. L., c. 111, § 48, if the owner or licensee has acted upon the strength of the permit and in good faith has incurred expense thereunder, where it does not appear he has violated the laws of the Commonwealth.

JULY 31, 1926.

DR. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR:— You request my opinion as to whether or not the health department of a city, having approved the building plans and equipment proposed to be used in the establishment of a new bakery, may subsequently revoke such approval if construction work has commenced between the time of granting such approval and revoking the same.

G. L., c. 111, § 48, provides:—

“No new bakeries shall be established unless the building plans and equipment proposed to be used have been approved by the local board of health. The board shall refuse a permit for such bakery if the building and equipment do not comply with sections thirty-nine to forty-five, inclusive, and sections two to six, inclusive, of chapter ninety-four and rules and regulations made thereunder, provided that any party in interest may appeal to the department or to the superior court. Said department or court may affirm, reject or modify the findings of the board, and the said board shall thereupon proceed in accordance with the order of the court or department.”

It would seem that under said section no appeal would lie to the Department of Public Health or to the Superior Court unless a permit was “refused.” It was evidently the intention of the Legislature that if the plans and equipment proposed to be used met with the approval of the local board of health, a permit should be granted. The board is only empowered to refuse a permit for a new bakery if the building and equipment do not comply with sections 39 to 45, inclusive, and sections 2 to 6, inclusive, of chapter 94, and rules and regulations made thereunder. There is no provision in the statute authorizing the board to revoke such a permit if it has been granted and acted upon. Where such power exists, it is usually conferred in express terms.

While permits respecting purely personal privilege or dependent upon governmental permission may be revoked for sufficient legal reason, even where the power to revoke is not expressly conferred, yet where, as in the present case, a regulation of the right of ownership and use of land is involved, a permit lawfully granted and acted upon cannot be revoked unless the power so to do is conferred in express terms.

In *General Baking Co. v. Street Commissioners*, 242 Mass. 194, 196, the Supreme Court of this Commonwealth says, at pages 196-7:—

“The erection and use of buildings for innocuous purposes cannot ordinarily be left to the untrammelled and unregulated discretion of local officers. By analogy of reasoning the taking away of a permit once granted to make valuable and expensive improvements upon land,

without hearing and without the statement of any grounds, in the absence of express statutory authority transcends the power of local boards. . . . When permission is obtained, the landowner reasonably may infer that, so long as he complies with the requirements under which the privilege has been granted, he may claim protection until further legislation impairs his rights. It follows that a permit of this nature lawfully granted and acted upon by the landowner cannot be revoked."

See also *Lowell v. Archambault*, 189 Mass. 70, and cases cited.

This statement of the law applies with equal force to the present case, and I am accordingly of the opinion that the health department of the city of Boston cannot revoke its approval of a new bakery granted under G. L., c. 111, § 48, if the owner or licensee has acted upon the strength of the permit and in good faith has incurred expense thereunder, where it does not appear that he has violated the laws of the Commonwealth.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Compulsory Automobile Liability Security — Insurance Policies, Binders and Endorsements.

A definite basic form of liability insurance policy is required by G. L., c. 90, § 34A, but to this endorsements of more extended coverage may be added.

The issuance of both a policy of liability insurance and a binder which together cover the total period of registration of a motor vehicle may constitute a compliance with the provisions of St. 1925, c. 346, as amended.

AUG. 19, 1926.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You have requested my opinion upon certain questions relative to motor vehicle liability insurance under the provisions of St. 1925, c. 346, as amended by St. 1926, c. 368, and of the General Laws.

1. Your first question is as follows:—

"May the Commissioner lawfully approve a form of motor vehicle liability policy under G. L., c. 175, § 113A, which covers against liability for death or personal injuries arising out of the operation of a motor vehicle on the ways of this Commonwealth, and which also covers against liability for death or personal injury occurring elsewhere, and/or against liability for damage to another's property and/or against loss to the insured car caused by collision, assuming that the limited coverage demanded by St. 1925, c. 346, is separately stated in the policy and is granted at the rate determined by the Commissioner under St. 1925, c. 345, and that the premium therefor is separately stated in the policy?"

A motor vehicle liability policy is defined by G. L., c. 90, § 34A (enacted by St. 1925, c. 346, § 2, as amended), its requisite provisions enumerated and a definite basic form of policy is set forth. No policy whose coverage is less in extent or whose terms are less favorable than the minimum requirements of the section can be approved, but it

does not appear to have been the intention of the Legislature to prohibit the combination in one policy of the required provisions with other lawful ones more extensive in character, when no confusion with the required provisions of the statutory "motor vehicle liability policy" arises. G. L., c. 175, § 113A (enacted by St. 1925, c. 346, § 4, as amended), provides that the motor vehicle liability policy may contain other provisions than those required by the section, when the same are not inconsistent with the terms of the chapter or with G. L., c. 90, § 34A, and are approved by the Commissioner.

I answer your first question in the affirmative.

2. Your second question is:—

"May the commissioner lawfully approve a form of rider or endorsement under said section 113A or 192 to be attached to a motor vehicle liability policy covering only against liability for death or personal injuries arising out of the operation of a motor vehicle on the ways of the Commonwealth, which form of rider or endorsement extends the coverage of the policy to liability for death or personal injuries arising from such operation elsewhere than on said ways and/or liability for damage to another's property and/or against loss or damage by collision?"

To extend the coverage of a motor vehicle liability policy by adding, by way of a rider or endorsement, new terms as to additional coverage of a lawful character not inconsistent with the required statutory provisions, and not in such a form as to be confused therewith, does not appear to be prohibited by the terms of the statutes. The same considerations as to legislative intent apply in relation to the extension of coverage by endorsement upon the statutory motor vehicle liability policy as are applicable to extended coverage in an original policy, raised by your first question. Riders are permitted to be used with the motor vehicle liability policy when not in conflict with the provisions of G. L., c. 175, and c. 90, § 34A. An extended coverage, such as is indicated in your question, is not of such a character as to be in conflict with such statutory provisions.

I answer your second question in the affirmative.

3. Your third question is:—

"May the Commissioner lawfully approve under said section 113A, as a 'form' of 'motor vehicle liability policy,' a form of automobile liability policy not containing the provisions required by said section, but bearing a form of rider or endorsement which incorporates therein the said provisions, or does said section and St. 1925, c. 345, § 4, contemplate and require that only a distinct basic form of policy—as distinguished from a form of policy bearing an amendatory rider or endorsement—containing said provisions shall be approved by the Commissioner?"

I am of the opinion that it was the legislative intent, as manifested in the provisions of St. 1925, c. 345, as amended, to require a definite and distinct policy form embodying in itself the terms set forth in the definition of "motor vehicle liability policy" in G. L., c. 90, § 34A (enacted by St. 1925, c. 346, § 2, as amended), that such an original basic form of policy is referred to in G. L., c. 175, § 113A (enacted by St. 1925, c. 346, § 4, as amended), and that a policy form originally containing other provisions brought within the statutory terms by a

rider is not such a form of policy as the Commissioner is empowered to approve. The word "policy," as used by the Legislature quite generally throughout St. 1925, c. 346, as amended, appears to have a definite and limited meaning, referring specifically to the policy or binder forms themselves rather than to the contract of insurance as such, evidenced thereby. G. L., c. 175, § 113A, refers to a specific form of basic policy defined in G. L., c. 90, § 34A, and its language as used is not broad enough to cover a contract of insurance prepared, as your question indicates, by a modification of an older form of policy, not the defined "motor vehicle liability policy," by an endorsement which creates new terms similar to those of the new statutory type.

I answer your third question to the effect that the approval by the Commissioner of Insurance, as a form of motor vehicle liability policy, of a policy and an endorsement such as you describe in the question is not within the powers vested in him by the statutes.

4. Your fourth question is as follows:—

"May the Commissioner lawfully approve under said section 113A or 192, a form of rider or endorsement designed to be attached to the present form of automobile liability policies issued in 1926 and to incorporate therein the provisions required by said section 113A, or, has he no authority to approve such a rider or endorsement on the ground that it is not to be attached to a 'motor vehicle liability policy' as defined in said chapter 346, and that the provisions of said section 192 relative to riders and endorsements apply only to riders and endorsements to be attached to policies, the form of which the Commissioner is by law required to approve?"

I am of the opinion that the provisions of G. L., c. 175, § 192, do not apply to the approval of endorsements to be attached to policies which themselves do not require approval. As stated in my answer to your third question, the approval of an old policy bearing an endorsement couched in the language of the motor vehicle liability policy and modifying the original policy terms may not be approved by the Commissioner as a "motor vehicle liability policy."

5. Your fifth question, which is in three parts, is as follows:—

"(a) If in your opinion the Commissioner may lawfully approve a form of rider or endorsement as stated in question 4, may a company attach to an automobile liability policy issued in 1926 and expiring in 1927 before December 31st, an approved form of rider or endorsement amending the contract to incorporate therein the provisions required by said section 113A, and concurrently with the attaching of such rider or endorsement may it issue to the applicant for registration a binder on a form approved under said section 113A, insuring him in respect to the operation of the motor vehicle from the date of expiration of said policy in 1927 to December 31, 1927?"

(b) May a company lawfully issue to an applicant for registration for the year 1927 a motor vehicle liability policy expiring in 1928 before December 31st, and in connection with the registration for the year 1928 may it issue to the applicant a binder under said section 113A, insuring him in respect to the operation of the car until December 31, 1928, from the date of expiration of the policy?"

(c) Or, does said section 34A permit or require the issuance of a certificate in respect to a policy or a binder, and not in respect to both, and should therefore any such amendatory rider or endorsement

referred to in (a) *supra*, extend the term of the policy issued in 1926 to expire on December 31, 1927?"

(a) My answer to your fourth question precludes an affirmative answer to this question.

(b) and (c) In so far as these questions relate to policies of a later date than 1926, which latter are covered by my answer to your fourth question, I am of the opinion that the issuance of both a policy and a binder covering the period for which registration is desired is lawful. The effect of a policy and a binder issued as you describe is the creation of coverage for the whole period of the registration. The purpose of the act is carried out by such a form of coverage, and G. L., c. 90, § 34A, gives to the words "motor vehicle liability policy" two specific meanings, the second of which is "binder," and the issuance of binders is provided for in G. L., c. 175, § 113A. The certificate to be issued by the insurance company, *which is to be accepted* by the Registrar (G. L., c. 90, §§ 34A, 34B), is defined as a certificate stating that a motor vehicle liability policy running for a period at least coterminous with the registration has been issued or a binder executed. Since "motor vehicle liability policy" is given, by section 34A, either the meaning of policy or binder, it would seem that, where the policy and the binder supplement each other as to coverage and are together coterminous with the period of registration, the requirements for the certificate were fulfilled by the issuance of both, and that under the statutory definition the certificate might state that coverage was by a "motor vehicle liability policy." It may have been assumed by the Legislature, when enacting chapter 346, that policies would be issued for exact calendar years, but an intent to forbid the use of policies and binders in the manner indicated by your question cannot be gathered from the language of the statute, more particularly in view of the phraseology and definitions contained in section 34A.

6. Your sixth question is as follows:—

"If in your opinion the company may lawfully amend an existing policy issued in 1926 and may lawfully issue a binder therewith, as stated in question 5 (a), or if in your opinion it may lawfully issue a motor vehicle liability policy and a binder, as stated in question 5 (b) *supra*, should the certificate issued by it under section 34A for filing with the Registrar of Motor Vehicles—

(a) recite that it has issued a motor vehicle liability policy running for a period at least coterminous with that of the registration; or,

(b) should it state that it has issued such a policy expiring on a certain date in 1927 and that it has also executed a binder running from said date of expiry until December 31, 1927, pending the issue of a policy; or,

(c) should it, or may it, issue two certificates, one in respect to the policy and one in respect to the binder?"

Inasmuch as by the terms of G. L., c. 90, § 2, the words "motor vehicle liability policy" mean either policy or binder, it would not seem to be improper or unlawful for an insurance company, issuing both to cover a period of registration, to certify to the issuance of "a motor vehicle liability policy" running for a period coterminous with the registration.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Insurance — Guaranty Insurance — Foreign Company.

A foreign insurance company authorized by its charter to write policies guaranteeing the fidelity of individuals and to transact other descriptions of ordinary guaranty business is empowered to act as surety on official bonds.

AUG. 28, 1926.

Hon. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR:— You have asked my opinion as to whether a foreign corporation engaged in the business of writing policies of insurance and guaranty of various sorts, and authorized by its charter to issue "policies guaranteeing the fidelity of individuals filling or about to fill situations of trust or confidence, and such other descriptions of ordinary guaranty business as the company may from time to time think fit to conduct," may be licensed by you to transact the kind of business specified in G. L., c. 175, § 47, cl. 4th (b), which is described in said clause 4th (b) as acting "as surety on official bonds and for the performance of other obligations."

G. L., c. 175, § 152, as amended, provides that "no foreign (insurance) company shall transact in this commonwealth any kind of business not specified in its charter," and section 107 makes the foregoing section applicable to companies becoming sureties on bonds.

The business of guaranty insurance, as conducted today, commonly embraces the writing of a wide variety of contracts, and the words "guaranty insurance" are not ordinarily used with any hard and fast meaning and have been said to be generic in scope and substance. *People v. Potts*, 264 Ill. 522. The business frequently covers a variety of somewhat similar types or forms of insurance, which are described generally by the use of the words "guaranty insurance," and more specifically by particular titles, such as, "fidelity guarantee insurance" or "fidelity insurance," which terms accurately denote the type of business authorized by said section 47, clause 4th (a), and the form of business which the charter under consideration in the first part of its section 2 (d) empowers the foreign corporation to transact. In the second part of section 2 (d) of the company's charter, joined to the first part by the conjunction *and*, the corporation is given a wider power, which embraces, in addition to that of writing fidelity guarantee insurance, that of transacting such other description of "guaranty business" as the company may desire to carry on, and, in my opinion, the power to act as surety on official bonds and for the performance of other obligations, as used in said section 47, clause 4th (b), is comprehended in this broad power given to the corporation by this second part of section 2 (d) of its charter.

The exact distinction which exists between contracts of suretyship and guaranty is not always carefully preserved either in statutes or in common usage, and the words are often used as though synonymous. Accurately used, guaranty insurance is a contract to indemnify against loss from the breach of an agreement, real or implied. Accurately used, "to act as surety" means to become collaterally liable for payment or performance by another. The obligations of the surety and the guarantor are very similar, but the latter's are greater in extent and comprehend in their scope all the advantages which flow to others from the contract of the surety. Guarantor and surety, as descriptive of an obligor, and corresponding adjectives describing a business cor-

poration or the kind of business to be undertaken by a company, are not infrequently used interchangeably.

A *surety company* has been defined as "a corporation incorporated for the purpose of making, *guaranteeing* or becoming a surety upon bonds or undertakings required or authorized by law." (32 Cyc. 303.)

The statement has been made that guaranty insurance may be regarded as merely a mode of compensated suretyship. 2 May on Insurance, § 540. "Surety insurance" has been said to be a synonym for guaranty insurance as commonly used in the business world. *People v. Potts*, 264 Ill. 522, 531. The business of guaranty insurance or guaranty business, as the words are used in the charter under consideration, cannot, without too narrow an interpretation of words, be said not to include the power to act as surety, itself a position similar to and less onerous than that of a guarantor.

The general laws (as amended) of the State of Connecticut, whose Legislature, by a special act, granted the instant charter, contain no specific differentiation between the formation of corporations for the purpose of guaranteeing the fidelity of persons and their formation for the purpose of acting as surety on bonds, as does G. L., c. 175, § 47, cl. 4, in respect to domestic corporations. In the absence of such differentiation in the laws of the State of incorporation, it cannot be said that the foreign corporation under consideration is not organized for the purpose of transacting both kinds of business specified in section 47.

Accordingly, I answer your question in the affirmative.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Municipalities — Expenditure of Money for the Purpose of Entertaining Conventions.

The authority of a town to appropriate and expend money raised by taxation is derived from the statutes of the Commonwealth, and such money can be expended only for public purposes sanctioned by law.

In the absence of a statute permitting municipalities to expend public moneys for the purpose of entertaining conventions, municipalities have no power to do so.

OCT. 6, 1926.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:— You request my opinion as to whether or not municipalities may legally expend sums of money for the purpose of entertaining conventions. I assume that by this question you mean to ask whether or not municipalities may lawfully pay out of the public treasury for the board, lodging, banqueting, transportation and entertainment of delegates and other members of such conventions while the conventions are being held within the municipality.

The law is well settled and laid down in numerous decisions in this Commonwealth that municipalities are creatures of the Legislature, existing solely to aid in the administration of government. Their powers respecting raising and expending money are strictly limited to the public purposes for which they are created. The money they expend is raised through taxation. Such money can be expended only

for a purely public purpose. To permit it to be spent otherwise would be taking private property for a private use, which is illegal.

In the case of *Whittaker v. Salem*, 216 Mass. 483, 484, 485, the court said:—

“However meritorious the project may appear to be either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it.”

There is no simple and merely logical test by which the limit can be fixed. It must be determined by practical considerations. The question is one of degree. See *Hubbard v. City of Taunton*, 140 Mass. 467.

The authority of a town to appropriate and expend money raised by taxation is derived from the statutes of the Commonwealth, and it can be expended only for public purposes sanctioned by law. It accordingly follows that in the absence of a statute permitting municipalities to expend public moneys for the purpose of entertaining conventions, municipalities have no power to do so.

G. L., c. 40, outlines the powers and duties of cities and towns. Section 1 provides that, except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special laws, and all laws relative to towns shall apply to cities. Section 5 contains the purposes for which towns may appropriate money. Clause 26 permits the appropriation of money for public band concerts or for music furnished for public celebrations, not exceeding \$500. Clause 27 permits towns to appropriate money for the celebration of the Fourth of July, or for the observance of an old home week or day, during which the town may conduct appropriate celebrations in honor of returning residents and other invited guests and hold exercises of historical interest, and for the celebration of the anniversary of its settlement or incorporation at the end of a period of fifty or any multiple of fifty years therefrom, and for publishing the proceedings thereof. G. L., c. 40, § 9, authorizes cities to appropriate money for the celebration of holidays. This is apparently as far as the Legislature has permitted municipalities to expend public money for entertainment.

In *Waters v. Bonvouloir*, 172 Mass. 286, the Supreme Court of this Commonwealth held that an appropriation of money to defray the expenses of a committee composed of certain officers of the city to attend a convention of American municipalities in another State was unauthorized either by the general laws or by the charter of the city, and that the city treasurer might be enjoined from the payment of the money. See also *Ducey v. Inhabitants of Webster*, 237 Mass. 497. The decisions of other States are in accord with this principle. *Stevens v. Sedgwick County*, 5 Col. App. 115; *Beauchamp v. Snider*, 170 Ky. 220; *Hitchcock v. State*, 34 So. Dak. 124; *James v. Seattle*, 22 Wash. 654. If it is unlawful to expend public money to pay the expenses of the members of a city government to attend a convention elsewhere, it would seem that it is likewise illegal for a municipality to pay the expenses for entertaining delegates from other places while visiting such municipality. The principle of law involved is the same in both cases.

I am accordingly of the opinion that, in the absence of a statute

expressly permitting municipalities to appropriate money raised by taxation for the purpose of entertaining conventions, such expenditures are illegal.

Very truly yours,
JAY R. BENTON, *Attorney General*.

Escape from Reformatory for Women — Felony or Misdemeanor.

An attempt to escape from the Reformatory for Women may be a felony or a misdemeanor.

The Reformatory for Women being an institution where women may be sentenced for a felony or a misdemeanor, the original sentence should be the controlling factor in deciding whether an escape from the Reformatory is a felony or a misdemeanor.

HON. SANFORD BATES, *Commissioner of Correction*. OCT. 6, 1926.

DEAR SIR: — You have requested my opinion as to whether or not an attempt to escape from the Reformatory for Women is a felony or a misdemeanor.

At the present time the definition of a felony has almost lost its significance. In *Jones v. Robbins*, 8 Gray, 329, it was decided that a definition of a felony or a misdemeanor depended upon the institution to which the criminal must be sent and not upon the nature of the crime. Under the recent statutes, prisoners may be sent to reformatories, training schools, prison camps, etc., for the commission of felonies, and this complicates the issue considerably. It is very difficult today to make a distinct classification in defining a felony or misdemeanor.

G. L., c. 274, § 1, defines a felony as “a crime punishable by death or imprisonment in the state prison,” and a misdemeanor as any other crime. The statutes providing that persons may be sent to a reformatory for felonies, however, complicate this issue. G. L., c. 279, § 19, provides that a woman convicted of a felony shall be sent to the Reformatory for Women. In *Moulton v. Commonwealth*, 215 Mass. 525, the court held that a woman felon may be sent nowhere but to the Reformatory for Women. In G. L., c. 279, § 16, it is provided that: —

“A female, convicted of a crime punishable by imprisonment in a jail or house of correction, may be sentenced to the reformatory for women.”

The statutes have provided for a separate prison for women.

In view of the statutes and the cases, the definition of a felony or a misdemeanor will be controlled by the place where the prisoner is to serve his sentence. The statutes provide that for a misdemeanor persons may be sentenced to the reformatory for an indeterminate term. The underlying principle is, of course, to give the prisoner an opportunity to reform and become a useful citizen of the community, and that that reform cannot be obtained unless there is an indeterminate sentence so that the necessary moral and educational training be accomplished.

In the case in issue we have a woman sentenced to the reformatory for fornication, and on her attempt to escape she is resentenced to the reformatory. There is nothing in our statutes which specifically states that escape from an institution is a felony. G. L., c. 268, § 16,

provides that the penalty for escaping or attempting to escape from a penal institution shall be punishment by imprisonment in the institution to which he was originally sentenced for a term not exceeding five years.

The original sentence was for a misdemeanor, and the prisoner was given an indeterminate sentence. Her attempt to escape is not any greater crime than her original crime, in view of the statute requiring the return to the "same institution." A felony being a crime that is punishable by imprisonment in State Prison and not the sentence itself, the institution to which a person may be sentenced being the controlling factor in deciding what is a felony or a misdemeanor, and the Reformatory for Women being an institution where a woman may be sentenced for a felony and a misdemeanor, and, further, there being nothing in the statutes classifying escapes from institutions, it seems to me to be equitable and fair that the original sentence should be the controlling factor in deciding whether escape is a felony or a misdemeanor. I cannot see how any other conclusion can be reached, where the statutes are silent in regard to classifying or distinctly stating whether an escape from an institution is a felony or a misdemeanor.

It is my opinion, therefore, that the escape from the Reformatory for Women in the case in issue was a misdemeanor, and that consideration of escapes from the Reformatory for Women should be governed by the original sentence given for the crime which was originally committed.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Sale, Rental and Leasing of Firearms — Non-Resident — License.

A non-resident of Massachusetts must obtain a permit to purchase, rent or lease firearms, as provided by St. 1926, c. 395, §§ 131A and 123.

OCT. 6, 1926.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR:— You request my opinion whether a non-resident of Massachusetts must obtain a permit to purchase firearms, as provided by St. 1926, c. 395, § 131A, and whether a non-resident must comply with the other provisions of the law as set forth in St. 1926, c. 395, more specifically section 123 of said act.

St. 1926, c. 395, § 123, is an act regulating the sale, rental and leasing of certain firearms and prohibiting loans of money thereon. The second condition of said section reads as follows:—

"That every licensee shall before delivery of a firearm make or cause to be made a true entry in a sales record book to be furnished by the licensing authorities and to be kept for that purpose, specifying the description of the firearm, the make, number, whether single barrel, magazine, revolver, pin, rim or central fire, whether sold, rented or leased, the date and hour of such delivery, and shall, before delivery as aforesaid, require the purchaser, renter or lessee personally to write in said sales record book his full name, sex, residence and occupation. The said book shall be open at all times to the inspection of the licensing authorities and of the police."

The eighth condition of said section provides:—

“That no firearm shall be sold, rented or leased to a person who has not a permit, then in force, to purchase, rent or lease a pistol or revolver issued under section one hundred and thirty-one A.”

The ninth condition provides:—

“That upon a sale, rental or lease of a firearm, the licensee . . . shall take up such permit and shall endorse upon it the time and place of said sale, rental or lease, and shall forthwith transmit the same to the commissioner of public safety.”

St. 1926, c. 395, § 131A, provides:—

“A licensing authority under the preceding section, upon the application of a person qualified to be granted a license thereunder by such authority, may grant to such a person, other than a minor, a permit to purchase, rent or lease a pistol or revolver if it appears that such purchase, rental or lease is for a proper purpose, and may revoke such permit at will. Such permits shall be issued on forms furnished by the commissioner of public safety, shall be valid for not more than ten days after issue, and a copy of every such permit so issued shall within one week thereafter be sent to the said commissioner. Whoever issues a permit in violation of this section shall be punished by imprisonment for not less than six months nor more than two years in a jail or house of correction.”

There is nothing in this law which makes any distinction relating to residents or non-residents of this State. The act reads that “persons” shall do or shall be prohibited from doing. It is very apparent that by the precise language used whoever purchases a firearm in Massachusetts must comply with the provisions of this act. This act is a prohibition to sellers, and makes it mandatory that full knowledge and information be given to the proper authorities before a person can purchase a revolver or a firearm. The purpose and scope is to prevent the promiscuous sale, rental or lease of firearms to irresponsible persons or criminals. The purpose is that the traffic of firearms shall be exposed to the scrutiny of the proper authorities and that criminals and irresponsible persons shall be unable to obtain firearms easily. This law makes it mandatory that records be kept, that persons purchasing, leasing or renting firearms must sign personally, in a book kept for that purpose, their name, residence, sex, etc., and must first show good reason why a permit should be issued to them for the purchase, rental or lease of firearms. It is very apparent, therefore, that the act was intended to apply to all persons.

In my opinion, this act applies to all persons who purchase, rent or lease a firearm in Massachusetts, whether resident or non-resident.

Very truly yours,

JAY R. BENTON, *Attorney General*.

*Compulsory Automobile Liability Security — Division of Highways —
Deposits by Owners of Motor Vehicles.*

Savings bank books may be accepted as deposits under G. L., c. 90, § 34E.

Securities deposited should be so prepared as to be immediately available for sale when necessary.

Liability for loss of deposits might arise by reason of negligence. All deposits are to be held for at least one year after expiration of registration of motor vehicles.

OCT. 22, 1926.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR:— You have asked my opinion in regard to seven questions connected with the practical operation of St. 1925, c. 346, as amended, commonly called the Massachusetts Compulsory Automobile Liability Security Act. The principal portion of the law applicable to a consideration of all these questions is now set forth in G. L., c. 90, § 34E.

Your first question is as follows:—

“Should the Division of Highways accept properly transferred savings bank account books as cash or security?”

Savings bank account books are evidences of indebtedness such as are included in the words of said section 34E, in which the applicant for registration is authorized to deposit with the Division, in lieu of cash, “bonds, stocks or other evidences of indebtedness satisfactory to the division, of the market value of not less than five thousand dollars, as security.” If such books are properly transferred so that they can be disposed of in the manner provided by the statute, if it becomes necessary to liquidate them, and are of the prescribed value, it is within the discretion of the Commission to accept them as security.

Your second question is as follows:—

“Where registered bonds, stock, etc., are deposited with the Division, is it necessary that the depositor cause the ownership to be transferred on the company’s books?”

Said section 34E provides a mode of turning the securities deposited with the Commission into money when necessary to liquidate, the mode being a sale by public auction. Bonds, stocks and other evidences of indebtedness deposited with the Division should be transferred on the company’s books, or such other action should be taken in regard to them as will make the right to possession and control, for the purposes of the statute, in the Commission apparent and the securities immediately available for sale by the Commission at any time when it may become necessary to liquidate, without the necessity of any further steps being taken by the depositor.

Your third question is as follows:—

“In case of loss by theft, or otherwise, of deposit, is the Division of Highways, or any member thereof, liable in any way for the amount lost?”

The individual members of the Division of Highways might be liable for loss of securities deposited with them, either by theft or otherwise, if such loss was due to the negligence of any member or members of the Commission, respectively, in regard to securing the reasonable safety of the same.

Your fourth question is as follows:—

“Should all deposits be held by the Division for one year after expiration of registration term?”

G. L., c. 90, as amended by St. 1926, c. 368, § 2, provides, in section 34G, that the Division shall retain cash or securities deposited with them, and shall not deliver the same or the balance thereof to the registrant, the depositor, or his order, until the expiration of the time within which actions, the payment of judgments in which are secured by such deposits, may be brought.

G. L., c. 260, § 4, as amended by St. 1926, c. 368, § 10, provides that "actions of tort for bodily injuries or for death, the payment of judgments in which is required to be secured by chapter ninety, . . . shall be commenced only within one year next after the cause of action accrues."

These sections make necessary the retention by the Division of securities for at least one year after the expiration of the registration term. Nor, where written notice is filed with the Division stating that an action has been brought against the registrant, may the securities be returned to the depositor until such action is finally disposed of, as provided in said section 34G.

Your fifth question is as follows:—

"If a deposit is made to cover registration of motor vehicle, and the owner during the fiscal year sells or exchanges said motor vehicle, procuring a new motor vehicle in place of the previously registered vehicle, is it necessary that additional cash or securities be deposited for the new vehicle, holding the previous deposit for one year after the date of disposal of the first vehicle?"

The intention of the Legislature, as disclosed in the statutes under consideration, is to provide that the prescribed amount of security shall be provided with relation to each motor vehicle registered. It would therefore be necessary, under the circumstances described in your question, that the deposit made to cover the motor vehicle originally registered should be held for at least one year after the expiration of the registration upon that particular car, and that a new deposit should be made to cover a second motor vehicle registered thereafter.

Your sixth question is as follows:—

"In case a certified check is deposited, should the check be converted to cash by the Division and reinvested in savings banks, or should it be held as a check in trust of the Division?"

A certified check is not evidence of indebtedness, within the meaning of said section 34E, and should be converted into money, and in the latter form retained and deposited by the Commission in accordance with the provisions of said section.

Your seventh question is as follows:—

"If a deposit is made to cover registration of a motor vehicle and the owner takes out liability insurance before the expiration of the year covered by the registration, can the deposit be returned when the insurance becomes effective, or must it be held, and for how long?"

The liability insurance policy taken out by the owner of the motor vehicle, as described in your seventh question, would not afford coverage to such owner for accidents which might have occurred prior to the taking out of the policy, and it would therefore be necessary for the Division to retain the deposited security for a period of at least

a year from the time when such policy was taken out, to protect persons who might have suffered injury due to the operation of the motor vehicle during such period.

Very truly yours,

JAY R. BENTON, *Attorney General*.

United States Apple Grading Law — Massachusetts Apple Grading Law — Interstate Commerce.

The United States Apple Grading Law refers to apples packed in barrels only, and does not apply to apples packed or repacked in this Commonwealth in boxes. The Massachusetts Apple Grading Law applies to apples packed in boxes, even though they purport to be branded in accordance with the United States Apple Grading Law.

The powers of the Commissioner of Agriculture under the Massachusetts Apple Grading Law can be exercised only while the apples are still within the jurisdiction of the Commonwealth of Massachusetts and have not been shipped in interstate or foreign commerce. Exportation is generally held not to begin until the product is committed to a carrier for transportation out of the State to the State of destination, or has actually started on its ultimate passage to that State. Until then it is reasonable to regard the product as not only within the State of its origin but as a part of the general mass of property of that State, and subject to its jurisdiction.

Apple inspectors, in performing their duties under the Massachusetts Apple Grading Law, are limited to apples packed or repacked in this Commonwealth but not in process of actual shipment out of the State. Violations of such law may be prosecuted by complaint entered in the municipal, district or police court or in the Superior Court of the Commonwealth.

Nov. 4, 1926.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:— You request my opinion on the following questions:—

1. Does the "United States Apple Grading Law" apply to apples packed or repacked in the Commonwealth in boxes, when the Federal law specifically provides for barrel containers?

2. In the event that the "United States Apple Grading Law" does not apply to apples packed or repacked in the Commonwealth because of failure to pack or repack in containers authorized by the Federal law, does the Massachusetts Apple Grading Law apply to apples packed or repacked in boxes branded in accordance with the "United States Apple Grading Law?"

3. How far would the activities of the apple inspectors of the Department of Agriculture, under G. L., c. 94, § 110, be restricted where apples packed or repacked in the Commonwealth and marked or branded in accordance with the "United States Apple Grading Law" but failing to comply with this law in respect to containers or packages, are shipped in foreign commerce and the consignor has a receipt from a foreign steamship company for said shipment of apples?

4. Does G. L., c. 94, § 114, refer only to apples that have actually

commenced their final movement for transportation from the State of their origin to that of their destination?

5. Does G. L., c. 94, § 110, apply to apples packed or repacked in the Commonwealth and packed and branded in accordance with the "United States Apple Grading Law" but not actually in their final movement for transportation from the State of their origin to that of their destination?

6. If G. L., c. 94, § 114, refers only to apples that have commenced their final movement from the State of their origin to that of their destination, and if apple inspectors of the Commonwealth may inspect and take samples from "barreled apples" marked or branded in accordance with the "United States Apple Grading Law" but not in the process of actual shipment out of the State, in what court or courts should alleged violations under said act be prosecuted?

1. U. S. Const., art. I, § 8, vests in Congress the power to "fix the standard of weights and measures." Acting under this power, Congress has enacted the United States Apple Grading Law, known as the Sulzer Bill (Public, No. 252, 61st Congress, H. R. 21480, approved August 3, 1912), which is an act to establish a standard barrel and standard grades for apples when packed in barrels. Section 1 of said act establishes the dimensions of the standard barrel for apples. Section 2 provides the standard grades for apples "when packed in barrels which shall be shipped or delivered for shipment in interstate or foreign commerce, or which shall be sold or offered for sale within the District of Columbia or the Territories of the United States." Said act refers to apples packed in barrels only, and does not provide grades for apples packed in boxes. It accordingly follows that the United States Apple Grading Law does not apply to apples packed or repacked in this Commonwealth in boxes, and I so answer your first question.

2. The Commonwealth of Massachusetts has an apple grading law which regulates the grading, packing, marking, shipping and sale of all apples packed or repacked in Massachusetts and intended for sale either within or without the Commonwealth. This act is found in G. L., c. 94. Section 100 provides the dimensions of the standard barrel and the standard box for apples. Section 101 provides the requirements of the standard grades of apples when packed or repacked in closed packages within the Commonwealth. While the United States Apple Grading Law does not apply to apples packed or repacked in the Commonwealth in boxes, the Massachusetts Apple Grading Law specifically does apply to apples packed or repacked in boxes, and I am accordingly of the opinion that the Massachusetts Apple Grading Law applies to such boxes even though they purport to be branded in accordance with the United States Apple Grading Law.

3. Under G. L., c. 94, § 110, the Commissioner of Agriculture is empowered to make and modify rules and regulations for enforcing the specified provisions of the Massachusetts Apple Grading Law, and is authorized, either in person or by his assistant, to have free access at all reasonable hours to each building or other place where apples are packed, stored, sold, or offered or exposed for sale, and further, may, in person or by his assistant, open each box, barrel or other container, and upon tendering the market price may take samples therefrom. This power can, of course, be only exercised over such apples while they are still within the jurisdiction of the Commonwealth of

Massachusetts and have not been shipped in interstate or foreign commerce, over which Congress has control. U. S. Const., art. I, § 8. Until said product has actually been "shipped" in interstate commerce, the Massachusetts Apple Grading Law applies thereto, and the powers and activities of the apple inspectors thereby granted may be fully exercised. The Massachusetts Apple Grading Law is not and cannot be a direct regulation of interstate or foreign commerce. It does not affect interstate or foreign commerce in any way and imposes no burden upon it. The statute is an attempt to protect the public against fraud in the sale of apples, and to insure to all like measure and grade when buying the same. See *Commonwealth v. Gussman*, 215 Mass. 349.

There is a point of time when goods cease to be governed exclusively by State law and begin to be governed and protected by the national law of commercial regulation, and that moment has been defined as the one in which they commence their final movement for transportation from the State of their origin to that of their destination. When a consignor has delivered his goods to a foreign steamship company and holds a receipt therefor, he has completed the last step in their final movement for transportation, and the goods themselves have become subject to the laws relating to foreign commerce. It accordingly follows that the activities of the apple inspectors under G. L., c. 94, § 110, cannot be exercised over such apples, and I so answer question 3.

4. G. L., c. 94, § 114, provides as follows:—

"Apples shipped in the course of interstate commerce and packed and branded in accordance with the act of congress approved August third, nineteen hundred and twelve, and known as 'The United States Apple Grading Law,' shall be exempt from sections one hundred and one to one hundred and seven, inclusive, one hundred and nine, one hundred and ten, one hundred and twelve and one hundred and thirteen."

By its terms this section applies only to apples actually "shipped in the course of interstate commerce," and I am accordingly of the opinion that it refers only to apples that have actually commenced their final movement for transportation from the State of their origin to that of their destination, and I so answer your fourth question.

5. It follows from my answer to question 3, that G. L., c. 94, § 110, applies only to apples packed or repacked in the Commonwealth but not actually in their final movement for transportation from the State of their origin to that of their destination, and, in my opinion, this is true regardless of the fact that said apples purport to be branded in accordance with the United States Apple Grading Law, inasmuch as under such circumstances such apples are not yet exports nor are they in process of exportation. Exportation is generally held not to begin until the product is committed to a carrier for transportation out of the State to the State of destination, or has actually started on its ultimate passage to that State. Until then it is reasonable to regard the product as not only within the State of its origin but as a part of the general mass of property of that State and subject to its jurisdiction. See *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, and cases cited; *Commonwealth v. Gussman*, *supra*.

6. Inasmuch as it is my opinion that G. L., c. 94, § 114, refers only

to apples that have commenced their final movement from the State of their origin to that of their destination, and have accordingly become objects of interstate commerce, apple inspectors, in performing their duties under the Massachusetts Apple Grading Law, are limited to apples packed or repacked in this Commonwealth but not in process of actual shipment out of the State. If in the course of their duties alleged violations of the law of this Commonwealth are discovered, such violations may properly be prosecuted by a complaint entered in the municipal, district or police court, or, if preferred, in the Superior Court of the Commonwealth, within whose jurisdiction the offense occurred, and, if found guilty, the offender is subject to the punishment provided by G. L., c. 94, §§ 112 and 113, and I so answer your sixth and last question. See G. L., c. 218, §§ 26-37.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Constitutional Law — Biennial Sessions.

The Constitution provides that the General Court shall assemble every year on the first Wednesday of January.

A change to biennial sessions can be made only by amendment to the Constitution under Mass. Const. Amend. XLVIII.

Nov. 11, 1926.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have asked me to advise you what would be the procedure in order to give the people an opportunity of voting on the question of biennial sessions, providing the Legislature refuses to put it on the ballot.

The Constitution provides that "the general court shall assemble every year on the first Wednesday in January." See Mass. Const., pt. 2nd, c. I, § I, art. I; Mass. Const. Amends. X and LXIV.

The only provision for amendment to the Constitution is contained in Mass. Const. Amend. XLVIII, under which a constitutional amendment may be made in one of three ways: (1) by initiative petition; (2) by legislative substitute; and (3) by legislative amendment. See Attorney General's Report, 1924, pp. 48 and 51. In order to be brought before the people, a proposal for amendment must first be introduced into the General Court, either by a member or by an initiative petition signed by not less than 25,000 qualified voters. Subsequent proceedings are governed by the provisions of Mass. Const. Amend. XLVIII.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Board of Registration in Pharmacy — Applicant for Examination — Conviction of Violation of any of the Laws of the Commonwealth — Assistant Pharmacist.

The Board of Registration in Pharmacy cannot properly refuse to examine an applicant for registration as a pharmacist or as an assistant pharmacist, although such applicant has been convicted of a violation of any of the laws of the Commonwealth, if such applicant has furnished satisfactory evidence complying with the law and regulations of the Board as to age, drug store experience

and citizenship; but the Board may withhold for a time or refuse registration as a pharmacist or as an assistant pharmacist to an applicant who has been examined and who has obtained a passing mark, if it appears to the Board that he has been recently convicted of a violation of any laws of the Commonwealth which have such bearing on the practice of the business of a pharmacist as in the opinion of the Board would disqualify him from registration.

A registered assistant pharmacist desiring to do business as a pharmacist shall, upon payment of five dollars to the Board of Registration in Pharmacy, be entitled to examination, and, if found qualified, shall be registered as a pharmacist and receive a certificate signed by the president and secretary of the Board.

Mr. WILLIAM F. CRAIG, *Director of Registration.*

Nov. 15, 1926.

DEAR SIR:— You request my opinion on the following questions:—

First.— Can the Board of Registration in Pharmacy refuse to examine an applicant for registration as a pharmacist or as an assistant pharmacist who has been convicted of a violation of any of the laws of the Commonwealth, the applicant having furnished satisfactory evidence complying with the law and the regulations of the Board as to age, drug store experience and citizenship?

Second.— Can the Board of Registration in Pharmacy withhold for a time or refuse registration as a pharmacist or as an assistant pharmacist to an applicant who has been examined and who has obtained a passing mark, because of court conviction of a violation of any laws of the Commonwealth?

Third.— An applicant for registration as an assistant pharmacist has been examined and registered as an assistant pharmacist; is it necessary under the statute that this applicant should wait for the expiration of three months before he may be examined for registration as a pharmacist?

I answer your questions in the order submitted.

First.— The law governing the examination of applicants for registration as pharmacists is contained in G. L., c. 112, § 24, as amended by St. 1924, c. 53. Section 27 empowers the Board of Registration in Pharmacy to hear all complaints made to it, against any person registered as a pharmacist, charging him in his business as a pharmacist with violating any laws of the Commonwealth. Section 28 empowers the full Board, sitting at such hearing, to suspend the effect of the certificate of registration as a pharmacist for such term as it fixes, if it finds such person guilty. Section 61, as amended by St. 1921, c. 478, authorizes the Board of Registration in Pharmacy, after a hearing, by a majority vote of the whole Board, to suspend, revoke or cancel any certificate, registration, license or authority issued by it, if it appears to the Board that the holder thereof is insane, or is guilty of deceit, malpractice, gross misconduct in the practice of his profession, or of any offense against the laws of the Commonwealth relating thereto.

It is to be noted that the power of the Board of Registration in Pharmacy, with respect to pharmacists convicted of violation of laws of the Commonwealth, is limited to registered pharmacists, not to applicants for registration as pharmacists. I am of the opinion that under the express language of G. L., c. 112, § 24, any person who desires

to do business as a pharmacist shall, upon payment of five dollars to the Board of Registration in Pharmacy, be entitled to examination. It accordingly follows that the Board of Registration in Pharmacy cannot properly refuse to examine an applicant for registration as a pharmacist or as an assistant pharmacist, although such applicant has been convicted of a violation of any of the laws of the Commonwealth, if such applicant has furnished satisfactory evidence complying with the law and regulations of the Board as to age, drug store experience and citizenship, and I so answer your first question.

Second. — A literal construction of St. 1924, c. 53, undoubtedly requires the Board of Registration in Pharmacy to examine any person applying therefor, upon payment of five dollars, and to issue to him a certificate as a pharmacist "if found qualified." While the qualification apparently refers to the examination, nevertheless, I am of the opinion that the Board of Registration in Pharmacy is vested with some discretion in order to prevent the registration of unfit persons as pharmacists. The certificate of the Board of Registration in Pharmacy is a license to the holder thereof to do a business which the Legislature has seen fit to regulate, under its authority to make laws for the welfare and good of the citizens of the Commonwealth, and to a large extent the Legislature has vested in the Board of Registration in Pharmacy the authority of executing those laws. No man has the right to conduct the business of a pharmacist or assistant pharmacist until he has satisfied the Board that he is "qualified."

You do not state just what laws of the Commonwealth have been violated by the applicant. Obviously, minor infractions of the law which have no reference or bearing upon the fitness of an applicant to engage in the business of a pharmacist would not be sufficient to cause the Board of Registration in Pharmacy to refuse registration, if such applicant has successfully passed his examination. Again, you do not state how long ago such convictions occurred, which might well have an important bearing upon the question. I am of the opinion, however, that the matter is entirely within the sound discretion of the Board of Registration in Pharmacy.

It accordingly follows that the Board of Registration in Pharmacy may withhold for a time or refuse registration as a pharmacist or as an assistant pharmacist to an applicant who has been examined and who has obtained a passing mark, if it appears to the Board that he has been recently convicted of a violation of any laws of the Commonwealth which have such bearing on the practice of the business of a pharmacist as, in the opinion of the Board, would disqualify him from registration.

Third. — G. L., c. 112, § 24, authorizes the Board of Registration in Pharmacy to grant certificates of registration as assistants, after examination, upon the same terms as are required for registration as pharmacists. The obligation to wait three months before taking an examination applies only to a person failing to pass an examination. It accordingly follows that a registered assistant pharmacist desiring to do business as a pharmacist shall, upon payment of five dollars to the Board of Registration in Pharmacy, be entitled to examination, and, if found qualified, shall be registered as a pharmacist and shall receive a certificate signed by the president and secretary of the Board.

Very truly yours,

JAY R. BENTON, *Attorney General.*

License to keep Gasoline — Procedure upon Applications — Board of Street Commissioners of Boston.

The board of street commissioners of the city of Boston, on application for licenses to keep gasoline, addressed to them as persons designated by the State Fire Marshal, under G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 1, to grant such licenses, proceeds under the provisions of G. L., c. 148, § 14, as amended, and not under the provisions of St. 1913, c. 577, §§ 1 and 2.

Nov. 22, 1926.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You state that the board of street commissioners of the city of Boston has been designated by the State Fire Marshal, under the provisions of G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 1, to grant licenses for the keeping, storage and sale of gasoline. You request my opinion as to whether, in giving notice of the time and place of hearings upon application for such licenses, the board of street commissioners proceeds according to the provisions of G. L., c. 148, § 14, as amended by St. 1925, c. 335, or according to the provisions of St. 1913, c. 577, §§ 1 and 2.

The provisions of St. 1913, c. 577, as amended by St. 1914, c. 119, relate to the regulation of the erection and maintenance of buildings as garages for the storage, keeping or care of automobiles in the city of Boston. They do not describe the motive power of the automobiles to be stored, kept or cared for. They require the issuance of a permit from the board of street commissioners before a building may be erected and maintained for such use. They regulate construction. They designate the authorization for such use a "permit," not a "license." They specify the details to be observed in application for and issuance of the permit, compliance with which details affects the jurisdiction of the board. See *Marcus v. Board of Street Commissioners*, 252 Mass. 331, 335. They vest authority to issue such permits in the street commissioners exclusively. *Foss v. Wexler*, 242 Mass. 277, 279. The permit, when granted, partakes of a personal privilege and grant which attaches to the land whereon the building is to be so erected and maintained. *Hanley v. Cook*, 245 Mass. 563, 565.

The authority of the board of street commissioners is entirely distinct from the authority of the Fire Marshal, in him vested by G. L., c. 148, § 30 (formerly St. 1914, c. 795, § 3), and exercised by the board on delegation to it by him under the provisions of G. L., c. 148, § 31. V Op. Atty. Gen. 718. Attorney General's Report, 1921, p. 320; 1922, p. 202. See also *McPherson v. Street Commissioners*, 251 Mass. 34, 38.

It follows, therefore, that, in the exercise of powers of the Fire Marshal, delegated to it by him, under the provisions of G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 1, to grant licenses for the keeping, storage and sale of gasoline, the board of street commissioners should proceed according to the provisions of G. L., c. 148, § 14, as amended by St. 1921, c. 485, § 3, St. 1924, c. 254, and St. 1925, c. 335, § 1, relating to such licenses, authority for the grant of which in the Metropolitan District is vested in the Fire Marshal by G. L., c. 148, § 10 (as amended by St. 1921, c. 273 and c. 485, § 2), and § 30.

Yours very truly,

JAY R. BENTON, *Attorney General.*

Permit to keep Gasoline — State Fire Marshal — Consideration of Welfare of a Community.

In determining the grant of a permit to keep gasoline, under G. L., c. 148, § 14, outside the Metropolitan District, the State Fire Marshal has not the same right to consider the inconvenience and annoyance of persons affected and the general order and welfare of the community, as well as fire hazard, as in making a decision upon an appeal to him, under G. L., c. 148, § 45, from a decision of a board issuing a license to conduct or maintain a garage within the district.

In the given case, where the sole objection to the granting by the State Fire Marshal of a permit to keep gasoline, under G. L., c. 148, § 14, outside the Metropolitan District, is danger to school children, anticipated to be occasioned by persons or vehicles in passing to, from or upon the site of the purposed keeping, the State Fire Marshal is confined to consideration of fire hazard.

Nov. 22, 1926.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You inform me that the board of selectmen of Needham has granted a license for the keeping, storage and sale of gasoline, acting under the statutory authority of G. L., c. 148, § 14, and not under any delegated authority of the Fire Marshal; that application was made to the Fire Marshal for a permit required by G. L., c. 148, § 14; that at the hearing upon the application the sole objection was that of danger to school children, and that the Marshal has the application under advisement. You request my opinion whether the State Fire Marshal, in determining the issuance of a permit, has the same right to consider not only fire hazard but the inconvenience and annoyance to persons affected and the general good order and welfare of the community, as the Attorney General advised him, in an opinion dated November 28, 1923, he had in making a decision upon an appeal from the action of the board of license commissioners of Cambridge in granting a license to conduct or maintain a garage and to keep or store volatile inflammable fluids in connection therewith.

G. L., c. 148, § 14, as amended by St. 1925, c. 335, provides, in part, as follows: —

“No building or other structure shall . . . be used for the keeping, storage, manufacture or sale of any of the articles named in section ten (inflammable fluids, etc.) . . . unless the . . . selectmen shall have granted a license therefor . . . after a public hearing, . . . and unless a permit shall have been granted therefor by the marshal or by some official designated by him for the purpose; . . . ”

There are two distinct prerequisites for the use of a building or other structure for the keeping of inflammables. One is a license; the other is a permit. Though the words are frequently employed as synonyms, the statute makes a distinction between them by differing appellations. One is issued by a local tribunal; the other is granted by an official at the State House, or by some local officer designated by him. G. L., c. 148, § 19, as amended by St. 1921, c. 485, § 4. One is determined by a power vested in an agency, the personnel of which is several; the other, by a power vested in an agency which is single.

Thus, in the process of determination of one, opportunities, enabling more embracing consideration, are more immediate both for the determining power and the general public; in the other, they are more remote. A public hearing and attendant formalities are prescribed antecedents to the determination of one, but not to the other. Thus, the issuance of one is statutorily premised upon an inquiry compulsory and comprehensive; in the grant of the other it is not.

The requirement of a license by the mayor and aldermen or selectmen for the storage and keeping in any city or town appears first in St. 1865, c. 285, § 1; the requirement of a permit by the State Fire Marshal in St. 1904, c. 370, § 3, which office was created by St. 1894, c. 444, § 1, with duties relating to investigations of causes and circumstances of fires occurring in the Commonwealth (§ 2). By St. 1905, c. 280, § 3, power to issue permits was vested in the Chief of the District Police. By Gen. St. 1919, c. 350, pt. III, all powers of the District Police were transferred to the Department of Public Safety, to be exercised, in certain respects relating to fire prevention, by the State Fire Marshal (§§ 99-104). Historically, therefore, they are distinct, in that the exercise of the power to grant permits for keeping and storage of inflammables in localities outside the Metropolitan District has been vested in appointive officials whose functions have related to police protection and fire prevention, and the power to issue licenses has been vested in officials, elected by the localities, whose functions related to the administration of general municipal business.

In cities and towns in the Metropolitan District the Fire Marshal has the power of selectmen to license persons or premises. G. L., c. 148, § 30. The power to issue a license and the power to grant a permit are vested therein in one and the same official. In the determination of issuance and grant the Fire Marshal may entertain considerations which the powers peculiarly vested in him in the district require for their exercise. In the exercise in the district of the powers of local tribunals to pass upon and determine whether a license should be issued, you were advised, in an opinion dated November 28, 1923, relating to the issuance of a license in the city of Cambridge, that the Fire Marshal had the right to consider the general good order and welfare of the community.

Cambridge is included in the Metropolitan District; Needham is not. G. L., c. 148, § 28.

In the pending application for the grant of a permit in a locality outside the district, wherein the exercise by the Fire Marshal of the power of issuance of a license is not invoked, I am of opinion that the Fire Marshal may consider the fire hazard only.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Corporations — Articles of Organization — Illegal Corporate Purposes.

The purpose of carrying on the business of wine and liquor dealers is not a lawful one which may be included in the powers of a corporation organized to carry on the business of hotel and innkeeper. The Commissioner of Corporations is not required to perform any duty in regard to articles of organization containing an illegal purpose, after their return to him by the Secretary of the Common-

wealth without the issuance of a certificate of organization by the latter.

The act of filing articles of organization with the Secretary of the Commonwealth does not of itself give corporate life to the body to which they relate, if they contain illegal purposes.

Nov. 24, 1926.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:—You have asked my opinion relative to your official actions in relation to the organization or attempted organization of a certain corporation.

You state that the purposes for which the corporation was to be formed, as originally contained in the articles of organization, were as follows:—

“To carry on the business of hotel and innkeepers, restaurant keepers, caterers, keepers of livery stables and garages for horse-less conveyances and motor vehicles of all kinds, warehousemen, tobaccoists, dealers in provisions, wine and liquor dealers, barbers and hair dressers, news dealers and proprietors or managers of theaters, opera houses and other places of public entertainment.

To purchase, lease, hire or otherwise acquire, to hold, own, maintain, improve, alter and to sell, convey, mortgage or otherwise dispose of real estate and personal property, and any interest therein, in or out of this state, and in any state in the United States or any foreign country, incidental to the purposes of the corporation.

To acquire use and to dispose of any real or personal property which may be deemed useful and convenient in the carrying out of the main purposes for which the corporation is formed and organized and in general to do things which may be necessary and desirable for the carrying on of a hotel business.”

You have advised me that the last sentence of such purposes, as it appears on the first page of your letter, was in fact added to the original description of purposes, contained in the articles of organization to which you gave your approval October 4, 1926, and transmitted to the Secretary of the Commonwealth on the same day, after the return to you, on October 19th, by the Secretary of the Commonwealth of such articles of organization. You have advised me that the addition of such sentence was made by you personally to the original articles of association, with the approval of some of the subscribers thereto but without any action on their part; that the articles of organization with the said sentence so written in by you, but without any action in relation thereto having been taken by the subscribers or any new endorsement of approval of the articles having been made by you, were again transmitted by you to the Secretary on or about October 19th; and that on November 4th the Secretary again returned the articles to you and declined to issue a certificate of incorporation.

The sentence added by you to the purposes contained in the original articles of organization, made subsequent to your approval of and after the transmission of such articles to the Secretary, was not properly a part of the articles of organization which were transmitted to the Secretary for filing, and a consideration of the effect of such additional sentence upon the purposes of the organization is not, under the cir-

cumstances, essential in answering the questions in your letter. The added sentence as given in your communication reads thus: "The business of dealing in wines and liquors prohibited under the laws is to be carried on only outside the United States and its possessions or dependencies."

The specific questions which you ask me in your letter are:—

1. Have I approved corporation purposes which are contrary to law?
 2. If not, shall I hand to the Secretary of the Commonwealth these articles of organization?

3. If I have approved articles of organization contrary to the law, and it appears that corporate existence begins on the filing with the Secretary of the articles of organization, what action shall I take as regards these articles of organization?

1. The main purpose of the proposed corporation, as described in the articles of organization, is "to carry on the business of hotel and innkeepers." All the other purposes are obviously intended, from the context, to be exercised in connection therewith. To carry on the business of "wine and liquor dealers," more particularly in relation to the general business of an hotel or innkeeper, is not, in my opinion, a lawful purpose for which a corporation may be organized in this Commonwealth.

The ordinary meaning attaching to the words "the business of wine and liquor dealers," without limiting or qualifying adjectives in relation to them, is not that of dealers in non-intoxicating beverages alone. The words in their natural use have not so limited a meaning but at least include, if, indeed, they do not invariably mean solely, dealers in intoxicating wines and liquors. All the modes of business which a "dealer" in such intoxicating beverages commonly carries on are made specifically unlawful by statute in this Commonwealth.

There is nothing in the articles of organization concerning the purposes of the proposed corporation which tends so to qualify or limit the words "the business of wine and liquor dealers" as to bring the proposed power within any of the existing exceptions to the illegality under our laws of dealing in wines and liquors. It is possible that under some circumstances a corporation might be organized for the purpose of carrying on the business of wine and liquor dealers, where, by a proper use of words in the articles of organization, it was made plain that the power given in this respect was so limited as to authorize the doing of nothing contrary to the laws of the State of incorporation or to those of any place where the corporation might seek to do business.

I answer your first question in the affirmative.

2. As to your second question, inasmuch as your approval has been given to articles of organization containing an illegal purpose, you are not required to perform any further duty in regard to such articles, now that they have been returned to you by the Secretary.

3. As to your third question: G. L., c. 156, § 11, is as follows:—

"The articles of organization, the agreement of association, and the record of the first meeting of the incorporators, including the by-laws, shall be submitted to the commissioner, who shall examine them and who may require such amendment thereof or such additional information as he deems necessary. If he finds that the provisions of law relative to the organization of the corporation have been complied with, he shall endorse his approval on the articles. Thereupon, the

articles shall, upon payment of the fee provided by section fifty-three, be filed in the office of the state secretary, who shall cause them and the endorsement thereon to be recorded."

G. L., c. 156, § 12, is, in part, as follows:—

"Upon the approval and filing as above provided of the articles of organization of a corporation organized under general laws, the state secretary shall issue a certificate of incorporation in the following form:

If such corporation is organized with capital stock without par value, the form of said certificate may be modified to conform thereto.

The state secretary shall sign the certificate of incorporation and cause the great seal of the commonwealth to be thereto affixed, and such certificate shall have the force and effect of a special charter. The existence of every corporation organized under general laws shall begin upon the filing of the articles of organization in the office of the state secretary. The state secretary shall also cause a record of the certificate of incorporation to be made, and such certificate, or such record, or a certified copy thereof, shall be conclusive evidence of the existence of such corporation."

Although section 12 states that "the organization of every corporation organized under general laws shall begin upon the filing of the articles of organization in the office of the state secretary," it does not follow that a body organized for an illegal purpose, among others, gains a corporate existence by the apparent performance of the acts required by the law as preliminary to incorporation. Where purposes are illegal a body has not been organized under general laws into a corporation, within the meaning of sections 6 and 12, and the act of filing articles with the Secretary, even when the articles have been approved by you, does not give corporate life to the body nor fix the date upon which its existence begins, more particularly in the absence of a certificate of incorporation.

I am not advised that the subscribers of the articles of agreement under consideration intend to attempt to exercise corporate powers without the certificate of incorporation which has been refused them. It rather appears from the letter of the Secretary to you of November 4th that they do not intend so to do, but, rather, plan to seek to incorporate under new articles which shall not contain mention of an illegal purpose. I am of the opinion that at the present time you are not required to take any action relative to the articles of organization.

Very truly yours,

JAY R. BENTON, *Attorney General.*

REPORTS UPON ORDERS OF THE LEGISLATURE.

REPORT OF THE ATTORNEY GENERAL IN RELATION TO DAMAGES FOR THE TAKING OF LAND IN QUINCY FORMERLY OWNED BY SAMUEL F. NEWCOMB, AND FOR THE TAKING OF LAND IN WOBURN FORMERLY OWNED BY PHILLIP H. DOHERTY.

Eminent Domain—Compensation by Act of the Legislature after Claims were barred by Statutory Limitation—Amount for Damages sustained.

The existence of a moral obligation to compensate for real estate taken by eminent domain, when remedy in the courts is barred by passage of time, is for the reasonable determination of the Legislature. The value of real property taken by eminent domain may be affected by its peculiar adaptation to a form of business previously conducted thereon, although the value of the business, as such, cannot be used as a measure of the damages resulting from such taking. The peculiar adaptability of a lot of land, taken by eminent domain, for a particular form of business, coupled with the fact that such adaptability was generally known to persons engaged in the real estate business at the time of such taking, is some evidence of the greater market value of such lot in comparison with other lots in its neighborhood of a similar character but without such peculiar adaptability.

DEC. 7, 1925.

The Attorney General was requested, by an order adopted by both houses of the Legislature, on March 17, 1925, to investigate and to report to the next annual session of the General Court upon the two matters referred to in such order, which reads as follows:—

“Ordered, That the Attorney General is hereby requested to investigate, and to report to the next annual session of the General Court, the following matters:—

(1) The subject-matter of House Document 442 of the current session, and to ascertain the amount of additional damages, if any, which should be allowed and paid by the Commonwealth for the taking of certain lands.

(2) The subject-matter of House Document 611 of the current session, more particularly to determine the amount of the damages, if any, which should be paid to Philip H. Doherty, of Woburn, as a result of the taking of certain lands by the Department of Public Works, and upon determining the amount of said damages, if any, to ascertain whether or not the city of Woburn will agree to assume and pay the same.”

House Document 442, referred to in the above order, is as follows:—

“Resolve extending the Time within which Awards for Damages may be contested in Connection with the Taking by the Commonwealth of Certain Land along Hayward’s Creek in the City of Quincy.

Resolved, That, the commonwealth having taken by eminent domain on March twenty-first, nineteen hundred and seventeen, certain land and buildings situated on East Howard street in the city of Quincy

bordering on Hayward's Creek, and formerly owned by Samuel F. Newcomb and later awarded damages for such taking, and certain parties whose rights were prejudiced by such awards having failed without fault of their own to appeal therefrom within the period provided by law, a further period of one year from the date this resolve takes effect is hereby granted for appealing from said awards."

House Document 611, referred to in the above order, is as follows:—

"An Act authorizing Philip H. Doherty to Bring Action against the Commonwealth for Certain Lands taken by Eminent Domain.

Philip H. Doherty of Woburn is hereby authorized to bring suit against the commonwealth for damages for the taking of land on behalf of the commonwealth by the metropolitan district commission for highway purposes in nineteen hundred and twenty-one, notwithstanding the provisions of section five of chapter two hundred and fifty-eight of the General Laws."

The Attorney General, in compliance with the foregoing order, has investigated the matters therein referred to, and respectfully reports thereon as follows:—

- (1) *Matter of House Document 442. — Land formerly owned by Samuel F. Newcomb on East Howard Street, Quincy.*

The lot of land in question is a rectangular parcel on East Howard Street, Quincy, near Hayward's Creek. It has a frontage of about sixty-four feet on East Howard Street, and a depth of about fifty-four feet. It contains two thousand, nine hundred and ninety-eight square feet. The soil and slope are of such a character that the whole lot could be built upon. It had on it at the time of the taking a wooden, one and one-half story building with a basement, used by the owner as a grocery store and lunch room, carried on by the two male heirs of Samuel F. Newcomb, the former owner of the property, for the benefit of the three heirs. The building was about seventy years old, with an ell about forty years old. It was well built, in good condition, adapted to the business which was carried on in it, and capable of use for a much larger volume of trade.

The owner of the land and building taken was Amey F. Newcomb, one of the three heirs of the late Samuel F. Newcomb, former owner. Herbert H. Newcomb and Arthur W. Newcomb, the other children and heirs of Samuel F. Newcomb, had conveyed their interests to her. The land was subject to a mortgage of \$200 to the Quincy Savings Bank.

The land was taken by the Commission on Waterways and Public Lands by eminent domain, under St. 1911, c. 748, on March 16, 1917.

An award was subsequently made to the owner by the Commission of \$1,159.76. This was on a basis of \$359 for the land, figured at about 12½ cents a foot on the land, and \$800 on the building. This award was not accepted by the owner, who employed an attorney at law to bring a petition for damages on her behalf against the Commonwealth. The attorney failed to bring the petition seasonably, and the owner finds that the statutory period in which the petition might have been brought has expired and that she is without remedy, although without fault on her part.

The mortgagee, the Quincy Savings Bank, also failed to bring a petition for damages seasonably, but has, notwithstanding, been paid

P.D. 12.

by the Commonwealth \$274.73, the amount of the mortgage and interest, by virtue of a resolve of the Legislature, Resolves of 1923, chapter 29.

The Newcomb parcel was assessed in 1916 for \$1,500. It appears that in making settlements in relation to other parcels of land in the vicinity the assessment values of the city of Quincy have been invariably treated as much too low by the Commission, settlements ranging from 72 to 235% in excess of such valuations. Two real estate experts in the employ of the Commission valued the Newcomb property for it, shortly after the taking, and reported values of \$2,000 and \$1,800, respectively.

A hearing was held by this office, at which the owner was represented by her two brothers, who made statements regarding the value of the land and introduced experts who also gave their opinions as to value. The Department of Public Works, as the successor of the Commission on Waterways and Public Lands, was represented at the hearing.

Herbert H. Newcomb and his brother Arthur, brothers of the owner, both of whom have lived in Quincy for many years and have had some knowledge of values of land in the vicinity and of amounts paid for various parcels, stated that in their opinion the fair market value of the parcel, as a whole, including land and building, was \$8,500. Alfred N. LaBrecque, of Quincy, and William E. Harvey, also of Quincy, having an expert knowledge of land in the vicinity, stated that in their opinion the fair market value of the land and building at the time of the taking was somewhat more than \$8,500, and that \$8,500 would be a low valuation.

While the value of the business carried on in the building cannot be used in determining the damages caused by the taking, under the law applicable to the statute of 1911, chapter 748,—it appeared that the owners made a net annual profit before the taking, from the business carried on in the store or building, of about \$3,000—yet the value of the property may be affected, and in this instance was affected, by its adaptation to the business which was carried on there. The building was the only store of its kind for a long distance in either direction on the street. The lot was situated in close proximity to industrial plants whose employees patronized places of the character of this store. The numbers of such employees were increasing rapidly even before the date of the taking, and the market value of this particular lot was enhanced by its availability for the purposes for which the building was adapted, and could be further adapted with the increasing demands of customers, which might easily have been anticipated by buyers of real estate at and before the time of the taking. For this reason the parcel of land owned by Miss Newcomb had a market value in excess of that which appertained at that time to unoccupied or more distant pieces of land in the same general locality. Taking into consideration all the known facts relative to the land belonging to Amey F. Newcomb, formerly owned by Samuel F. Newcomb, if the Legislature determines that there is a moral obligation upon the Commonwealth to pay the owner of this land, I am of the opinion that, in addition to the sum of \$1,159.76 awarded by the Commission, the further sum of \$2,840.24 should be paid as damages for the taking of the parcel of land, less \$274.73 which has already been

paid to the Quincy Savings Bank, which held a mortgage for a like amount, including interest thereon; and that accordingly, as no money has been paid to the owner heretofore, the sum of \$3,725.27 should be allowed and paid by the Commonwealth as damages for the taking of the land and building in question.

If the owner had recovered damages for the taking of her land and building as a result of a judgment obtained upon a petition brought in the Superior Court, she would have been entitled to interest at four per cent on the amount so recovered from the date of the taking, in this instance March 16, 1917. (G. L., c. 79, § 37.) Whether under all the circumstances relative to the taking of the Newcomb land there is a moral obligation upon the Commonwealth to pay interest upon the sum of \$3,725.27, which I have found to be the amount of Miss Newcomb's damages, is a matter for the determination of the Legislature, and one upon which I am not required to make a finding or give an opinion under the terms of the foregoing order.

(2) *Matter of House Document 611. — Land formerly owned by Philip H. Doherty of Woburn.*

This land was taken from Mr. Doherty for the purposes of State highway alteration and construction in Woburn by the Department of Public Works, by a taking under the provisions of G. L., c. 79, recorded in the registry of deeds of Middlesex County at Cambridge, on July 16, 1921. An award of \$200 was made him. Mr. Doherty was not satisfied with this award and employed an attorney, who brought a petition on his behalf in the Superior Court against the city of Woburn, within whose boundaries the premises were situated, to recover damages. An agreement to indemnify the Commonwealth against all claims and demands for damages sustained by any person whose property should be taken by the Commonwealth for the foregoing purposes had been made by the city of Woburn on June 13, 1921.

In the Superior Court, on demurrer to the petition against the city of Woburn, made upon the ground that the land owner's right to recover damages lay against the Commonwealth alone and not against the city, the demurrer was sustained and judgment was entered for the defendant city in 1923. It was then too late for Mr. Doherty to bring a petition for damages against the Commonwealth, the time within which such petition can be brought being limited, by G. L., c. 79, § 16, to one year from the time when the right to damages accrued — in this instance July 16, 1922 — and he was consequently left without further recourse to the courts for an assessment of damages.

The land in question consists of three parcels, referred to, respectively, as Nos. 3, 5 and 6.

No. 3 is a triangular piece of unused land, containing about 11,930 square feet, separated from the rest of the Doherty land by an old way or road on its northerly side. It was bounded on its easterly side by Lexington Street, and on the third side by the old highway layout of Cambridge Street. A part of this triangle was incorporated in the actual roadway of the new layout of Cambridge Street, and the remainder, about 5,000 square feet, furnishes an open area, triangular in shape, on the easterly side of the new highway at the junction of Cambridge and Lexington Streets and the old way or road referred to above.

No. 5 is a small triangular piece containing about 208 square feet

to the west of No. 3, near the southerly boundary of the Doherty land.

No. 6 is an irregular shaped piece of land running along and near the southwesterly boundary of the Doherty land, containing about 22,500 square feet.

The main Doherty lot from which these parcels were taken is a large one, having a dwelling house fronting on Lexington Street, and consists in the main of land suitable for pasturage and some cultivation.

An investigation was made to ascertain the market value of the land at the time of the taking, and a hearing was held at which Mr. Doherty stated his opinion to be that the triangular lot, No. 3, was at the time of the taking worth \$6,000, that parcel No. 5 was of no value, and that parcel No. 6 had a value of \$1,000. Two real estate experts appearing for Mr. Doherty stated that in their opinion the values were greater than those given by Mr. Doherty, and that lot No. 3 was worth at least \$7,000 in 1921, and lot No. 6 \$2,000. The land within the triangle, parcel No. 3, which was unimproved, had been assessed for three years preceding the taking at the sum of \$10, or at the rate of about one-eleventh of a cent a foot; and the land of which parcels Nos. 5 and 6 were a part, the main Doherty lot, had been assessed at the rate of about one-third of a cent a foot. It is a fact that assessed valuations in the vicinity prior to 1922 were low as compared to market values, and these assessments afford no real standard of comparison in determining the market value of the Doherty parcels in 1921. The assessment of \$10 on lot No. 3, unimproved land, was merely nominal in character.

The damage to the remaining land of Mr. Doherty by change of grade, destruction of a portion of a stone wall and damage to trees was very slight; it suffered no diminution in value as a result of the taking.

The reason for the high value assigned to the triangular piece, lot No. 3, was based upon its situation at the junction of two streets, its bordering before the taking on the old location of the main highway, Cambridge Street, which even then was being increasingly used by automobiles, and the unusual adaptability of the lot for the purposes of an automobile service station. While it is true that the new location of the main highway through the westerly part of lot No. 3 has increased and emphasized the desirability of the use of the land for such a purpose, nevertheless, it is a fact that the situation of this lot in 1921 was such that it had a market value far in excess of the rest of the Doherty land. Its situation for the purposes of an automobile service station was unexcelled by any other plot in the neighborhood. This fact was known to persons interested in real estate, and a price commensurate with its peculiar value could probably have been obtained in the open market before the taking. The petitioner was contemplating the development of the lot for service station purposes himself immediately before the taking.

I find that the fair market value of all the land taken from Philip H. Doherty in 1921, including damage to the remaining land, was \$5,690, and that if the Legislature determines that there is a moral obligation upon the Commonwealth to pay Mr. Doherty a sum as damages sustained by reason of the taking referred to in House Document 611, I am of the opinion that such sum of \$5,690 should be paid to him.

The city of Woburn, through its mayor and city council, has not

expressed a willingness to pay any part of a sum to be appropriated directly for the benefit of Mr. Doherty, but the city council has passed an order, notwithstanding the veto of the mayor, that purports to agree to indemnify the Commonwealth for the payment of any sum which may be paid by virtue of authority given under House Document 611. The terms of House Document 611 are such as would, if the measure were enacted, enable Mr. Doherty to bring a new petition for damages, and the payments by the Commonwealth to which the order relates by reference to House Document 611 would appear to be only such as were made in consequence of the bringing of such new petition.

Mr. Doherty has expressed a desire to have reconveyance made to him of that portion of lot No. 3 which has not been actually incorporated within the travelled limits of the new highway. This, as has been already described, is a triangular piece on the easterly side of the new highway at the junction of Cambridge and Lexington Streets. It contains about 5,000 square feet, is most advantageously placed for the purposes of an automobile service station, and on account of its situation has today, by reason of the increased motor traffic on the new highway, a market value at least equal to the value of the whole of the original lot No. 3 at the time of the taking. Mr. Doherty states that he would feel himself fully compensated by the reconveyance of this remaining piece of land without any pecuniary award. The Department of Public Works has indicated that it considers a reconveyance as undesirable and inconsistent with the public welfare in relation to the maintenance and use of the highway at and near the junction of Cambridge and Lexington Streets.

As in the matter of the taking of the Newcomb land, it is proper for me in this instance to call attention to the fact that if Philip H. Doherty had recovered damages for the taking of his land as a result of a judgment obtained upon a petition brought in the Superior Court, he would have been entitled to interest at four per cent on the amount so recovered from the date of the taking, in this instance July 16, 1921. (G. L., c. 79, § 37.) Whether under all the circumstances relative to the taking of Philip H. Doherty's land there is a moral obligation upon the Commonwealth to pay interest upon the sum of \$5,690, which I have found to be the amount of his damages, is a matter for the determination of the Legislature and one upon which I am not required to make a finding or give an opinion under the terms of the joint order of the Senate and House of Representatives directed to me.

Respectfully submitted,

JAY R. BENTON, *Attorney General.*

REPORT OF THE ATTORNEY GENERAL ON THE CLAIM OF FRED T. DOERPHOLZ AND OTHERS FOR DAMAGES IN CONNECTION WITH THE RELEASE OF SEWERAGE WATER FROM THE BELCHERTOWN STATE SCHOOL SEWAGE DISPOSAL BEDS.

Belchertown State School—Damage to Cattle of Adjoining Owners by Reason of Pollution of a Brook.

On certain facts found, the Commonwealth may be said to be responsible for damage caused to property of one whose lands adjoin its lands.

The Commonwealth is not so responsible for certain other damage to such property which cannot be attributed to acts of misfeasance or non-feasance on the part of the sovereign or its officials.

DEC. 10, 1925.

This matter came before the last session of the Legislature on a petition of Fred T. and Mabel M. Doerpholz and Wladyslaw and Stella Pinski, asking for damages by reason of sewerage water escaping into a brook from the disposal beds on the grounds of the Belchertown State School. The matter was referred to me under the terms of the resolve. I designated Assistant Attorney General James H. Devlin to make an investigation. A hearing was held, at which the parties were present and testified. A thorough investigation was made and information sought from all proper and available sources.

Taking the claim of the petitioners literally, as printed in House Document No. 475, it is for damages by reason of sewerage water escaping and released from the sewerage disposal beds, or which may escape or be released from said beds, as now maintained. As a matter of fact, the damage complained of occurred principally during the summer of 1923, at which time the sewerage disposal beds had not been put into use. However, from all the facts it appears that the brook had been contaminated prior to the time the disposal beds were put into use, and, that being the case, I make the following findings and recommendations.

I find as a fact that the filter beds were put into use on October 13, 1923, that they have been operated since without interruption, and that there has been no further contamination of the brook by the State institution. I also find as a fact, based on the records of the State Department of Public Health showing results of analyses of sewage (settled sewage and effluent taken at least once a month since November, 1923), that since the operation of the filter beds the effluent has been purified to a high degree, and that no damage could have been caused to anyone due to sewage from the State institution after the filter beds were put in operation.

I find, however, that prior to October 13, 1923, and beginning substantially in October, 1922, sewage from the Belchertown State School did discharge directly into a brook which ran through the school property, and also through the farms of the petitioners. I find specifically as follows:—

On October 25, 1922, 17 employees began to live at the main group of buildings. From this time until October 13, 1923, the sewage from the main group discharged into the brook running through the property.

November, 1922, found 228 patients and 40 employees at the main group.

March 31, 1923, found 302 patients and 73 employees at the main group.

May 24, 1923, the sewage from the Farm Colony buildings was turned into the main sewerage line, which discharged into the brook.

June, 1923, the population increased to 400 patients and 96 employees.

On October 12, 1923, there were 479 patients and 96 employees at the main group.

On October 13, 1923, the discharge of sewage into the brook was stopped and the filter beds put into operation, since which time they

have operated without interruption, and there has been no further contamination to the brook by sewage.

There is no doubt, therefore, that in 1923 this brook was badly polluted, from a water supply standpoint, on account of this sewage. It is for the year 1923 that the petitioners really intend to claim damages. The claim of each petitioner is substantially the same. Each claim is double headed and somewhat contradictory. Each petitioner claims a substantial loss in that his cows would not drink the water, and that they had to be brought out of the pastures to wells and places other than the brook. The petitioners had no books or accounts in substantiating their claim, but testified that the milk supply fell off about fifty per cent for the spring, summer and fall of 1923. I find that their contention that the cows refused to drink this water over a long space of time in 1923, and that their milk supply substantially decreased, is borne out by the facts. Each petitioner, however, has another item of damage, somewhat inconsistent. While their first claim is for damages because the cows would not drink the water, their second claim is based on the theory that certain cows did drink it and were thereby injured. Each petitioner claims that by reason of this polluted water a valuable cow aborted. I find no evidence to substantiate this claim as one properly chargeable to the State institution. While the brook was polluted by the school with house sewage, such pollution produces the germ known as colon bacilli, and there is no testimony that such germ can be the cause of abortion in a cow. On the contrary, all expert testimony that I have been able to gather shows that the abortion germ is a different and a specific one, and no analysis of this brook water has disclosed its presence in 1923. And if it were present, it must have come from some other premises than those of the Commonwealth, because it is not found in house sewage. This brook was polluted before the State institution was put there, and drainage from other premises had been going into it.

The petitioners introduced some vague testimony as to the depreciation in value of their farms. I find no depreciation in value due to any act or fault of the institution. The filter beds are working properly, the effluent from them shows a high degree of purification, and the institution is not now polluting the brook.

The petitioners Mr. and Mrs. Doerpholz testified that to the best of their estimation they lost thirty quarts of milk a day for nine months. Taking their outside figure of $8\frac{1}{2}$ cents a quart, and figuring a month as thirty-one days, their damage would amount to \$711.00.

The petitioners Mr. and Mrs. Pinski testified that their milk supply was gradually reduced in 1923 from eighty quarts a day to forty in July and during the summer, rising to sixty in the fall. That would average a loss of thirty quarts for both summer and fall, and while no figures were given for the spring, it is perhaps fair to assume that their loss for the spring months would also so average, as the pollution existed then. On this computation, the Pinski damage is \$711.00.

I find by investigation that there have been awards to three other persons by the Legislature of 1924, namely, Henry M. Lamson, Roderrick L. Weston and Joseph Soja. These awards have been accepted and the amounts paid. Outside of the petitioners in this matter and the three persons referred to above, I do not find that there are any other claims for damage presented, or any possible ones. There is one

other piece of property adjoining the land of one Soja and within the former polluted area through which this brook runs for a distance of one hundred and ninety feet. The man who owned it, up to a few months ago, never made a claim, and presumably has none. Of course, the present owner has no claim.

I therefore recommend that the petitioners Fred T. and Mabel M. Doerpholz be awarded the sum of \$711.00 as damages, and that the petitioners Wladyslaw and Stella Pinski also be awarded the sum of \$711.00 as damages, for such pollution of the brook referred to as was caused by sewage from the Belchertown State School.

Respectfully submitted,

JAY R. BENTON, *Attorney General.*

OPINION UPON APPLICATION OF CHARLES F. WEED AND OTHERS FOR LEAVE TO FILE INFORMATION IN THE NAME OF THE ATTORNEY GENERAL IN THE MATTER OF THE COTTAGE FARM BRIDGE.

Information in the Name of the Attorney General — Cottage Farm Bridge.

An information for the protection of public rights should only be filed with an eye singly to the public welfare.

The exercise of that right has been confided to the discretion of the Attorney General.

In an information against the Metropolitan District Commission, the Attorney General would also have to act as attorney for the Commission.

Such information, for that reason, should not be filed if there is any other remedy.

The fact that the Legislature will convene within a week and can take action is sufficient reason for not filing such an information.

The Legislature intended to empower the Commission to fill in part of the Charles River in the process of constructing Cottage Farm Bridge.

DEC. 31, 1925.

This was an application signed by Charles F. Weed and others requesting the Attorney General's permission to begin in his name some suit or proceeding against the Metropolitan District Commission, hereinafter called the Commission, to prevent the Commission from filling in the Charles River, in the process of constructing the Cottage Farm Bridge, so as to narrow the river at that site to approximately 170 feet. The authority to construct the bridge is contained in St. 1921, c. 497, as amended by St. 1924, c. 416.

Two public hearings on the question of granting the permission were held by me, of each of which ample notice was given, and at each of which evidence was presented and arguments heard. Two petitions were received by me urging me not to permit the use of my name in such suit in order that the construction of the bridge might not be delayed. It developed at the second hearing before me that in 1924 hearings were held by the committee on ways and means and the committee on metropolitan affairs with respect to a bill amending the act of 1921, which was subsequently enacted (St. 1924, c. 416), and that at these hearings plans were presented showing clearly that the river would be narrowed in the course of constructing the bridge to approximately 170 feet, and that the existing opening in the river was only approximately 80 feet. The identical plans shown to each of these legislative committees were submitted to me at the second public hearing. It also appeared that the question of filling the river so as to narrow it to 170 feet at that point was discussed at great length at each of these legislative hearings, and it was made clear that the Commission proposed so to fill in the river. It further appeared that one of the petitioners, a member of the Legislature, filed a bill with the 1925 Legislature which, if enacted, would specifically prohibit the filling in of

the river at the site of the Cottage Farm Bridge, and that the legislative committee to which the bill was referred reported "leave to withdraw." The petitioner did not see fit to attempt on the floor of the House to substitute the bill for the committee's adverse report.

At the outset, I deem it advisable to point out that the Attorney General, in determining the application for the use of his name, should not consider the questions whether the proposed bridge is in the best location, the amount of the appropriation for the bridge, whether it is possible to build a bridge within the appropriation, the solution of the bridge problem, the type of the bridge, or similar questions which were brought to his attention at the public hearings.

The right to institute proceedings of the character here sought for the protection of public rights is one which should be used with an eye singly to the public welfare. The exercise of that right has been confided to the discretion of the Attorney General. The petitioners seek to have a proceeding instituted in the courts, in the name of the Attorney General, against the Commission. In such suit the Attorney General would be the plaintiff and would be in full charge of the case against the Commission. But G. L., c. 12, § 3, provides, in part:

"The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth . . . All such suits and proceedings shall be prosecuted or defended by him or under his direction. . . . All legal services required by such departments, officers, commissions . . . in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction."

Under the provisions of that act, therefore, the Attorney General, having instituted a suit against the Commission, would be compelled to appear for the Commission, file an answer in its behalf, defend it, and render it all legal services required by it. The Attorney General would thus at the same time be the plaintiff, attorney for the plaintiff and attorney for the defendant. This, in and of itself, presents a serious difficulty in permitting the use of his name in a suit against said Commission. If, however, public rights were affected and the public welfare demanded such action, it would not, in my opinion, present an insurmountable difficulty, provided no relief and no remedy could be obtained but at the hands of the court. But there is another remedy and another mode of relief. The Legislature will convene in less than a week. The Commission derives its power from the Legislature, and if the Commission is threatening to act outside the scope of its power, speedy and decisive relief can be obtained at the hands of the General Court. The chairman of the Commission stated at the public hearing before me that it would be impossible to prepare all of the details so as to be ready to sign a contract for the construction of the bridge before February. The petitioners, therefore, have approximately a month, and perhaps a longer period, within which to obtain relief at the hands of the Legislature if the Commission is usurping power.

Under these circumstances I am of the opinion that for the fore-

going reasons alone I should not permit suit to be instituted in my name against the Commission, and should remit the petitioners to their remedy at the hands of the Legislature.

But there are other impelling reasons. St. 1921, c. 497, authorized and directed the Commission to construct four bridges, one of which was the Cottage Farm Bridge. This act was amended by St. 1924, c. 416, which affected the Cottage Farm Bridge alone. It is manifest that in the construction of any bridge dredging or filling may be necessary, and the river may have to be widened or narrowed at the site of construction. This has been the usual practice. The other three bridges authorized by the act have either been completed or are in process of construction. At the River Street Bridge the river was narrowed 131 feet; at the Western Avenue Bridge the river was narrowed 68 feet; at the Arsenal Street Bridge the river was widened 1 foot; at the North Beacon Street Bridge, built under another similar act, the river was narrowed 113 feet; at the Larz Anderson Bridge, built under another act, the river was widened 17 feet. The amount of the widening or of the narrowing of the river necessarily depends upon all the problems arising in the specific situation.

In considering St. 1924, c. 416, the committees on ways and means and on metropolitan affairs had before them the plans calling for a narrowing of the river by a fill on each side to approximately 170 feet. The question of the fill was discussed and considered at length. With that question specifically before them chapter 416 was enacted. The act provides:—

“The commission may construct and thereafter shall maintain and renew without expense to the railroad company an *underpass of suitable width and headroom* under said new location on the southerly side of said Charles River Basin in *connection with a proposed shore drive along said basin*.

The commission may at its own risk and expense loam the portions of said new location which the railroad company may not require from time to time for the tracks and appurtenances of said branch and maintain plants and shrubs in such portions.”

The underpass, the proposed shore drive along the basin, the loaming and the maintaining of plants and shrubs fit in exactly with the plans submitted to the legislative committees and with the fill then and now proposed. It seems clear to me that the Legislature intended to authorize the Commission to make the proposed fill if the Commission finally deemed that advisable, but, for obvious reasons, did not bind the Commission to the proposed plan. Moreover, the Legislature of 1925, when specifically requested to prohibit the fill, refused to do so. That being so, I do not deem it advisable to seek to prevent the Commission from exercising a power which, in my opinion, the Legislature intended it to have. If my view is incorrect, if the Legislature did not intend to confer this power, the remedy is simple. The Legislature about to convene can prohibit the proposed action.

I am not unmindful of the rule of law that the fact that specific plans and suggestions were considered by the legislative committees might not be admissible in evidence in court where the construction of the statute was involved. *Boston & Providence R.R. Corp'n. v. Midland R.R. Co.*, 1 Gray, 340. But that rule of law does not bind me in exer-

P.D. 12.

cising my discretion whether I ought to permit a suit to be instituted. In the exercise of that discretion I cannot close my eyes to the actual facts.

The question of the Cottage Farm Bridge has been before the General Court at various times over a period of years. The agitation with respect to its location has been widespread and conspicuously in the public eye. The Legislature by various acts has undertaken to deal with the problem. To throw the question into the courts at this time might mean great delay before the question is finally determined. The remedy by applying to the Legislature is direct, simple, speedy and effective. Taking everything into consideration, I am of the opinion that in the exercise of my discretion I ought not to permit suit to be instituted in my name against the Metropolitan District Commission.

JAY R. BENTON, *Attorney General*.

William D. Turner, for the Relators.

INDEX TO OPINIONS.

	PAGE
Armory land; use for raising money	136
Attorney General; authority to advise county commissioners	127
Back Bay lands; release of restriction	44
Belchertown State School; damage to cattle of adjoining owners by reason of pollution of a brook	170
Billboards, regulation of; signs advertising persons occupying or business done on premises	61
Boston & Maine Railroad; issue of convertible bonds; approval of Department of Public Utilities	99
Boston, city of; authority of the street commissioners as to regulation of traffic; boulevard stop regulation	57
Boston Consolidated Gas Company; impairment of contract	85
Boston Elevated Railway Company; impairment of contract	94
Sale of elevated structures	54
Boulevard stop regulation; authority of the street commissioners of Boston as to regulation of traffic	57
Conflict with statutory requirements as to vehicles at intersecting ways	93
Burial permit; death certificate; medical examiners	137
Civil service; suspension; separation from the service	77
Veteran; extent of preference in appointment and as to continuous employment or reinstatement	133
Constitutional law; amendment of existing law with reference to the trustees of the Massachusetts Agricultural College	87
Arbitrary discrimination; exemption of individual from the operation of a general law	76
Biennial sessions of the Legislature	156
Boston Elevated Railway Company; sale of elevated structures	54
Charitable foundations; legislative power; application of trust funds to a foreign purpose	57
Legislative power; change in terms of a charitable trust; Smith's Agricultural School; Trustees of Derby School	67
Enlargement of powers and purposes of charitable corporations as to holding property	79
County and Boston retirement systems	104, 117
Eminent domain; authority of Legislature to lease property	55
"Taking"	113
Estate tax	96
Foreign telephone or telegraph companies; right to do business in Massachusetts	46
Governor and Council; separate or collective confirmation of appointments	38
Impairment of contract; Boston Consolidated Gas Company	85
Boston Elevated Railway Company	94
Initiative and referendum; additional information to voters as to measures submitted	91
Initiative petitions; objections	41
Legislative power; payment to family of a deceased member of the House of Representatives of balance of yearly salary	111
Payment to one who stood <i>in loco parentis</i> to a deceased soldier	92
Maintenance of athletic field by a city; admission fee	63
Retroactive tax laws	65
Special law; colleges	81
Taxation; corporate franchise tax; foreign telephone company	69
Telephone or telegraph companies; authority to transfer locations	46
Time of taking effect of a statute	112
Corporations; articles of organization; illegal corporate purposes	161
Change of name; certificate	45

Cottage Farm Bridge; use of Attorney General's name	174
County commissioners; organization for the purpose of re-districting	127
Eminent domain; compensation by act of the Legislature after claims were barred by statutory limitation	165
Firearms; sale, rental and leasing; non-resident; license	149
Forest warden; dismissal	130
Governor and Council; separate or collective confirmation of appoint- ments	38
Health, local boards of; bakeries; revocation of approval of building plans and equipment; appeal	140
Highway Fund; accrediting of State treasury receipts; general revenue and special funds	51
Appropriations	39
Inspection of apples in this Commonwealth by an inspector from the State where the apples were grown	73
Insurance; compulsory automobile liability security; classification of owners of motor vehicles for purposes of liability insurance; rates for policies and bonds	118
Deposits by owners of motor vehicles	150
Policies, binders and endorsements	141
Guaranty insurance; foreign company	145
Service agreements	72
License; maintenance of garage; time within which appeals to State Fire Marshal from decisions of the street commissioners of Boston may be made	131
Sale of gasoline; public ways; curb pumps; structure	82
Storage of gasoline; authority of State Fire Marshal to rescind action of the street commissioners of Boston; notice	75
Board of license commissioners of Cambridge; disapproval of license granted by the State Fire Marshal	98
Consideration of welfare of a community	160
Procedure by the street commissioners of Boston upon applications	159
Time within which appeals to State Fire Marshal from decisions of the street commissioners of Boston may be made	131
Massachusetts Agricultural College; acceptance of gift	62
Powers and duties of trustees	87
Massachusetts apple grading law; interstate commerce	153
Medical examination of prisoners; travel	43
Medical examiners; death certificate; burial permit	137
Motor vehicles; forfeiture for transportation of intoxicating liquor	74
Registration by partnerships	123
Sale of business by dealer, manufacturer or repair man; rebate; registra- tion fee	103
Municipalities; expenditure of money for the purpose of entertaining conven- tions	146
National Guard; band wearing uniform; civilian function	129
Pardons; report submitted to the Legislature by the Governor; commutation of sentence	49
Pharmacy, Board of Registration in; applicant for examination; conviction for violation of any law of the Commonwealth	156
Probate records; photostatic copies	52
Public Health, Commissioner of; duties in relation to buildings of the Nor- folk State Hospital	128
Public officer; clerk of the Supreme Judicial Court	59
Reformatory for Women, escape from; felony or misdemeanor	148
Regulation of traffic by cities and towns; approval by Registrar of Motor Vehicles	84
State Retirement Association; compulsory membership; temporary employ- ment; clerk of the Supreme Judicial Court	59

Taxation; corporate franchise tax; foreign telephone company . . .	69
Estate tax	96
Exemption of veterans	66
Income tax; authority of Commissioner with reference to certain agree- ments as to payment of taxes	38
Retroactive tax laws	65
Teachers' Retirement Association; effect on payments of death of applicant for retirement occurring before action taken upon application; ap- portionment of instalments	124
United States apple grading law; Massachusetts apple grading law; interstate commerce	153
Weekly wages paid by check; valid set-off	114

RULES OF PRACTICE

IN INTERSTATE RENDITION.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:—

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(b) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to

the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1927





The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1927



The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL, State House.

Attorney General.

ARTHUR K. READING.

Assistants.

FRANKLIN DELANO PUTNAM.

JOSEPH E. WARNER.

ROGER CLAPP.

CHARLES F. LOVEJOY.

MELVILLE FULLER WESTON.¹

SAMUEL H. LEWIS.

RALPH W. STEARNS.

EMMA FALL SCHOFIELD.

GERALD J. CALLAHAN.

JAMES S. EASTHAM.²

R. AMMI CUTTER.³

VINCENT J. ZEO.⁴

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

¹ Resigned June 30, 1927.

² Appointed July 1, 1927.

³ Appointed March 16, 1927.

⁴ Appointed March 31, 1927.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 18, 1928.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my annual report.

The cases requiring the attention of this Department during the year ending November 30, 1927, to the number of 9,077 are tabulated below:

Corporate franchise tax cases	597
Extradition and interstate rendition	319
Grade crossings, petitions for abolition of	57
Indictments for murder	45
Land Court petitions	123
Land-damage cases arising from the taking of land by the Department of Public Works	75
Land-damage cases arising from the taking of land by the Metropolitan District Commission	58
Land-damage cases arising from the taking of land by the Department of Mental Diseases	4
Land-damage cases arising from the taking of land by the Department of Conservation	1
Land-damage cases arising from the taking of land by the Department of Public Health	3
Miscellaneous cases	1,715
Petitions for instructions under inheritance tax laws	51
Public charitable trusts	229
Settlement cases for support of persons in State hospitals	64
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	5,736

Fortunately, the past year has witnessed a great decrease in the commission of serious crime. This condition, I believe, has been brought about by a more determined effort on the part of all law enforcement agencies of the Commonwealth to procure the immediate apprehension, speedy trial and adequate punishment of the criminal.

The citizens of the Commonwealth and all who have contributed to the decrease in crime are to be congratulated. Nevertheless, the need of constant study of all phases of the criminal problem is apparent.

The Sacco-Vanzetti case has concentrated the attention of the Nation, and, indeed, of foreign countries, upon our methods of law enforcement, and there can be no doubt that, as a result of the deliberate misrepresentation and propaganda which accompanied this case, the fair name of the Commonwealth has been brought into a measure of disrepute with many unintelligent or misinformed persons.

Acting under the provisions of G. L., c. 12, § 11, providing that the Attorney General "may, with the approval of the governor and council, prepare and publish such reports of capital trials that he deems expedient for public use," I have recommended that the entire record, including all the evidence presented in the Sacco-Vanzetti case, be published, in order that the true facts in the case, which, in my opinion, cast no reflection upon Massachusetts justice, be preserved for all time.

One highly beneficial result of the Sacco-Vanzetti case is the intensive study which has been given to the general subject of murder trials, in all their ramifications, by the Judicial Council.

Recommendations of Judicial Council.

The following are recommendations of the Judicial Council relative to murder trials, which, I believe, should be enacted into law without delay:

1. That motions for a new trial or any other proceeding, subsequent to the entry of an original appeal in the Supreme Judicial Court, should be made directly to that court.

Such a law will undoubtedly have a strong tendency to prevent counsel for the accused, in murder cases, from filing a succession of baseless motions for a new trial and will permit disposition by the full court without unnecessary delay of all petitions for unusual remedies.

2. That the Supreme Judicial Court be empowered to stay the execution of a sentence of death from time to time for definite and stated periods pending the final determination of any judicial question arising in or out of the case in which the sentence has been imposed.

Such a provision would relieve the Governor and Council of the necessity and responsibility of granting respites in capital cases.

3. That St. 1922, c. 508, be repealed, thus limiting the time within which motions for a new trial in murder cases may be filed, to one year, which rule applies to other felonies.

4. That the functions of the Supreme Judicial Court on appeal be so broadened that it will be empowered to pass upon the whole case, including questions of law or fact, and will have power to order a new trial upon any ground if the interests of justice appear to require it. This is the New York rule, and not greatly dissimilar from the English practice. During the Sacco-Vanzetti case our criminal system was subjected to criticism upon the ground that the Supreme Judicial Court could only concern itself upon appeal with questions of law.

I also concur in the following general recommendations of the Judicial Council:

1. That special justices should not be permitted to practice in their own courts. The practice undoubtedly tends to undermine confidence in the courts and makes it difficult for the presiding justice to preserve judicial impartiality.

2. That G. L., c. 223, §§ 16 and 86, be amended so that papers served upon defendants, when suits are brought against them, shall state the facts and tell them what they are expected to do, instead of containing misleading directions and sometimes misstatements of fact under the seal of the court.

3. That trial be given to the plan recommended by the Judicial Council whereby a defendant shall elect whether he desires to be tried by a jury or be permitted to waive jury trial in criminal cases other than capital cases. This method, already employed in Connecticut and Maryland, has proved effective and economical. It would strongly tend to relieve the congestion of our criminal dockets and might eventually lead to the release of judges for work in the civil courts.

4. That a law be enacted to expedite the final disposition of actions brought to collect debts as differentiated from actions which may generally be classified as controversial litigation.

5. That the act allowing the chief justice of the Superior Court to call in district court justices to try misdemeanor cases with juries be made permanent. The system has worked well, and if abolished, the need of appointment of more Superior Court justices would soon become apparent.

Judicial Salaries.

I wish again to call to the attention of the Legislature the pressing need of an upward revision of the salaries of the justices of the Supreme Judicial Court, the Superior Court, and the Land Court. The arguments in favor of increases in these salaries have been too frequently stated to render it necessary for me to repeat them here. It

is almost universally conceded that it is unreasonable to expect the most competent and able men at the bar to surrender their profitable practice to accept judicial appointment when that involves so serious a pecuniary sacrifice.

It is, of course, not possible to pay our judges salaries commensurate with what they could earn in private practice, but it is advisable and highly necessary that the judges should be paid a sum which more nearly represents the value to the Commonwealth of their ability and of their services than does the present scale of salaries. I cannot urge too strongly that the Legislature give favorable attention to the various bills now pending for increases in judicial salaries.

Revision of the Jury System.

I recommend that the present system of making up and drawing venires for petit juries be changed. It has come to my attention that political pressure has frequently influenced the selection of those who shall be placed upon jury lists.

Responsibility for our juries should rest with some single individual.

I therefore suggest legislation providing for appointment by the Governor of a person to be entitled "jury commissioner," who shall be connected with and under the jurisdiction of the Secretary of the Commonwealth. It should be the duty of the jury commissioner to take complete charge of the preparation of jury lists, but the actual drawing of the names should be done by the clerks of the Superior Courts for the several counties. The jury commissioner should be responsible for the type of person selected for jury service. He should be the judge of whether or not a person is "of good moral character, of sound judgment and free from all legal exemptions," subject, of course, to review by the court. He should have at his disposal the various police departments to aid him in the investigation of prospective jurors and be empowered to employ as much of our election machinery as in his judgment will facilitate the performance of his duties.

Jury Fixing.

There has grown up in the community the profession of "jury fixer," composed of men who by the use of money have proved invaluable aids to guilty defendants. Unfortunately it is only upon rare occasions that action is taken to punish those engaged in this criminal business. It is my belief that the more frequent filing of petitions for contempt and the imposition of jail sentences will result in a lessening of the activity of the jury fixer.

Scire Facias.

I recommend that an additional section be added to St. 1926, c. 340, dealing with bail in criminal cases. This section should provide that in all cases where bail is given in a criminal case the clerk of courts of the county in which the case rests shall forthwith transmit to the register of deeds for the county in which the land lies a form of document or *caveat* to be recorded, and which from its terms will clearly indicate that the parcel referred to has been furnished by the owner thereof as security for the appearance of the defendant when requested. The *caveat* recorded as above set forth should operate as a lien upon the land and buildings, subject, however, to prior encumbrances of record; the lien thus created to be discharged either upon the final disposition of the case or the payment of such sum as the court shall determine to be equitable, as provided for under the present law. In the event it becomes necessary to enforce the lien because of the failure of the surety to pay, the law should include a method for enforcing the same, which should be simple and swift.

The purpose of bail in criminal cases is to permit a defendant to acquire his liberty so that he may properly prepare his defense, and at the same time ensure his presence in court when desired. Up to two years ago bail conditions were very lax, and many men of vicious tendencies and clearly guilty of serious violations of the law were given their liberty upon the furnishing of straw bail. This condition has been remedied to some extent by legislation passed in 1926, but chapter 340 of the Acts of 1926 did not provide for every emergency. It is now possible when men furnish real estate security as bail, to arrest them on a *scire facias* execution issued after suit against them on their recognizances. Women are still exempt from arrest on executions, and while I am heartily in favor of the law protecting our womanhood in that respect, some special provision should be made for the further protection of the Commonwealth in cases where women give bail. Many hardened criminals, having been advised by competent attorneys of this legal situation, have induced women to go their bail, on the assurance that in the great majority of instances suits are not diligently prosecuted to recover the penal sum of the recognizance, and that in any event they could never be subjected to arrest for failure to pay.

Our present system permits, after bail is furnished, the property to be transferred, either for or without value, and in either case the redress of the Commonwealth lies only in the arrest of the surety and

his subjection to an examination to determine whether or not he should be committed until the Commonwealth's claim is satisfied. Such a system will inevitably become abused and only by the restriction of the transfer of the bail real estate and by additional legislation in the case of female sureties, can the Commonwealth hope to secure some redress for the failure of a defendant to appear at the bar of justice. In addition the law should give the District Attorney the right to bid in the property in the name of the Commonwealth and to give valid title to the same.

Regulation of the Sale, Possession, and Use of Pistols.

At the last annual session the General Court in an act approved April 27, 1927 (St. 1927, c. 326), amended the provisions of the General Laws with respect to the licensing and sale of firearms. To a great extent these amendments strengthened the hands of the authorities in dealing with the pistol menace, as far as regulation by this Commonwealth could do so.

In my opinion a pistol serves no useful purpose in the hands of law-abiding citizens. For protection in the home other types of weapon are more effective, and the possibility for concealment by criminals nullifies any possible benefit which may come from the ownership of such weapons by responsible members of the community. I feel that even more drastic laws could well be enacted with respect to the possession of pistols, even in the home.

The National Crime Commission has prepared a draft of an act regulating the sale, possession, and use of firearms which it is endeavoring to have passed by Congress and by the several States. The fact that it is impossible for a State to prevent the sale of firearms in interstate commerce renders congressional action necessary, and I hope the Legislature will consider the advisability of taking steps to insure that senators and representatives in Congress from this Commonwealth will support legislation to secure Federal regulation of the pistol menace.

Recommendations of the District Attorneys.

I submit herewith those recommendations of the District Attorneys in which I concur:

1. That conspiracy to commit a felony be punished in the same manner as an attempt to commit that felony.
2. That G. L., c. 274, §§ 2 and 3, be repealed, and that there be

substituted therefor a short section making accessories before the fact triable, guilty and punishable as principal felons.

3. That technical, dilatory pleas and motions for specifications be filed within three days after return of indictment or entry of appeal.

4. That if insanity is to be set up as a defense the defendant be required to file a statement to that effect before the jury is impanelled.

5. If appropriation for criminal administration is exhausted before the end of the year, additional appropriation be made by county commissioners upon certificate of the Attorney General or District Attorney that public necessity or emergency requires it.

6. In cases of extradition on lower court complaints, funds be advanced by the county treasurer upon order of the District Attorney.

7. That the county treasurer advance to the District Attorney such money, approved by a judge of the Superior Court, as may be necessary for expenses and travel outside of the Commonwealth for investigation or preparation for the trial of criminal cases.

8. Expert testimony in capital cases be confined to experts appointed by the court to give an impartial opinion.

9. Right of appeal by the Commonwealth on questions of law; the appeal to be allowed on all questions raised throughout a trial.

10. Amendment of the statute making criminal records available for the impeachment of witnesses, to the end that the word "conviction" be defined so as to include all cases which have been disposed of, whether by placing on file or probation, or plea of nolo contendere.

11. That the larceny statute, G. L., c. 266, § 30, be amended so as to enable the court to impose a sentence of not more than twenty years in State Prison for the larceny of property exceeding \$2,000 in value.

Police Departments.

Today serious crime is not a local matter, owing to the ability of the criminal to commit a crime in one community and rush by automobile, to another, perhaps committing a crime there, before returning to his home at some point perhaps fifty or one hundred miles away. It is obvious, therefore, that under present-day conditions, in order to obtain information, facilitate apprehension, hasten conviction and secure the use of uniform methods of capture and a uniform administration of the criminal law, the ideal police system would be one operated from a common point and one whose activities would cover the whole Commonwealth without regard to town or city lines. I believe that

the consolidation of the police departments throughout the State will eventually come, but do not feel that the present Legislature is ready to enact laws creating such a radical change.

Legislation in Aid of Police Departments.

One of the advantages gained by consolidation of police departments would be speedy notification to police units throughout the State of all matters requiring their attention. The city of Boston has pointed the way to obtain much the same result under the present organization of our police. The city has installed a communication system operated from police headquarters at Boston. An operator at headquarters operates a machine with keys similar to a typewriter, and whatever is written by him is simultaneously printed in twenty-one stations in Boston.

I would recommend that this system, operated from a central station, be required by legislation to be installed in all police stations of the Commonwealth so far as practicable.

Bureau of Identification of Criminals.

The bureau for the identification of criminals, including the finger print bureau, is now located in the Department of Correction. Inasmuch as that Department does not deal directly with the apprehension of criminals, I would recommend that the Legislature provide for the transfer of this bureau to the Department of Public Safety, where it is constantly needed in the work of apprehending criminals who commit serious crimes.

Identification of Stolen Property.

In a consolidated police department reports of stolen property would be transmitted to a central office. The same result can be accomplished by the establishment of a central bureau for the identification of stolen property in the Department of Public Safety. At the same time reports of pawnbrokers, second-hand dealers and dealers in antiques regarding their transactions should be required by legislation to be sent to the central bureau. By this method all police departments in the Commonwealth would benefit by the ability of this central organization to check the reports of property purchased or sold by dealers and the reports of property stolen. It is a well-known fact that the bulk of the property stolen eventually falls into the hands of the above-mentioned dealers.

Antique Dealers.

I recommend legislation requiring that antique dealers be registered and required to report their transactions. The selling of antiques has become an important matter, and most of the stolen antiques which have been recovered have been found in the hands of dealers.

Detective Laboratory.

The quarters used by the firearms expert in connection with the work of the Department of Public Safety have become so congested that it is necessary to provide more room. In addition, the Legislature should see to it that sufficient appropriation is given to purchase additional equipment. Not only do the photographs, photomicrographs and microscopic examinations of this Department furnish almost conclusive proof in trials, but they have a strong tendency to cause criminals to confess when confronted with them, and thereby save the Commonwealth a great deal of expense by making trials unnecessary. All police departments in the Commonwealth should be brought to realize that this laboratory is available to them at all times. Thus another of the advantages of consolidation could be obtained under the present organization of police departments, and the Commonwealth would profit materially.

Motor Vehicles.

Among those who have been studying the motor vehicle situation there seems to be a division of opinion as to whether or not a traffic commission or a commission handling general motor vehicle affairs is needed in Massachusetts at the present time, on the one hand, or whether, on the other hand, legislation is the better method of handling the situation.

After an examination of the motor vehicle laws of various States, the laws of our Commonwealth seem to be, in the main, adequate, with a few exceptions, to take care of the present situation.

Our problem seems principally to be a question of adequate policing and the enforcement of our present laws. If a traffic commission, or a similar body dealing with motor vehicle affairs, were created, the policing end of the problem would still be present.

This is not said by way of criticism of the police who are handling the problem at the present moment. It is rather with a hope that cities and towns and the State itself may be permitted to employ more men, so that this important part of police work will be more thoroughly covered.

Uniform Traffic Signals and Signs.

One cause of confusion to the resident driver as well as to the operator of a motor vehicle who comes in from another State is the lack of uniformity in traffic signs and signals. For instance, it is popularly understood that a red light at an intersection of ways means "stop," and yet in some towns a red light is placed at the junction of roads as a mere caution. This light does not go on and off, but remains on constantly, and many times persons reaching such a point have waited many minutes before they have come to the realization that the red light is not a signal for them to stop.

One of our States, Pennsylvania, has made a law providing that colored lights used in relation to the movement of traffic shall have certain specific meanings. Others have made provision that certain signs commonly used to direct traffic should be made uniform throughout the State.

I recommend that the matter of uniform traffic signals and signs be considered with a view to legislation thereon.

Automatic Signals.

In various cities and towns of the Commonwealth automatic signals purporting to direct the movement of traffic have been installed. A question has been raised as to whether or not these automatic signals when operated from a central station or operated without the presence of a police officer in charge of directing traffic can subject persons disregarding them to a penalty under the laws of this Commonwealth.

I recommend that the Legislature consider this matter with a view to clearing up any doubt.

Boulevard Stops.

Towns and cities at the present time have no authority to require vehicles about to enter a main thoroughfare to stop before entering. Such a by-law would be repugnant to G. L., c. 89, § 8, as amended by St. 1926, c. 330, which provides the general rule that every driver of a motor or other vehicle approaching an intersecting way shall grant the right of way at the point of intersection to vehicles approaching from his right, provided that such vehicles are arriving at the point of intersection at approximately the same instant; except that whenever traffic officers are standing at such intersection they shall have the right to regulate traffic thereat.

It would tend toward greater confusion if the Legislature should extend to cities and towns the privilege of passing by-laws providing that vehicles approaching a main thoroughfare should be brought to a stop before entering, for we would have a situation where one town would have such a rule and the next town located on the same highway would not have such a rule. Endless confusion would result, and undoubtedly the number of accidents would increase tremendously. If any legislation concerning such stops on main thoroughfares is to be introduced, it should be drawn with a view toward uniform application throughout the State.

The Right of Way Law.

Many accidents are occurring daily because of the failure of motorists to observe the right of way law, cited above, which is now in force. The Legislature has provided no penalty for the failure of motorists to observe that law.

I recommend that the Legislature affix a penalty for the breach thereof. Once a penalty is attached those persons who habitually disregard the law will be brought to the realization of their responsibility in regard thereto.

Stolen Automobiles.

There is a prevalent practice among those who steal automobiles to store them in private garages, barns and warehouses until such time as the search for them has subsided or until the cars can be registered under a new name and new registration plates therefor can be obtained.

California requires every owner or lessee of any building used for the purposes of a private garage, who rents the building, or space therein, for the storage of a motor vehicle, to report the fact within twenty-four hours, together with the name of the person renting and a description of the motor vehicle stored therein, including the name of the maker, the motor number and the registration number.

I recommend that the Legislature consider the advisability of enacting such a law in this Commonwealth, requiring such report to be made to the Registrar of Motor Vehicles, and that the requirement of the report be extended to all places where motor vehicles are stored for hire, including warehouses.

Identification of Licensees.

A number of States, including New York and Illinois, require that chauffeurs present with their applications for a license photographs of themselves, taken within thirty days. The photograph is affixed to the license when granted. Frequently persons not authorized to drive automobiles, driving stolen cars and committing other crimes, carry with them licenses not their own. A photograph affixed to a license would in many instances be a help toward identifying a person driving, and would prevent unauthorized operation of a motor vehicle on a license belonging to another. It might be advisable that photographs be attached to all licenses to operate motor vehicles, and, in addition, a die should be used which would make an impression on the photograph and on the paper behind it, so as to prevent an exchange of photographs or counterfeiting.

Operation of Motor Vehicles.

The Judicial Council, in its report for 1927, recommends that G. L., c. 90, § 24, as finally amended by St. 1926, c. 253, be amended by inserting after the word "so" in the third line the word "negligently", — so as to read as follows:

Whoever upon any way operates a motor vehicle recklessly, or while under the influence of intoxicating liquor, or so negligently that the lives or safety of the public might be endangered, or upon a bet or wager or in a race, . . .

I am of the opinion that the statute should not be amended. It provides an efficient method of meeting the evil of the dangerous operation of motor vehicles upon our highways by persons who might otherwise escape any penalty for their actions. In many cases it is extremely difficult, if not impossible, to produce evidence of recklessness or negligence, even though it is apparent that the defendant is guilty of such conduct beyond all reasonable doubt. The present statute has been found to be a wise and desirable measure, and its careful and just enforcement may well be safely left to the proper authorities.

If a change is to be made I recommend that the words "wilfully" and "recklessly" be inserted as well as the word "negligently." The word "negligence" does not embrace or include wilful or reckless misconduct, and no conviction could be procured on this count if the defendant's conduct was wilful or reckless. The Supreme Judicial

Court has stated in several cases that "negligence" and "wilful and reckless misconduct" are different in kind, and that neither one includes the other. See *Prondecka v. Turners Falls Power Co.*, 238 Mass. 239.

The Judicial Council, in its report, has stated that it is sufficient to insert the word "negligently," as the court and jury may be safely trusted to find a person who operates wilfully or recklessly guilty within the common sense meaning of the word "negligently" thus inserted. As indicated above, this is not a correct statement of the law, as the word "negligently," under our decisions, does not and cannot include wilful and reckless misconduct. It is true that another clause of the statute in question provides a penalty for recklessly driving a motor vehicle, but as a practical matter it is highly advisable to make the count under discussion broad enough in its terms to include not only the negligent operation of a motor vehicle but also the operation thereof in a wilful or reckless manner.

Compulsory Automobile Insurance.

St. 1925, c. 346, as amended, provides that an assistant attorney general shall be one of the three members of the Board of Appeal created by the statute. The designation of Assistant Attorney General Roger Clapp as a member of such Board, which had been made by my predecessor in office, was confirmed by me, and he continues to hold this position. The work of this Board has played a very considerable part in rendering effective the unique system of compulsory automobile liability insurance inaugurated by this Commonwealth.

Suggestions for Amendment of the Laws regulating the Sale of Securities.

His Excellency the Governor, in his annual message to the General Court, both in 1927 and in 1928, has suggested certain reforms in the laws regulating the sale of securities. The present act, familiarly known as the "Blue Sky" Law and contained in St. 1921, c. 499 (G. L., c. 110A), entrusts to the Department of Public Utilities the regulation of the licensing and sale of securities within the Commonwealth. Since the passage of this act, due in part to the efforts of the officials of the Department of Public Utilities and in part to the efforts of citizens of the community with a high sense of civic duty, such as the gentlemen engaged in the activities of the Boston Better Business Bureau, some improvement has taken place in conditions surrounding the sale of securities.

For a number of reasons, however, the present act does not provide sufficient protection for small investors from the fraudulent activities of unscrupulous stock operators. The Department of Public Utilities is, properly, primarily charged with the regulation of the great privately owned companies engaged in public and quasi-public service, such as the railroads and the lighting and gas companies. The energy of that Department in recent years has been, of necessity, largely taken up with the great mass of business connected with the regulation of the rates charged by these public utilities, which presents many difficult and intricate problems which can well consume the whole time of that Department. As a result of the demands upon the time of the Public Utilities Commission and because of an inadequate staff of investigators, that Commission has found it impossible to give to the regulation of the sale of securities the attention which that important matter really deserves.

The security problem is one almost entirely foreign to the natural scope of activity of the Department of Public Utilities, and it is difficult for them to transfer their attention from the field of utility regulation, which occupies the greater portion of their time and interest, to that of stock regulation, which is far removed from their natural field. It would seem wise, therefore, to relieve the Public Utilities Commissioners of a great deal of the burden now laid upon them with respect to the regulation of the sale of securities, not only because the Commission can ill afford the time and energy required to regulate and combat the present serious situation in the security field, but also because that serious situation needs prompt and energetic attention.

In accordance with the suggestion of His Excellency, I recommend that the responsibility for investigating and proceeding against fraudulent stock operators be placed in the Department of the Attorney General, who is the chief prosecuting officer of the Commonwealth, and that he be given adequate legal and police assistance for the purpose of investigating and proceeding against fraudulent operators, both in the courts by way of criminal prosecution and before the Department of Public Utilities for the purpose of seeing that the licenses of those whose activities are unlawful are revoked.

For many reasons the actual granting and revoking of licenses to deal in securities should remain in a quasi-judicial body. The Public Utilities Commission is such a body and the responsibility for passing upon the merits of cases presented to them by the Attorney General should be left in their hands, with the present adequate provisions for

appeal to the courts from their decisions. It might well be that the General Court would not feel justified in entrusting to an elective officer the responsibility for granting and revoking the licenses to carry on an important business, and it is also true that that important function should not be left to the official who investigates the case and prepares it, but should be exercised by a body at least quasi-judicial in its nature.

New York, by an energetic and well-directed campaign on the part of the Attorney General, has to a great extent eliminated fraudulent dealings in securities in that State. By virtue of the provisions of the so-called Martin Fraud Act in force in that State many of the fraudulent operators in the security field have been driven from New York by permanent injunctions, and have taken refuge in the neighboring States, particularly in Massachusetts, where they are still conducting extensive operations. The "Blue Sky" Law, actively enforced, can do much to eliminate the menace of these fraudulent operations. In my opinion, it should be supplemented by legislation giving to the Attorney General powers of investigation and of proceeding in the courts, similar to those given to the Attorney General of New York by the Martin Act. By such an act the Attorney General would be able to proceed in the courts by a bill in equity to enjoin particular fraudulent schemes which threaten to result in injury to the public welfare. Such legislation would provide a preventive remedy, which would forestall the evils of stock frauds rather than leave the Commonwealth to proceed by way of criminal prosecution, always of slight value after the damage has been done to those who have been defrauded.

After consultation with the Commissioners of the Department of Public Utilities, especially with Hon. Lewis Goldberg, who has been of material assistance to me in this matter, I have prepared a draft of a bill, submitted herewith, amending the "Blue Sky" Law in certain particulars, which would carry out the reforms which I have suggested above.

I am also grateful to the officers of the Boston Better Business Bureau for their helpful suggestions throughout the year.

I should also refer to two closely allied matters which have been brought to my attention and which I believe the Legislature should investigate. The first arises out of the practice of issuing so-called "interim certificates" by bond houses which are floating securities, prior to the delivery of the actual security. Upon the payment for the security to be issued, the company furnishes the purchaser with

a certificate entitling him to receive a bond "as, when, and if" that bond is finally issued. The company is entitled to take the money and mingle it with its general funds and use it for any purpose whatsoever, being under only a contractual obligation to deliver to the holder of the interim certificate the bond specified or the money paid plus interest. The purchaser, unless well informed on such matters, usually thinks that the interim certificate is as good as the bond, and frequently, no doubt, is deceived by the form of the certificate and by the salesman into such a belief.

In my opinion, the situation is fraught with many possibilities of fraud and I feel that legislation might well be passed requiring the money received at the time of the issuance of the interim certificate to be deposited by the company issuing the certificate in a separate account, to be used only for the purchase of the bonds, so that the holder of the certificate may be certain of receiving either the bond to be delivered to him or the return of his money. Such legislation would make the company in substance trustee of all money paid in for the purchase of such certificates. As in many cases it is necessary for the companies floating bond issues to purchase the securities behind the bonds before issuing them, such legislation should provide for the use of the funds paid in for the purpose of the purchase of securities or property upon which the bonds are secured prior to the actual issue of the bonds. As this matter involves problems of vast importance to investment bankers generally, any legislation should be prepared in close co-operation with representatives of those dealing in such investments, so that their requirements and needs may be adequately protected, at the same time protecting the public from misuse of a very useful business convenience by unscrupulous operators.

A second matter in the security field which I should mention is in connection with the present growth of investment trusts. An investment trust properly managed and controlled by conscientious and capable business men is in all respects a satisfactory medium for protecting the savings of small investors. Such a trust unquestionably enables them to obtain a wide distribution of risk in stock investment which they could obtain in no other way. Because, however, of the intervention of trustees in this method of caring for savings of small investors there is present not only the risk of bad management of the companies whose stock the trust carries but also the danger of either careless or fraudulent management of the trust itself.

This type of investment, which should be encouraged by the Commonwealth when properly conducted, should, in my opinion, be so protected that small investors will run no danger of loss because of the fraudulent management of such trusts. The interests of the banking houses and corporations conducting such trusts should be carefully considered and they should not be in any way unduly hampered by legislation; but because the appeal of these investment trusts is so largely to the man of small means, I urge that the General Court consider carefully what measures, if any, are necessary for the protection of citizens making use of the investment trust as a savings device.

Billboard Cases.

The so-called billboard cases are a group of bills in equity, consolidated by order of court, brought by various billboard companies and owners to enjoin the enforcement of the rules promulgated by the Department of Public Works under the authority of legislation authorizing the regulation of billboards. During the past year hearings in these cases have proceeded before the master appointed by the court, Frank H. Stewart, Esq., and the cases have been advanced materially.

The billboard companies who are complainants in this action found it advisable to widen the scope of their bill in equity considerably by amendments, and the allowance of the amendments by the court necessitated several weeks' work by the members of the staff of this Department in preparing an answer to the new allegations, which covered over one hundred printed pages. The pleading incident to the amendments inevitably delayed the cases for some time. At the present time the complainant billboard companies have not finished presenting their case before the master and probably will not do so for some months to come.

In a case involving as many detailed facts as these billboard cases, other engagements of counsel are bound to interfere materially with the prompt presentation of it before a master, and hearings have at present been suspended because of the engagement of counsel for the billboard companies in extended hearings in a case in the Federal courts. It is hoped that the hearings in the Federal courts will be finished by the middle of February, at which time hearings in the billboard cases will be resumed. The cases will be prosecuted vigorously during the coming year, and the questions of law raised by the report to be filed by the master should be argued in the Supreme Judicial Court in the not long distant future.

The Commonwealth has as yet had no opportunity to present evidence sustaining the constitutionality of the legislation regulating the billboard nuisance. As soon as the billboard companies complete the presentation of their evidence before the master, the Commonwealth, in co-operation with counsel for the town of Concord, also a respondent in these cases, will present evidence which the Commonwealth contends sustains the constitutionality of the statute and the rules enacted in accordance with the statute.

The Initiative and Referendum.

One of the most important of the duties which fall upon the Attorney General is to certify or to decline to certify initiative petitions. Amendment XLVIII of the Constitution provides, in substance, that no initiative petition shall be filed with the Secretary of the Commonwealth until it has been submitted to the Attorney General and he has certified that the measure intended for enactment is in proper form for submission to the people and that it is not substantially the same as any measure which has been qualified for submission or submitted to the people within three years of the succeeding first Wednesday in January, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent.

During the past calendar year eleven initiative petitions have been submitted to the Attorney General. Some of them have been withdrawn, but others he has had to consider. The Attorney General is bound by the language of the amendment and cannot certify as proper for submission any petition which contains a measure having in it the excluded matters specifically set forth in the amendment, nor one containing certain propositions inconsistent with rights of the individual specifically named in the amendment, nor one which is defective in any point of form. Hearing has been given to parties interested, either on behalf of or in opposition to measures proposed by initiative petitions, in order that ample opportunity might be given for an expression of opinion as to the questions of law and fact involved in the determinations which the Attorney General is required to make. The Supreme Judicial Court of this Commonwealth, in the case of *Anderson v. Secretary of the Commonwealth*, 255 Mass. 366, has held that the question as to whether the preliminary requirements for an initiative petition, prescribed by the Constitution, have been complied with is for the determination and the decision of the

Attorney General, and that, in the absence of bad faith, his determination and decision is final and cannot be set aside by the Supreme Court.

Settlement of Small Claims against the Commonwealth.

Since the period covered by my predecessor's last annual report thirty-one claims have been made against the Commonwealth under St. 1924, c. 395. Of this number, eighteen were approved, representing a total payment of \$2,977.58; nine were heard and disallowed; and four, aggregating \$170, are still pending. In six matters the Department co-operated with the House Committee on Ways and Means, investigating the facts and reporting upon claims embodied in proposed legislation.

Of the claims dealt with as above, twenty-one arose from automobile accidents, one of which resulted in the death of a motor cyclist; two were for remuneration for peculiar services; two were for property damage suffered by lessees at Commonwealth Pier; one for a fall on icy steps; one for property lost at a State hospital; one for a fall on a manhole cover on the Charles River Esplanade; two for wearing apparel damaged at the State House; and one for destruction of tubercular cattle.

Shellfish Industry.

In June, 1927, the Commissioner of Public Health, upon being informed by the Attorney General of the latter's opinion that under the law as it now stands (G. L., c. 130, § 139, as amended by St. 1926, c. 370), the Commissioner was without power to recall or enforce the return of certificates relative to the condition of tidal waters and flats in respect to contamination, ceased to issue such certificates. Later a conference was held by the Attorney General with the Commissioner and with a large number of persons interested in the shellfish industry, and a new set of regulations was compiled by the Department of Public Health relative to the issuance and use of such certificates, commonly known as bed certificates, and the Commissioner began again to issue the same. It was plainly stated by the Commissioner at this conference that he would hold the houses shipping shellfish out of the State strictly responsible for the quality of the shellfish so handled by them.

I recommend the passage of legislation which will enable the Department of Public Health to exercise certain supervision over the

shellfish industry, that it may afford to the inhabitants of this Commonwealth the same protection against infected shellfish which it is now able, under existing statutes, to provide for the citizens of other States.

Under the existing provisions of said G. L., c. 130, § 139, as amended, the Commissioner of Public Health is authorized to make rules and regulations relative to issuing tags or certificates concerning shipments or consignments of shellfish to points outside the Commonwealth. The giving of these tags or certificates by the Commissioner to houses exporting shellfish from Massachusetts is dependent upon the purity of the product so shipped by such houses, respectively, and the obtaining from him of such certificates or tags by such shippers is treated by other States as a necessary prerequisite to the handling of shellfish shipped from Massachusetts in the markets of such other States. The Commissioner of Public Health has no such power at the present time relative to the shipment, consignment or use of shellfish within the Commonwealth. He is therefore unable to provide the same protection to the inhabitants of Massachusetts as the statute enables him to give to those of New York and other States. This inequality in the power of enforcement of the laws directed toward maintaining the purity of sea food should be remedied, and adequate authority given to the Commissioner or to the Department of Public Health to deal with shellfish used, shipped or consigned to points within as well as without the Commonwealth.

Public Administration.

Because of the possible interest of the Commonwealth in these estates by way of escheat, the Department of the Attorney General, representing the Treasurer and Receiver General, is interested in the administration of the estates of persons who have died without known heirs. At the present time such estates are administered by public administrators who are compensated by such charges as are allowed by the Probate Court upon the rendering of the administrator's accounts. These charges vary fairly directly with the size of the estate. From time to time dissatisfaction is expressed with the system by which these estates are administered, a system which leaves the proper administration of that estate to the individual initiative of a public administrator selected more or less by chance by some person interested in the estate.

It has been suggested by persons interested in the question, including certain public administrators, that these duties could be more prop-

erly carried out by some salaried public official, as, for instance, the register of probate in each county through delegation of the duties to an assistant register. The present system has worked satisfactorily for some years and should not be changed unless it is certain that a new method can be devised which will result in benefits commensurate with the weight of the additional duties imposed upon the public official to whom the administration of such estates is to be committed. The advisability of any action in this matter cannot be properly determined without a careful investigation of the whole situation with respect to public administration, and I suggest that some provision for such an investigation might well be made by the General Court.

Fraud in State Examinations.

For the purpose of eliminating fraud in State examinations a penalty should be imposed adequate to meet the situation. The bar examinations are not the only instances in which fraud has been discovered. In other cases I have been informed that an applicant has employed another person to take the examination in his place, a practice which might well result in the issuing of a license to a person not properly qualified.

It is difficult to secure convictions in cases of this type, and I recommend that legislation be enacted to deal directly with this evil.

Disbarment of Attorneys.

The law with reference to the disbarment of attorneys at law is, in my opinion, unsatisfactory and requires attention. G. L., c. 221, § 40, as amended by St. 1924, c. 134, provides that an attorney may be removed by the Supreme Judicial or the Superior Court, and that, whenever a petition is filed for the removal of an attorney, the proceedings thereafter shall be conducted by an attorney to be designated by the court. Under this recent law it has been the custom for bar associations to file petitions. It is my experience that the various bar associations of our Commonwealth do not function properly, with the result that there are many cases of members of the bar who deserve censure at least, but who, because of the laxity of the bar associations, have escaped any manner of punishment. Many persons have made complaints to the bar associations first, and then to the Attorney General, because of the failure to secure any satisfaction from them. Several of the cases were ones in which attorneys were seriously at fault, and where, with prompt attention, victimized clients could have been aided.

I recommend the adoption of the suggestion embodied in the second report of the Judicial Council outlined on pages 29-33, namely: That the justices of the Supreme Judicial Court appoint in each county a "bar counsel," whose duty it shall be to make a preliminary investigation respecting any complaint of professional misconduct on the part of a member of the bar; and shall appoint three or more "bar masters," who shall hear such cases as the bar counsel deems it proper to submit to them; that witnesses may be summoned to testify before them, and shall be sworn; that the records of all such cases shall be filed with the clerk of courts and shall be public records; that the bar masters shall either (a) dismiss the case, or (b) administer a written censure to the person charged, or (c) report their findings to the Supreme Judicial Court; that any findings so reported shall be conclusive of the facts, and after the filing of the same and after such hearing, if any, as the court shall order, the court shall either dismiss the case, censure the person charged or suspend or disbar him.

The present system of voluntary unofficial agencies undertaking the work of investigating complaints has not been satisfactory. Bar associations have no official standing and have no power to summon witnesses or administer oaths. In addition thereto, their failure to act promptly in all cases has caused a lessening of public respect for their work.

An official body of competent men will soon regain the confidence which has been lacking for several years. Attorneys themselves are prone, under the present arrangement, to do things which otherwise they would not do if they knew that their actions would be carefully scrutinized by constituted authority, with the probability that punishment would follow.

Rules and Regulations of the Director of Forestry.

G. L., c. 132, § 34, gives to the Director of Forestry authority to make certain rules and regulations relative to hunting and fishing in the state forests. No penalty is provided for a violation of such rules and regulations, and I recommend that the Legislature provide such a penalty.

Revocation of Plumbing Licenses.

The State Examiners of Plumbers are considerably hampered in their important work for the reason that they have not an adequate power to revoke plumbing licenses. Many vexatious instances occur where the only feasible remedy is a revocation of the license. Plumb-

ers are aware of the fact that the power of the Examiners to revoke is very limited and certain of them, conscious of this fact, frequently pay little or no heed to laws and regulations. No more effective method of dealing with this situation can be found than that of conferring upon the examiners the power to revoke for sufficient cause. A section should be inserted in G. L., c. 142, similar to section 4 of chapter 141, which chapter deals with "supervision of electricians." Said section 4 is as follows:

No certificates issued under this chapter shall be assignable or transferable. They may, after hearing, be suspended or revoked by the examiners upon failure or refusal of a licensee to comply with the rules and requirements of the examiners, or for other sufficient cause.

Report of Joint Special Committee on Elections.

I recommend that the report of the Joint Special Committee on Elections be accepted in so far as it deals with corrupt practices and with the proposed amendments to articles XXI and XXII of the amendments to the Constitution of Massachusetts.

Interstate Rendition and Extradition.

During this fiscal year 328 interstate rendition cases were handled and 1 extradition case. Of these cases 113 were for non-support, desertion or abandonment.

There have been 15 hearings on the applications for rendition and two petitions for writs of *habeas corpus*.

Charles Ponzi, after a vigorous fight to avoid being brought back to this Commonwealth, was eventually returned by the State of Texas on February 15, 1927.

Department of the Attorney General.

The number of official opinions rendered by the Department during the year was 99.

The collections of the Department for the fiscal year amounted to \$112,057.10.

Four cases have been argued in the United States District Court and 1 case before the United States Circuit Court of Appeals. One case was argued before the United States Court of Claims and 2 petitions for writs of certiorari before the Supreme Court of the United States. Fourteen cases have been argued before the Supreme Judicial Court of

this Commonwealth, and there have been 65 hearings and trials before a single justice of that court. There was 1 appearance before the Grand Jury for the County of Suffolk, and 42 trials in the Superior Court. Fourteen cases have been tried in the Probate Court, and 5 cases in the local district courts. The Department has been in attendance at 19 hearings and conferences before the Industrial Accident Board. Fifteen hearings have been had on rendition. The Department has filed appearances in 120 cases in the Land Court. There were continued hearings before the master in the billboard cases.

Publication of the Opinions of the Attorneys General.

I recommend that a sufficient sum of money be appropriated for the purpose of continuing the publication of the opinions of the Attorneys General, there now being, in my judgment, a sufficient number of public interest to warrant the publication of Volume VII.

Annexed hereto is a draft of a bill entitled "An Act in regulation of the promotion and sale of securities and for the prevention of fraud," a statement of appropriations and expenditures, a list of capital cases throughout the Commonwealth, and such official opinions rendered throughout the past year as it is thought may be of interest and which properly may be made public at this time.

Respectfully submitted,

ARTHUR K. READING,
Attorney General.

**AN ACT IN REGULATION OF THE PROMOTION AND SALE OF
SECURITIES AND FOR THE PREVENTION OF FRAUD.**

Be it enacted, etc., as follows:

SECTION 1. Clause (a) of section two of chapter four hundred and ninety-nine of the acts of nineteen hundred and twenty-one, being chapter one hundred and ten A of the General Laws, known as the Sale of Securities Act, is hereby amended by inserting at the end of said clause the following sentence: — The powers granted to the commission under this chapter, except where expressly provided to the contrary, may be exercised by a single commissioner or by a deputy or subordinate appointed by the commission to exercise such powers, subject to review as provided by section seven of this chapter, — so as to read as follows: — (a) "Commission", the commission supervising and controlling the department of public utilities under chapter twenty-five. The powers granted to the commission under this chapter, except where expressly provided to the contrary, may be exercised by a single commissioner or by a deputy or subordinate appointed by the commission to exercise such powers, subject to review as provided by section seven of this chapter.

SECTION 2. Clause (g) of section two of said chapter four hundred and ninety-nine of the acts of nineteen hundred and twenty-one, is hereby amended by striking out the word "gross" in the third line of said clause, and by inserting after the word "negligence" in the third and fourth lines of said clause the words: — or made without the use of ordinary care in determining whether or not such misrepresentation is true, — and by inserting after the word "commission" in the eleventh line of said clause the following: — and making or attempting to make in the commonwealth any fictitious or pretended purchases or sales of securities or commodities; or attempting to affect the price of securities or commodities by the use of any device, artifice, or scheme of fictitious or pretended purchases, sales, or transactions as are ordinarily known as wash sales; or publishing reports of fictitious or pretended sales or purchases or of wash sales, — so as to read as follows: — (g) "Fraud" and "fraudulent" shall include any misrepresentation in any manner of a relevant fact, such misrepresentation being intentionally dishonest or due to negligence or made without the use of ordinary care in determining whether or not such misrepresentation is true, and any promise or representation or prediction as to the future not made honestly and in good faith, or an intentional failure to disclose a material fact; the gaining directly or indirectly, through the sale of any security of an underwriting or promotion fee or profit, selling or managing commission or profit, so gross and exorbitant as to be unconscionable and fraudulent, and any scheme, device or artifice to obtain such a profit, fee or commission; and making or attempting to make in the commonwealth any fictitious or pretended purchases or sales of securities or commodities; or attempting to affect the price of securities or commodities by the use of any device, artifice, or scheme of fictitious or pretended purchases, sales, or transactions as are ordinarily known as wash sales; or publishing reports of fictitious or pretended sales or purchases or of wash sales; provided, however, that nothing herein shall limit or diminish the full meaning of the terms "fraud" and "fraudulent" as applied or accepted in courts of law or equity.

SECTION 3. Said chapter four hundred and ninety-nine of the acts of nineteen hundred and twenty-one is further amended by inserting immediately after section sixteen of said chapter the following sections:—

Section 17. Whenever it shall appear to the attorney general, either upon complaint or otherwise, that there is a violation of any of the provisions of this chapter or that in the advertisement, purchase, or sale within this commonwealth for future delivery of any commodity dealt in on any exchange or the delivery of which is contemplated by transfers of negotiable documents of title, or that in the sale, promotion, negotiation, advertisement, or distribution within this commonwealth of any security, including those exempted from the operation of the provisions of this chapter under section three, any person shall have employed, or employs, or is about to employ any device, scheme, or artifice to defraud or to obtain money or property by means of false pretense, representation, or promise; or that any person is engaged in or is about to engage in any fraudulent scheme or fraud as defined under clause (g) of section two of this chapter, or whenever he believes it to be in the public interest that an investigation be made, he may in his discretion require or permit any person to file with him a statement under oath or otherwise or upon written interrogatories as to all the facts and circumstances concerning the subject matter which he believes it is to the public interest to investigate.

The attorney general may also require such other data and information as he may in his discretion deem relevant, and may make such special and independent investigations as he may in his discretion deem necessary, and for the purposes of such investigation the attorney general or such assistant attorney general as may be designated by him is empowered to subpoena witnesses, compel their attendance, administer oaths and examine them.

If a person subpoenaed to attend such an inquiry fails to obey the demand of the subpoena without reasonable cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to be examined or to answer a question or to produce a book or paper when ordered so to do by the officer conducting such inquiry, or if a person fails without reasonable cause to perform any act required to be performed hereunder, he shall be guilty of a misdemeanor. It shall be the duty of all public officers, deputies, assistants, subordinates, clerks or employees and of all other persons to render or furnish to the attorney general, or his designated assistant, when requested, all information or assistance in their possession or within their powers. Any officer participating in such inquiry and any person examined as a witness upon such inquiry, who shall disclose to any person other than the attorney general or a properly designated assistant of the attorney general, the name of any witness examined or any other information obtained upon such inquiry, except as directed by the attorney general or his properly designated assistant, shall be guilty of a misdemeanor.

Section 18. Whenever the attorney general shall believe from evidence satisfactory to him that any person is engaged in, or is about to engage in, any fraudulent practice or transaction, or any transaction heretofore referred to as against the public interest, he may file an information in equity in the superior court for the county of Suffolk, regardless of the county in which the transaction complained of arises, or in such county, in the name of the commonwealth, against such person, to enjoin such person and such other person or persons as may be involved therein from continuing in such fraudulent practices or engaging therein, or doing any act or acts in furtherance thereof, and upon satisfactory proof of the fraudu-

lent practice, fraud or other action against the public interest such decree may be entered awarding such preliminary or final injunction or temporary restraining order as justice and equity may require.

Section 19. Upon a showing by the attorney general in his application for a preliminary injunction hereunder that the defendant named in the action or an officer thereof has refused to be sworn or to be examined or to answer a material question or to produce a book or paper relevant to the inquiry, when duly ordered so to do by the attorney general or an assistant attorney general delegated by him duly conducting an inquiry into the subject matter forming the basis of the application for such preliminary injunction, such refusal shall be *prima facie* proof that such defendant is or has been engaged in fraudulent practices as set forth in such application, and a preliminary injunction or temporary restraining order may thereupon issue without any further presentation of evidence by the attorney general.

Section 20. In any proceeding in equity brought by the attorney general under the provisions of this chapter the court at any stage of the proceedings may appoint a receiver of any or all property obtained by any party to the proceeding by means of fraudulent practices, including also all property with which such property has been mingled, if the property thus fraudulently obtained cannot be identified in time because of such commingling, together with any or all books of account and papers relating to the same. Such receiver shall be subject to all the duties of receivers as appointed by the court in any proceeding in equity within the commonwealth.

Section 21. If any person shall ask to be excused from testifying or producing any book, paper, or other document before the attorney general or assistant designated by him or before any court or magistrate upon any trial, investigation, or proceeding initiated by the attorney general or court pursuant to the provisions of this chapter upon the ground or for the reason that testimony or evidence, documentary or otherwise, required by him may tend to incriminate him or to convict him of a crime or to subject him to a penalty or forfeiture, and shall notwithstanding be directed by the court, magistrate, or officer conducting the inquiry to testify or to produce such book, paper, or document, he must none the less comply with such direction; but in such event he shall not thereafter be prosecuted or subjected to any criminal penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, pursuant thereto, and no testimony so given or produced shall be received against him upon any criminal action, criminal suit or proceeding, criminal investigation, criminal inquisition, or inquiry of a criminal nature; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony as herein provided for, nor shall immunity apply to corporations.

Section 22. Whenever it shall appear to the attorney general, either upon complaint or otherwise, that any person is engaged, or is about to be engaged, in fraud or fraudulent practices under the provisions of this chapter, he may file an information before the commission against the persons alleged to be engaged in such fraudulent practices, and the commission shall after notice and hearing enter such order with respect to the registration of any broker or salesman registered under this act, or with respect to the sale of any security as may seem to it to be required in the public interest.

CAPITAL CASES.

Indictments for murder disposed of during the year 1927.

Berkshire County. — In charge of District Attorney Charles R. Clason: Louis Mercier, Herbert T. Munson, Luther Todd and Mary Todd.

Bristol County. — In charge of District Attorney William C. Crossley: Peter Dyer, Gertrude F. Gibbons, Jan Kaminski, Joseph Kapinos and Charles F. Lewis.

Essex County. — In charge of District Attorney William G. Clark: John Frisone, Leo Nolin and Herman A. Reed.

Hampden County. — In charge of District Attorney Charles R. Clason: Charles Chambers, Albert L. Doe, Michael Fiorentino, Thomas Kosier, Antoine William LaFogg and Raymond Scott.

Middlesex County. — In charge of District Attorney Robert T. Bushnell: Frederico Mula and Asaird G. Saab.

Norfolk County. — In charge of District Attorney Winfield M. Wilbar: Celestino Madeiros, Nicola Sacco and Bartolomeo Vanzetti.

Plymouth County. — In charge of District Attorney Winfield M. Wilbar: James B. Stoddard.

Suffolk County. — In charge of District Attorney William J. Foley: George Rutkawsky and Guiseppe Turco.

Worcester County. — In charge of District Attorney Charles B. Rugg: Louis H. Baum.

The following indictments for murder are pending:

Berkshire County. — In charge of District Attorney Charles R. Clason: William F. Keefe.¹

Bristol County. — In charge of District Attorney William C. Crossley: Napoleon Pelletier and Antone Silvia.¹

Essex County. — In charge of District Attorney William G. Clark: James Kamanis, George Metaxatos and George Elmer Harrison Taylor.

Middlesex County. — In charge of District Attorney Robert T. Bushnell: Joseph Foster Buckley, Jerry Gedzium, Herbert J. Gleason and William N. Nern.¹

Suffolk County. — In charge of District Attorney William J. Foley: Gangi Cero, Alesandro Diotalevi, Giuseppe Fedanza,¹ Joseph Greco, Whitfield Lovell, Lorenzo D. Perrone¹ and Walter Perry.

Worcester County. — In charge of District Attorney Charles B. Rugg: Nathan Desatnick.

¹ Committed to State Hospital.

OPINIONS.

Division of Highways — Alteration of State Highway — Abandonment.

Upon an abandonment of any part of a State highway, formerly an existing town way, title to the land so abandoned is in the former owners, free of any easement in favor of a town for purposes of a way.

DEC. 6, 1926.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR: — You have asked my opinion upon the following question: —

“Whether or not, in cases where new cut-off lines are laid out and built by the Division of Highways and the existing State highway for which the cut-off line is substituted is abandoned by the Division of Highways, such abandonment causes the title in the old State highway to revert to the abutting owners, or does it revert in part to the abutting owners and in part to the town, the portion reverting to the town being that portion which was a town way before the State highway was originally laid out?”

I assume that the question relates to an “alteration” of a State highway which has been laid out in part over an old town way, upon a petition made under the provisions of G. L., c. 81, § 4, or earlier statutes of similar import.

It is provided by G. L., c. 81, § 5, as amended by St. 1921, c. 427, that, after the Division of Highways has acted upon such petition and has duly laid out and taken charge of the way referred to therein, “*thereafter said way shall be a state highway.*”

I am of the opinion that the laying out and taking charge of an existing town way as a State highway, or the laying out and taking charge of a new way which follows to such an extent the lines of an existing town way as practically to supersede it, although not following its lines exactly at all places, as a State highway, under G. L., c. 81, § 4, and § 5 as amended, works a discontinuance of any easement which a town may have acquired by an earlier taking by eminent domain for such a town way; and that upon the abandonment by the Division of Highways while acting under section 6 of any part of the land formerly used as such a town way, title to such land is then in the former owners or their legal representatives, free of any easement in favor of the town for purposes of a way.

It is an established principle of law that the public lose their right to a highway by discontinuance, where they have abandoned it and accepted another in its stead under provisions of law (*Commonwealth v. Boston & Albany R.R. Co.*, 150 Mass. 174; *Bliss v. Deerfield*, 13 Pick. 102; *Hobart v. Plymouth*, 100 Mass. 159, 163), and the acts done under sections 4 and 5 afford ample evidence of the abandonment of an old and the acceptance of a new way in place thereof on the part of the inhabitants of a town formerly having the old way. See also *Tinker v. Russell*, 14 Pick. 279. The intent of the Legislature that the petition for and the laying out of the State highway should, by force of the statute, work a complete discontinuance of the rights of municipal bodies in old ways superseded and

physically converted into a new highway, appears to be expressed in G. L., c. 81, and in the earlier statutes upon the subject, particularly by the use of the words "and thereafter said way shall be a state highway." The Legislature has full control over public ways, and they may be discontinued by direct enactment or through such instrumentalities as the Legislature may designate. *Cones v. Benton County*, 137 Ind. 404.

The complete incorporation of identity of the older way in the new highway and the extinguishment of any existing rights therein when the new highway took the place of the existing way is also indicated to some degree by the fact that prior to St. 1921, c. 427, in which specific power to discontinue a State highway was given, the Division was without authority to discontinue any part of a State highway once the same had been laid out under the provisions of G. L., c. 81, and earlier statutes of similar import. II Op. Atty. Gen. 378; III *ibid.* 113. In I Op. Atty. Gen. 284, it was said by one of my predecessors in office, in considering one of such earlier statutes:—

"I am of the opinion that these proceedings constitute a taking of the highway by the Commonwealth analogous to the taking of land for the purposes of a highway by county commissioners and by municipal boards; and that . . . the way, if an existing town or county way, ceases to be such and becomes a State highway. If it is a new way, then it is by such proceedings established as a State highway, in the same sense that a new way is established by the proceedings of local boards. It follows that the liability of the town to keep the road is determined by these acts; when the commission 'takes charge' of the highway, the town is discharged."

It is to be noted that although provisions for the alteration of a State highway are set forth in G. L., c. 81, § 6, and provisions for the abandonment of land or rights taken for such highway were contained in G. L., c. 81, § 12, and are now embodied in section 12, as amended by said St. 1921, c. 427, in which it is stated that after such an abandonment title to the land or rights given up shall revert "in the persons in whom it was vested at the time of the taking, or their heirs and assigns," it was held in an opinion of one of my predecessors in office (III Op. Atty. Gen. 113), with which I concur, that these provisions for revesting title relate only to that portion of an existing location which is not to be incorporated into the highway as finally constructed for use, and hence have no applicability to the facts which you set forth and upon the existence of which your question is predicated.

If, however, the highway which was laid out by the Division was not "an existing way" within the meaning of G. L., c. 81, § 4, and does not follow to such an extent the lines of an old town way as practically to supersede it, then I am of the opinion that as to any land abandoned by the Division which was part of such old way the same is charged after such abandonment with an easement as against the abutting owners for the purposes of a way, if acquired by a previous taking of a town by eminent domain (*New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397; *Perley v. Chandler*, 6 Mass. 455); but if the town previously acquired the fee in the land occupied by such way by deed, then the abutting owners would not have rights other than easements therein.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Civil Service — Laborer — Retention in Employment.

The fact that a laborer in the employ of the Commonwealth was convicted of keeping and exposing intoxicating liquor for sale does not of itself warrant the Department of Civil Service and Registration in refusing to allow his retention in the service of the Commonwealth, under G. L., c. 31, § 17.

DEC. 8, 1926.

HON. PAYSON DANA, *Commissioner of Civil Service.*

DEAR SIR: — You state that a certain man has been properly employed under civil service as a laborer in the public works department of Boston for over ten years. On May 7, 1926, at the request of the public works department, his temporary employment as an inspector was authorized for three months, and was extended for three months on August 11, 1926. He was employed as inspector only in cases of emergency, and has continued at all times on the payroll as a laborer, at laborer's wages. On February 17, 1926, he was convicted of keeping and exposing liquor for sale and was fined fifty dollars. On receipt of notice of this record of conviction on October 27, 1926, and acting under G. L., c. 31, § 17, you immediately revoked the authorization for his appointment as inspector and refused to allow his further employment either as laborer or inspector and withheld the payment of compensation to him. You further state that the case has been appealed to the full board of Civil Service Commissioners, which board has requested you to obtain my opinion on the following question: Does the provision in G. L., c. 31, § 17, apply to this case on the facts presented?

G. L., c. 31, § 17, as amended by St. 1922, c. 36, provides as follows: —

"No person habitually using intoxicating liquors to excess shall be appointed, employed or retained in any position to which this chapter applies, nor shall any person be appointed or employed in any such position within one year after his conviction of any crime against the laws of the commonwealth; provided, that the commissioner may in his discretion authorize the appointment or employment, within said year, of a person convicted of a violation of any rule or regulation made under section thirty-one of chapter ninety or of any of the provisions of said chapter ninety relating to motor vehicles except those of sections twenty-three to twenty-five, inclusive."

It is significant that the first part of said section, referring to persons habitually using intoxicating liquors to excess, provides that no such person shall be appointed, employed "or retained" in any position, while the provision referring to a person convicted of any crime against the laws of the Commonwealth provides that no such person shall "be appointed or employed," the word "retained" being omitted in this instance. An examination of the history of said section 17 discloses that this omission was intentional on the part of the Legislature.

St. 1884, c. 320, is entitled "An Act to improve the civil service of the Commonwealth and the cities thereof." Section 3 of said chapter provides: —

"No person habitually using intoxicating beverages to excess, shall be appointed to, or retained in any office, appointment or employment to which the provisions of this act are applicable; nor shall any vendor of intoxicating liquor be so appointed or retained."

Section 4 provides: —

“No person shall be appointed to or employed in any office to which the provisions of this act are applicable within one year after his conviction of any offence against the laws of this Commonwealth; and if any person holding such an appointment or in any such employment shall be convicted of the violation of any such law, he shall be immediately discharged from such appointment or employment.”

In the third annual report of the board of police for the city of Boston (December, 1887), at page 5, is the following recommendation: —

“The Board recommends that chapter 320, Acts of 1884, entitled ‘An Act to improve the Civil Service of the Commonwealth and the cities thereof,’ be amended by striking out all the words in section 4 after the semi-colon, to wit, ‘and if any person holding such an appointment or in any such employment shall be convicted of the violation of any such law, he shall be immediately discharged from such appointment or employment.’ This provision is a constant menace to the police force and has a tendency to materially affect its efficiency.”

Presumably as a result of this recommendation, the Legislature in the following year enacted St. 1888, c. 334, amending St. 1884, c. 320, § 4, by striking out the last clause thereof, so that, as amended, said section should read as follows: —

“No person shall be appointed to, or employed in, any office to which the provisions of this act are applicable, within one year after his conviction of any offence against the laws of this commonwealth.”

In this form the law in this particular was carried into the Revised Laws (c. 19, § 17), section 16 referring to persons habitually using intoxicating liquors to excess and to vendors of intoxicating liquors.

Gen. St. 1915, c. 76, entitled “An Act exempting vendors of intoxicating liquors from certain disqualifying provisions of the civil service laws,” amended R. L., c. 19, § 16, by striking out said section and inserting in place thereof the following: —

“No person habitually using intoxicating liquors to excess shall be appointed to or retained in any office, appointment or employment to which the provisions of this chapter apply.”

In the General Laws, R. L., c. 19, §§ 16 and 17, as amended, are combined in one section, to wit, G. L., c. 31, § 17.

The history of this legislation and also the phraseology of section 17 clearly indicate that the provision therein, “nor shall any person be appointed or employed in any such position within one year after his conviction of any crime against the laws of the commonwealth,” applies solely to applicants for appointment or employment and not to appointees or employees, while no person habitually using intoxicating liquors to excess shall be appointed, employed “or retained” in any position to which said chapter applies.

There are many crimes against the laws of the Commonwealth, both felonies and misdemeanors. Some of the latter are *mala prohibita* and do not involve any degree of moral turpitude or even criminal intent. It is obvious that the Legislature never intended that one holding a civil service position should lose such position and not again be appointed or employed

under civil service within one year after his conviction of each and every crime against the laws of the Commonwealth.

In the case to which you have directed my attention you state that the person referred to was convicted of the crime of keeping and exposing liquor for sale. I am accordingly of the opinion that in the absence of any allegation that said person habitually used intoxicating liquors to excess, G. L., c. 31, § 17, does not apply to the case under consideration, and that, on the facts presented, the Department of Civil Service and Registration is not authorized to refuse to allow his further employment as laborer or to withhold the payment of compensation to him.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Division of Highways — Removal of Buildings from Land taken — Procedure.

Three modes of procedure are available to the Division of Highways to effect the removal of buildings from land taken for the widening of a State highway.

DEC. 11, 1926.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR: — You have asked my advice relative to the following matter set forth in your letter to me: —

“Early this year the Division of Highways widened the State highway in Weymouth and made takings for the widening under the provisions of G. L., c. 79. There are two buildings the owners of which have not conformed with the orders of the Division to remove the same, and it is desired to know just what procedure to take in order to get the buildings removed. (See G. L., c. 79, § 13.)”

The following modes of procedure to effect the removal of the buildings, which I assume stand upon land taken for the purposes described in the paragraph quoted above from your letter, but which were not themselves taken, are open to the Division of Highways:

(1) If a time for the removal of such buildings was specified in the order of taking, and has now elapsed, the Division may proceed under G. L., c. 79, § 13, to sell the buildings at public auction. If at the sale no one bids for them, under the terms of section 13 the owner will be taken to have relinquished his right in them, and the Division may remove them or deal with them in such manner as is deemed best to relieve the highway from obstruction occasioned by them. The Division will have such implied authority by virtue of the provisions of section 13 as will enable it to go upon the adjoining land of the owner for the purpose of making such removal. If the buildings are purchased at such sale and the new owner fails to remove them after reasonable notice in writing from the Division, he will be held to have relinquished his right therein, under the concluding sentence of section 13, and they may be removed. By virtue of the taking and of the sale under the authority of the statute, the buildings are to be considered as so severed from the realty as to have become personal property, within the meaning of the last sentence of the section, and therefore by failure to remove in accordance with the provisions of such sentence the right of the owner acquired by the sale will be taken as relinquished to the body who acquired the land by eminent domain. If notice to remove was not embodied in the original order of taking, this procedure will not be open to you.

(2) A further method of proceeding is available to the Division, irrespective of the mode provided for in G. L., c. 79, § 13. Under the provisions of G. L., c. 81, § 22, the Division of Highways may give the owner or occupant of the buildings written notice to remove them forthwith from the highway. If he fails to comply with the order, the Division may remove the buildings to the adjoining land of the owner or occupant. For the purpose of removing the buildings to such adjoining land, the Division has implied authority, under the terms of section 22, to enter upon the adjoining land for all purposes necessary to effect such removal. The Division has no authority under this section to cut a building in parts, if only a portion protrudes into the highway, and remove one part of the building alone.

(3) If procedure under G. L., c. 79, § 13, cannot be adopted, and if it is in fact impossible by reason of lack of sufficient space in the adjoining land to remove the buildings to such land (or further back upon such land if the necessities of the case require only the latter form of removal), then recourse is to be had to the courts to compel the owner or occupant of the building to abate a public nuisance caused by the obstruction of the highway by so much of the building as projects therein, and the owner may be required by a court to make such abatement, either by cutting off the portion of the building which so projects or by some other feasible mode, at his own expense.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Massachusetts Agricultural College — Expenditure of Funds from Federal Government — Commission on Administration and Finance.

Employees of the Massachusetts Agricultural College are State employees even if their salaries are paid out of funds provided by the Federal government; and money received from the sale of products raised at the college is the property of the Commonwealth even if such products are produced by the aid of funds provided by the Federal government.

The Commission on Administration and Finance has authority to approve publications of the Experiment Station of said college, paid for out of money provided by the Federal government, but has no authority to approve or disapprove of expenditures for travel paid for out of money so provided.

DEC. 14, 1926.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You have asked my opinion upon certain questions relating to the administration of funds received by the Massachusetts Agricultural College from the Federal government for the use of the Agricultural Experiment Station from appropriations made under the Acts of March 2, 1887, March 16, 1906, and February 24, 1925; 24 U. S. Stat. at L. 440; 34 *ibid.* 63; 43 *ibid.* 970.

The first of these acts, known as the Hatch Act, provided for the establishment of agricultural experiment stations under the direction of the land grant colleges created in accordance with the Act of July 2, 1862 (12 U. S. Stat. at L. 503). It was declared to be the object and duty of those experiment stations to conduct researches and experiments relative to plants, animals, soils, etc., and bearing on the agricultural industry of

the United States; and annually to make to the governor of the State a full and detailed report of its operations, including a statement of receipts and expenditures, copies of which were to be sent to the Secretary of Agriculture and the Secretary of the Treasury. For the purpose of paying the expenses of conducting such researches and experiments and publishing the results an annual sum of money was appropriated to each State, to be paid "to the treasurer or other officer duly appointed by the governing boards of said colleges to receive the same." It was further provided that nothing in the act should be construed to impair or modify the legal relation existing between the colleges and the State governments; and the grants of money authorized were made subject to the legislative assent of the several States. The two later acts, known respectively as the Adams Act and the Purnell Act, made additional appropriations "for the more complete endowment and maintenance" of said agricultural and experiment stations. It was further provided in those two acts that the officers receiving the funds should make detailed statements to the Secretary of Agriculture of the amount so received and of its disbursement. These acts and the grants of money therein provided were each severally accepted by the Legislature of Massachusetts. St. 1887, c. 212; St. 1906, c. 330; St. 1925, c. 253. In the act of 1906 it was further provided that "the Massachusetts Agricultural College is hereby authorized and designated to receive said grant of moneys," and in the act of 1925 it was provided that "the trustees of the Massachusetts Agricultural College, in charge of the Massachusetts agricultural experiment station, are hereby authorized to receive the funds granted by said act and to use and expend the same in furtherance of the purposes and objects therein set forth."

The Massachusetts Agricultural College was incorporated, pursuant to the Federal act of 1862, by act of the Massachusetts Legislature (St. 1863, c. 220) as a public charitable corporation. See III Op. Atty. Gen. 308. By Gen. St. 1918, c. 262, the corporation was dissolved, and it was provided that thereafter the college should be maintained as a State institution under the same name, and that all employees of the institution should be considered State employees. Gen. St. 1919, c. 350, § 56, provided that the trustees of the college should serve in the Department of Education. See G. L., c. 75, § 1; c. 15, § 19.

The grant made by the act of 1862 was to the several States for the purposes therein mentioned. It has been conclusively determined that this grant was to the States and not to the institutions established by the State pursuant to the statute. *Wyoming Agricultural College v. Irvine*, 206 U. S. 278, 283; *Massachusetts Agricultural College v. Marden*, 156 Mass. 150, 156; VI Op. Atty. Gen. 105. But the provisions in the acts establishing and endowing agricultural experiment stations are different, in that, while the appropriation is to the State, payment is required to be made directly to the officers of the institution. With reference to the Hatch Act the court said in *Wyoming Agricultural College v. Irvine*, *supra*:—

"By the Act of March 2, 1887 (24 Stat. 440), Congress directed that a certain sum should be annually appropriated 'to each State' for the support of agricultural experiment stations at the institutions established under the Act of 1862. The law provides that the appropriation shall be paid to the treasurer of the institution where the experiment station is established, and no money has come or will come into the hands of the state treasurer. It is, therefore, unnecessary to consider further the provisions of this act."

Gen. St. 1918, c. 262, § 3, provided that the trustees of the Massachusetts Agricultural College "shall manage and administer any grant or devise of land, and any gift or bequest of money or other personal property, made to the Commonwealth for the use of said institution, and shall carry out said trusts." See G. L., c. 75, § 7. With respect to these Federal funds the same authority is given to the trustees and duty imposed on them by the acts of the Legislature accepting the Federal grants, and, as I have shown, the 1925 statute expressly directs the trustees "to use and expend the same in furtherance of the purposes and objects therein set forth." In my opinion, accordingly, these funds are received by authority of the Legislature under a trust or charge that they shall be administered and expended in accordance with the provisions of the Federal statutes.

It may be questioned whether, since the adoption of Mass. Const. Amend. LXIII, section 1 of that amendment does not require the trustees or the treasurer of the Massachusetts Agricultural College receiving these Federal funds to pay them into the State treasury. Section 1 is as follows:

"Collection of Revenue. — All money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof."

In my opinion, this provision is applicable only to the revenues of the State, which, under the amendment, must be paid into the treasury and can be paid out under the Constitution (pt. 2nd, c. II, § I, art. XI) only by legislative act, and does not apply to trust funds which are required to be expended in a particular manner. This department has previously held that while a gift to a branch of the State government must be paid into the treasury, gifts upon conditions which constitute a trust may be accepted by State officers or departments if authorized by statute so to do. VI Op. Atty. Gen. 636; 643.

The questions which you have asked I am at liberty to answer only in so far as they concern the performance of the duties of your department. As a former Attorney General has stated (II Op. Atty. Gen. 100): —

"Officers of the State government are entitled to the opinion of the Attorney General upon questions necessary or incidental to the discharge of the duties of their office."

1. Are employees of the College who receive full pay from one or more of these funds (Purnell, Adams or Hatch) State employees?

By section 13 of G. L., c. 75, the trustees are required to elect officers of the College, fix their salaries and define the duties and tenure of office, and by section 18 they are required to appoint a director of the Massachusetts Agricultural Experiment Station, a chemist and necessary assistants. Section 16 provides that the Experiment Station shall be a part of the College. It was provided in Gen. St. 1918, c. 262, § 5, that "all employees of the institution shall be considered state employees," but this provision was omitted in the General Laws (G. L., c. 75, § 24), apparently for the reason that the commissioners regarded it as unnecessary.

An employee is a servant, agent or representative, and the payment of compensation as such is not a necessary element of employment. *Commonwealth v. Griffith*, 204 Mass. 18, 21; *Commonwealth v. Riley*, 210 Mass. 387, 395, 396. The employees you speak of are, in my opinion, clearly State employees. See VI Op. Atty. Gen. 105.

2. Are such employees eligible to and required to take membership in the State Retirement Association?

The salaries received by the employees you refer to are not paid by the Commonwealth, since they are paid out of the Federal funds and not by appropriation from the State. See VI Op. Atty. Gen. 105. Whether or not such employees are or should be members in the State Retirement Association, it seems to me, is not a question necessary or incidental to the discharge of the duties of the officers in your department, and therefore not one on which I should express an opinion.

3. Is publication under the terms of these bills subject to the approval of the Commission on Administration and Finance?

The duties and powers conferred by G. L., c. 7, § 9, upon the Supervisor of Administration have been transferred to the Commission on Administration and Finance. St. 1922, c. 545, § 1; St. 1923, c. 362, § 92. G. L., c. 7, § 9, required the approval of the Supervisor of Administration of any publication issued by or on behalf of the Commonwealth, except publications "issued by the officers of either branch of the General Court, or issued under special authority given by the General Court," with certain other exceptions not here material. In my opinion, the publications of the Experiment Station, although founded upon and paid for out of the various Federal appropriations, are issued "by or on behalf of the commonwealth" and are none the less subject to the approval of the Commission on Administration and Finance by reason of their being issued under the terms of the Federal statutes.

4. Is out-of-state travel on any of these funds subject to the approval of the Commission?

The Commission on Administration and Finance has no statutory authority to deal with the question of out-of-state travel. By G. L., c. 6, § 10, it is provided that "no officer or employee of the commonwealth shall travel outside the commonwealth at public expense unless he has previously been authorized by the governor to leave the commonwealth. . . ." The statutory limitation relates only to travel at "public expense." In my opinion, travel the expense of which is paid out of these Federal funds is not travel at public expense requiring the authorization of the Governor.

5. Do receipts from the sale of products which may be produced on these funds revert to the State?

There is nothing in the acts themselves which reserves to the Federal government any right to the products resulting from the performance of the duties imposed by the acts. The purposes of the acts are completely accomplished when the funds are expended as therein provided and the other duties imposed are performed. There is therefore no trust property which can be traced into the products. In my opinion, all such products are the property of the Commonwealth, and any funds therefrom are the property of the Commonwealth. I should assume, however, that such proceeds should be accounted for in the "full and detailed report" made to the Governor, a copy of which is sent to the Commissioner of Agriculture and to the Secretary of the Treasury, which report is to include a statement of receipts and expenditures, and is, under the Hatch Act, to be made the basis of the determination of the Secretary of the Treasury whether any portion of the preceding annual appropriation remains unexpended.

Yours very truly,

JAY R. BENTON, *Attorney General.*

*State Reclamation Board — Reclamation District — Assessment Roll —
Correction of Error.*

There is no authority in the State Reclamation Board or in reclamation district commissioners to change or modify the determination of such commissioners as to an item in an assessment roll, made under G. L., c. 252, as amended, if no objection thereto is filed within fifteen days.

DEC. 14, 1926.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture.*

DEAR SIR: — You request my opinion with regard to the power of the State Reclamation Board or the district commissioners to correct an error in the following matter. It appears that in the Green Harbor Reclamation District, on an "assessment roll as printed and sent to the individual proprietors Mrs. Cadigan is charged with owning lots 13 and 14 of the Beach Meadow subdivision, but in acreage owned and charged for she was charged for three lots instead of two. Reference to the papers from which this official roll was made out shows Mrs. Cadigan also owning lot 85 of the same subdivision. The assessment roll that went out was therefore incorrect as to the numbers of the lots with which she was charged, but correct as to the acreage and corresponding money charged. That is as far as information was available at the time the roll was made up. This information came from the registry of deeds and the town assessors' lists."

G. L., c. 252, as amended by St. 1922, c. 349, St. 1923, c. 457, § 7, St. 1924, c. 93, § 3, and St. 1926, c. 393, § 5, provides as follows: —

"As soon as the district shall have been organized under the provisions of the preceding section the commissioners shall, under the direction of the board, cause the necessary surveys and investigations to be made and shall prepare a plan showing in detail the boundaries of the district and the improvements to be effected. On the basis of such surveys and investigations the commissioners shall prepare an estimate of the total expense of the proposed improvements and shall determine the percentage of such expense to be paid by each proprietor, based on the estimated special benefit to his land in excess of the damage thereto by the use thereof for the proposed improvements. If such damage to the land of any proprietor exceeds the special benefit thereto they shall award him damages for such excess. They shall report their plan, estimate and determination to the board, which shall approve, disapprove or modify such plan and estimate. The commissioners shall also notify each proprietor of such determination by delivering a copy thereof at his residence or by sending the same by registered mail to his last known address and shall certify to the board the date on which such notice is given. If any proprietor is aggrieved by the determination of the commissioners he may, within fifteen days after notice thereof, file with the board his objections thereto and if no such objections are filed by any proprietor within the fifteen days above specified then the determination of the commissioners shall be final."

The information upon which "the determination" of the district commissioners was based was procured from public records. The acreage credited to the proprietor was obtained from said records, and the percentage to be paid by said proprietor was properly based thereon. The assessment roll received by the proprietor made reference to a plan and a sub-plan of all the lots in the district. These plans were accessible to her, and therefore further information with regard to ownership of the lots was

available had she desired to obtain the same. It further appears that "the assessment roll that went out was . . . correct as to the acreage and corresponding money charged." It therefore seems that the proprietor was sufficiently informed as to the determination of the district commissioners, even though the number of a particular lot was omitted from the assessment roll. The proprietor not having filed with the State Reclamation Board her objections to the determination "within fifteen days after notice thereof," the determination must be considered final. The limitation placed upon the time for filing objections is reasonable and necessary to prevent delay in carrying out the proposed improvements in the district.

I find no authority vested in the district commissioners or in the State Reclamation Board to change or modify the determination of the commissioners if no objection is filed thereto within the prescribed period of fifteen days. I am therefore of the opinion that the assessment as determined must continue upon your records.

Very truly yours,

JAY R. BENTON, *Attorney General.*

Commission on Probation — Adoption — Illegitimate Child.

The consent of the mother of an illegitimate infant is a prerequisite to its adoption, even though such mother has been committed to the Reformatory for Women, and the Commission on Probation has no authority to effect an adoption without such consent.

DEC. 20, 1926.

Commission on Probation.

GENTLEMEN: — You request my opinion on the following case: There is before the Superior Court for trial the appeal of a man charged with bastardy, the appeal being taken from the adjudication of the Municipal Court of the City of Boston in September, 1926. The complainant in the case was committed to the Reformatory for Women at Sherborn from the Municipal Court on August 5, 1926, on a charge of larceny. The child in question was born July 7, 1926, and the presiding justice of the Municipal Court ordered the child to be committed to the Reformatory with her mother. A lump sum in settlement of the bastardy case has been suggested, and arrangements have apparently been made for the permanent care and ultimate adoption of said child. You state that this is for the best interests of the child, as the mother has no liking whatsoever for it and it is her intention when released from the Reformatory to give the child up to any one who will take it. You further state that in view of this arrangement preparations were made to carry out said plan, when you learned of the child's commitment to the Reformatory for Women with the mother. You request my opinion as to what right your department or the mother of said child has to sign away the mother's right in the child at the present time.

The mother, having been found guilty of the crime of larceny under G. L., c. 266, § 30, was committed to the Massachusetts Reformatory for Women, the mittimus reading, in part, as follows: —

"For which offence the said defendant is sentenced by said Court to be committed to the said Reformatory for Women, — there to be kept imprisoned, employed and detained according to the rules of the same.

And to take, convey and to deliver to said Superintendent an infant child under the age of eighteen months and you said Superintendent in the

name of this Commonwealth aforesaid are hereby commanded to receive the said defendant into your custody in said Reformatory for Women.

And you said Superintendent are hereby further commanded to receive said child (and place it in the care and custody of said . . . its mother)."

In committing the child to the Reformatory with the mother the court acted under the authority conferred by G. L., c. 127, § 95, which provides as follows:—

"If the mother of a child under eighteen months is imprisoned in a jail, house of correction, workhouse or other place of confinement and is capable and desirous of taking care of it, the keeper shall, upon the order of the court or magistrate committing her, or of any overseer of the poor, receive the child and place it under the care and custody of its mother."

The mother and child are being held at said Reformatory in accordance with this mittimus.

Under such circumstances the method provided by statute for removal of a child from the institution is contained in G. L., c. 127, § 96, which provides as follows:—

"If the officers having charge of such institution are of opinion that the health and comfort of such child require its removal, or that it is expedient that it should be removed, they shall give notice to the father or other kindred thereof, or, if no kindred can be found to receive it, to the overseers of the poor of the town where it has a legal settlement, who shall receive it. If it has no settlement in the commonwealth, it shall be sent to the state infirmary, as is provided in the case of alien paupers."

Your specific question, however, concerns the right of the Commission on Probation or the mother to sign away the mother's right in the child at the present time.

G. L., c. 119, § 16, provides as follows:—

"The mother of an illegitimate infant under two years of age who is a resident of this commonwealth may, in writing signed by her and with the consent of the department, give up such infant to it for adoption; and if it deems such action for the public interest, the department may, in its discretion and on such conditions as it imposes, receive such infant and provide therefor. Such surrender by the mother shall operate as a consent by her to any adoption subsequently approved by the department."

The department mentioned in said section is the Department of Public Welfare.

G. L., c. 210, § 3, provides, in part, as follows:—

"A giving up in writing of a child, for the purpose of adoption, to an incorporated charitable institution shall operate as a consent to any adoption subsequently approved by such institution."

G. L., c. 210, § 1, provides that a person of full age may petition the Probate Court in the county where he resides for leave to adopt as his child another person younger than himself. Section 2 provides that a decree for such adoption shall not be made, except as hereinafter provided, without the written consent "of the mother only of the child, if illegitimate." Section 3 provides that the consent of the persons named in the preceding section (§ 2) shall not be required if such person "is imprisoned in the state prison or in a house of correction in this com-

monwealth under sentence for a term of which more than three years remain unexpired at the date of the petition."

It appears that the mother in the instant case was found guilty of a charge of larceny of chattels of the value of approximately fifteen dollars. Under G. L., c. 266, § 30, "if the value of the property stolen does not exceed one hundred dollars" the punishment is "by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars."

The sentence to the Reformatory for Women was in accord with G. L., c. 279, § 16, which provides:—

"A female, convicted of a crime punishable by imprisonment in a jail or house of correction, may be sentenced to the reformatory for women."

The duration of her imprisonment is governed by G. L., c. 279, § 18, which provides as follows:—

"A female sentenced to the reformatory for women for larceny or any felony may be held therein for not more than five years, unless she is sentenced for a longer term, in which case she may be held therein for such longer term; if sentenced to said reformatory for any other offence, she may be held therein for not more than two years."

As the mother in the case before me was not imprisoned "in the state prison or in a house of correction," the exception to the requirement of the consent of the mother of an illegitimate child to its adoption under G. L., c. 210, § 3, does not apply.

I find no authority vested in the Commission on Probation to sign away this mother's rights in her child. In my opinion, under the existing circumstances, a giving up or adoption of said child can only be made with the mother's consent first obtained.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Motor Vehicles — Registration — Private Charitable Hospital.

A private charitable hospital may not register a motor vehicle unless such hospital complies with the provisions of the statutes relative to compulsory automobile liability insurance.

DEC. 21, 1926.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You have asked me for my opinion upon the following matter: "As to whether or not a hospital which is not liable in tort for the negligence of its servants will be compelled to present to the Registrar of Motor Vehicles a certificate from an insurance company before he can register its motor vehicle."

I assume that the hospital which you describe is eleemosynary in character and is not an institution conducted by the Commonwealth or one of its subdivisions.

I am of the opinion that a motor vehicle owned by such a hospital may not be registered unless the application for registration is accompanied by a certificate as defined in G. L., c. 90, § 34A (as amended by St. 1926, c. 368, § 2). Such a hospital is not mentioned in the statute as one of the exceptions to the general provisions relative to owners of motor vehicles and the requirement that they shall produce a certificate as a prerequisite to registration of such vehicles and trailers. G. L., c. 90, § 1A (as amended

by St. 1926, c. 368, § 1). No intent to include such a hospital within the exceptions to the general provisions can be inferred from the character or scope of the statutes relative to registration. The coverage of the policy, bond or deposit required by statute with relation to a registered motor vehicle extends not only to the liability of the owner and his or its employees but to that of any person responsible for its operation, maintenance, control or use with the express or implied consent of the owner. It cannot be said to be beyond the power of the Legislature to require such a hospital to provide security for liability on the part of such others as are designated by the statute when operating, maintaining, controlling or using its motor vehicle with its express or implied consent, even though its own liability for negligence be limited by familiar principles of law.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Insurance — Mutual Liability Company — By-Laws — Issuance of Policies.

If existing by-laws of a mutual liability insurance company provide that amendments to the same are to be made at stated annual meetings, such amendments may not be made at a special meeting.

The filing of agreements to take policies in a mutual liability insurance company upon condition that they should be executed on or before a day certain is insufficient compliance with G. L., c. 175, § 73, as amended, if the certificate of the Commissioner permitting the issuance of policies was granted not more than thirty days previous to such filing.

DEC. 23, 1926.

Hon. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR: — 1. You have submitted to me the following statement of facts: —

“The by-laws of one of the mutual liability insurance companies recently incorporated but which has not been authorized to issue policies provide that ‘Amendments to these by-laws may be made at any annual meeting by vote of a majority of those present, ten days’ notice of such amendment having been given.’ The by-laws provide that ‘An annual meeting of the members of the company shall be held at two P.M. on the second Tuesday of January of each year.’

At a special meeting of the Company, all of the incorporators being present, it was voted unanimously to amend one of the articles of the by-laws. This amendment increases the contingent liability of the members from an amount equal to and in addition to the cash premium written in the policy to double said amount.”

You have asked my opinion upon a question of law relative thereto as follows: —

“I request your opinion on the question whether the company has authority to amend its by-laws by a unanimous vote of the incorporators at a meeting at which all are present, but not an annual meeting.”

I answer your question to the effect that the company described by you, under the state of facts which you set forth in your communication, was without authority to amend its by-laws in the manner which you have detailed.

The general inherent power which a corporation possesses to amend its

by-laws is subject to such limitations as have been placed upon the exercise of the power in the by-laws already adopted. An amendment cannot be effected except by substantial compliance with the rules governing the making of amendments in the by-laws as they exist. Where, as in the instant case, existing by-laws provide for amendments to be made at annual meetings, with ten days' notice, such meetings to be held on the second Tuesday of January, the adoption of an amendment to the by-laws at a special meeting of the incorporators prior to the annual meeting is not a substantial compliance with the existing by-laws. See *Torrey v. Baker*, 1 Allen, 120. It is obvious that the adoption of an amendment such as you have set forth, increasing the contingent liability of members of a mutual liability insurance company in a manner and at a time not provided for in the existing by-laws might be prejudicial to the interests of persons not then members of the company; as, for example, persons who had subscribed for policies on the basis of the contingent liability as established in the by-laws as originally drawn, and in reliance upon the provisions of the by-laws that there should be no amendment thereof prior to the annual meeting on the second Tuesday of January, which date might be subsequent to the time when they would have taken their policies under the terms of their subscriptions.

2. You have also submitted to me the following statement of facts relative to a mutual liability insurance corporation:—

“The company submitted to the department applications for insurance in which an agreement was made to take the insurance applied for on or before a specified date. In a large percentage of these applications the agreement was made to take the insurance on or before December 31, 1926.”

You have asked my opinion relative thereto as follows:—

“I request your further opinion on the question whether, assuming all other requirements of the statute were complied with, and the license issued on some date not more than thirty days previous to said December 31st, the filing of said agreements would be a compliance with the requirements of the statute.”

The insurance company, in relation to its right to begin issuing policies, is governed by G. L., c. 175, § 73, as amended by St. 1926, c. 53, which provides that no policy may be issued—

“until a list of the subscribers for insurance, with such other information as he may require, shall have been filed with the commissioner, nor until the president and secretary of the company shall have certified on oath that every subscription for insurance in the list so filed is genuine and made with an agreement with every subscriber for insurance that he will take the policies subscribed for by him within thirty days of the granting by the commissioner of a certificate to issue policies as provided by section thirty-two.”

I am of the opinion that, although subscriptions for insurance in the instant case were, as you state, made upon condition that they should be executed before a day certain rather than within a period described by the language of the statute, yet, if in fact the required certificate was granted prior to such date certain, and not more than thirty days previous thereto, then the agreements of the subscriptions as written would be in substantial compliance with the terms of the statute, and their filing and

verification in the manner provided for in section 73 would fulfill the requirements thereof. Much the same principle of law as governs conditional subscriptions for stock, which are held to be binding upon the fulfillment of the conditions before the time set for the execution of such subscriptions (*Central Turnpike Corp. v. Valentine*, 10 Pick. 142), is applicable to the state of facts set forth by you.

Very truly yours,

JAY R. BENTON, *Attorney General*.

Board of Parole — Terms and Conditions of Parole — Time for granting Parole.

Prisoners eligible for permits to be at liberty may not be held beyond the term of their minimum sentence unless they refuse to assent to lawful and reasonable terms and conditions for parole, seasonably presented to them in writing.

DEC. 23, 1926.

HON. SANFORD BATES, *Commissioner of Correction*.

DEAR SIR: — You request my opinion upon the following questions: —

1. When and under what circumstances may prisoners who have not been punished be held beyond the term of their minimum sentence?

2. May the Board of Parole impose terms and conditions upon an inmate?

3. May the Board of Parole withhold the issuance of the permit if at the time set for release those terms and conditions precedent have not been complied with?

4. Must such terms and conditions be in writing, or what other formalities should be gone through with?

I answer your questions in the order submitted.

First. — G. L., c. 127, § 133, provides: —

“If the record of a prisoner sentenced to the state prison for a crime committed on or after the first day of January in the year eighteen hundred and ninety-six shows that he has faithfully observed all the rules of the prison and has not been subjected to punishment, the board of parole shall, upon the expiration of his minimum term of sentence, grant him a permit to be at liberty therefrom during the unexpired portion of the maximum term of his sentence, upon such terms and conditions as it shall prescribe. If the record shows that he has violated the rules of the prison, he may be given a like permit at such time after the expiration of the minimum term of his sentence as the board shall determine. If the prisoner is held in the prison upon two or more sentences, he shall be entitled to receive such permit when he has served a term equal to the aggregate of the minimum terms of the several sentences, and he shall be subject to all the provisions of this section until the expiration of a term equal to the aggregate of the maximum terms of said sentences.”

This statute expressly states that the Board of Parole “shall” grant such prisoner a permit to be at liberty during the unexpired portion of the maximum term of his sentence, “upon such terms and conditions as it shall prescribe.”

In an opinion of one of my predecessors to the Board of Parole, dated July 17, 1918 (V Op. Atty. Gen. 235), this section of the statute (then R. L., c. 225, § 115) was construed as follows: —

"In my opinion, the section in question imposes upon your Board two duties. It first must determine whether the record of a prisoner who comes within its terms 'shows that he has faithfully observed all the rules of the prison and has not been subjected to punishment.' If this determination is made in favor of the prisoner, it becomes the duty of the Board to 'issue to him a permit to be at liberty therefrom during the unexpired portion of the maximum term of his sentence, upon such terms and conditions as they shall prescribe.' This plainly imposes a second duty upon your Board of determining what shall be the terms and conditions under which the permit to be at liberty is to be issued. It seems to be within the discretion of your Board to impose any reasonable terms and conditions upon such a permit which are not inconsistent with any other provisions of this section or of the statutes in general. In my judgment, therefore, under the terms of this section the warden of the State Prison is not authorized to release any prisoner except upon a permit to be at liberty duly granted by your Board, after an investigation of the matter by you. If the terms and conditions imposed by your Board in connection with the issuance of such a permit require the assent or acceptance of the prisoner, the permit cannot be issued or the prisoner released until he has indicated his assent or acceptance."

In my opinion, if the Board of Parole ascertains that a prisoner who comes within the terms of the statute has faithfully observed all the rules of the prison and has not been subjected to punishment, it is the duty of the Board of Parole formally to prepare forthwith express terms and conditions upon which a permit to be at liberty shall be issued. Such terms and conditions must, of course, be reasonable and must not violate any provision of law. They will of necessity vary somewhat in accordance with the facts of each particular case and the objects to be accomplished. But the Board must formulate authoritative, definite and express "terms and conditions," which should be presented to the prisoner at the time when under the statute he becomes eligible for a permit to be at liberty. It seems obvious that when that time comes, in view of the mandatory language of the statute, a prisoner cannot properly be held in confinement thereafter simply because the Board of Parole has not formulated "terms and conditions" governing his permit to be at liberty. Such a construction would, in my opinion, defeat the main purpose of the statute. It is obviously not merely the right but the duty of the Board of Parole to prepare the terms and conditions so that they will be available at that time.

One of the terms and conditions imposed by the Board of Parole may properly be that the assent to or acceptance of such terms and conditions by the prisoner is required as a condition precedent to the granting of the permit to be at liberty. If in such case the prisoner refuses so to assent the Board may properly refuse to issue to him a permit to be at liberty until he has indicated his assent or acceptance.

I accordingly answer your first question that prisoners eligible under the statute for permits to be at liberty cannot properly be held beyond the term of their minimum sentence unless at the expiration of such minimum term such prisoners have definitely refused to assent to lawful and reasonable terms and conditions prepared by the Board of Parole and formally presented to such prisoners for their acceptance or rejection at that time.

Second. — I have already answered your second question in my answer to your first question.

Third. — It is reasonable to suppose that many of the terms and conditions imposed upon such prisoners are aimed to govern their movements after release, and accordingly the prisoners cannot be said to have broken them until their conduct after release so demonstrates. But as I stated in my answer to your first question, it is my opinion that one of the terms and conditions may be that the prisoner shall signify his assent to all or some of the terms and conditions imposed in his particular case before he receives his permit to be at liberty. If he refuses so to assent the Board may properly refuse him such permit, at least until he does so assent.

Fourth. — The statute does not expressly require the terms and conditions therein referred to to be in writing, and accordingly I cannot say that they must be; but from the use of the word "prescribe," such an intention may properly be inferred. In my opinion, a matter of such importance should require the practice of preparing such terms and conditions in writing in order that no controversy, misunderstanding or ambiguity should arise in relation thereto. Such terms and conditions may be few or many, as the Board of Parole may decide, according to the particular facts of each case, and in all fairness it seems to me that the prisoner should be furnished with a copy at the time his permit is granted, and that they should be clearly explained to him. If thus always available to him and clearly expressed, no prisoner can thereafter plead ignorance or misunderstanding of them. A copy should also be preserved with the records pertaining to said prisoner. I understand that this is substantially the custom in such cases.

Yours very truly,
JAY R. BENTON, *Attorney General.*

Department of Public Health — Quarantine — Typhoid Carrier.

The Department of Public Health has no authority to establish quarantine regulations for, or forcibly to restrain, typhoid carriers, in the absence of reasonable regulations with relation to such carriers made by local boards.

DEC. 24, 1926.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR:— You have asked my opinion relative to the following matter:—

"The Department is faced with the problem of control of a typhoid carrier who has repeatedly been the cause of sickness, not only in this State but elsewhere. The difficulty of control is that he moves from one community to another and may be outside a local jurisdiction at the time the sickness is recognized. Under G. L., c. 111, § 7, the Department is given 'co-ordinate powers as a board of health, in every town, with the board of health thereof.'

In your opinion, is it within the power of the Department to establish quarantine regulations in this particular case and to cause the arrest and forcible restraint of this individual if the regulations are broken?"

The duties of the Department of Public Health are contained in G. L., c. 111. Section 5, as amended by St. 1921, c. 322, provides as follows:—

"The department shall take cognizance of the interests of health and life among the citizens of the commonwealth, make sanitary investigations and

inquiries relative to the causes of disease, and especially of epidemics, the sources of mortality and the effects of localities, employments, conditions and circumstances on the public health, and relative to the sale of drugs and food and adulterations thereof; and shall gather such information relating thereto as it considers proper for diffusion among the people. It shall advise the government concerning the location and other sanitary condition of any public institution; and shall have oversight of inland waters, sources of water supply and vaccine institutions; and may, for the use of the people of the commonwealth, produce and distribute anti-toxin and vaccine lymph and such specific material for protective inoculation, diagnosis or treatment against typhoid fever and other diseases as said department may from time to time deem it advisable to produce and distribute; and may sell, under such rules, regulations or restrictions as the council may establish, such amounts of the various biologic products prepared or manufactured in the laboratories of the department, as constitute an excess over the amounts required for the diagnosis, prevention and treatment of infectious diseases within the commonwealth. It shall annually examine all main outlets of sewers and drainage of towns of the commonwealth, and the effect of sewage disposal."

Section 6 authorizes the Department of Public Health to define what diseases shall be deemed to be dangerous to the public health. Section 7 provides as follows:—

"If smallpox or any other contagious or infectious disease declared by the department to be dangerous to the public health exists or is likely to exist in any place within the commonwealth, the department shall make an investigation thereof and of the means of preventing the spread of the disease, and shall consult thereon with the local authorities. It shall have co-ordinate powers as a board of health, in every town, with the board of health thereof. It may require the officers in charge of any city or state institution, charitable institution, public or private hospital, dispensary or lying-in hospital, or any board of health, or the physicians in any town to give notice of cases of any disease declared by the said department to be dangerous to the public health. Such notice shall be given in such manner as the department may deem advisable. If any such officer, board or physician refuses or neglects to give such notice, he or they shall forfeit not less than fifty nor more than two hundred dollars."

City and town boards of health are expressly given power to make reasonable health regulations. G. L., c. 111, § 31, as amended by St. 1924, c. 180.

By G. L., c. 111, § 92, each city, except Brockton, shall, and each town may, and upon request of the Department shall, establish and maintain constantly within its limits one or more hospitals for the reception of persons having smallpox, diphtheria, scarlet fever, tuberculosis or other diseases dangerous to the public health as defined by the Department, unless there already exists therein a hospital satisfactory to the Department for the reception of persons ill with such diseases, or unless some arrangement satisfactory to the Department is made between neighboring municipalities for the care of such persons. Section 95 provides as follows:—

"If a disease dangerous to the public health breaks out in a town, or if a person is infected or lately has been infected therewith, the board of health shall immediately provide such hospital or place of reception and such nurses and other assistance and necessities as is judged best for his

accommodation and for the safety of the inhabitants, and the same shall be subject to the regulations of the board. The board may cause any sick or infected person to be removed to such hospital or place, if it can be done without danger to his health; otherwise the house or place in which he remains shall be considered as a hospital, and all persons residing in or in any way connected therewith shall be subject to the regulations of the board, and, if necessary, persons in the neighborhood may be removed. When the board of health of a town shall deem it necessary, in the interest of the public health, to require a resident wage earner to remain within such house or place or otherwise to interfere with the following of his employment, he shall receive from such town during the period of his restraint compensation to the extent of three-fourths of his regular wages; provided, that the amount so received shall not exceed two dollars for each working day."

Local boards of health are vested with drastic powers relative to nuisances and causes of sickness. G. L., c. 111, § 122, provides as follows:—

"The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town, or on board of vessels within the harbor of such town, which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto and to articles capable of containing or conveying infection or contagion or of creating sickness brought into or conveyed from the town or into or from any vessel. Whoever violates any such regulation shall forfeit not more than one hundred dollars."

The power of the Department of Public Health to make rules and regulations is limited to certain specified objects, while the power of local boards of health to make reasonable health regulations is broad and embracing, disclosing the intention of the Legislature to vest control largely in local boards rather than in the Commonwealth through the Department of Public Health.

In the absence of express power vested in the Department of Public Health to establish quarantine regulations in the case of a person who has been found to be a typhoid carrier, such right does not exist unless it can be implied from the sentence in G. L., c. III, § 7, providing that the Department "shall have co-ordinate powers as a board of health, in every town, with the board of health thereof." The word "co-ordinate" is usually defined as "existing or occurring together in equal degree or similar relation" or "to place in harmonious or reciprocal relation; combine or adjust for action or for any end." Standard Dictionary. For example, the word "co-ordinate," whenever used with reference to the three departments of state, implies equality and rank, importance, independence and dignity. *Woods v. Sheldon*, 69 N. W. 602. It is not the same as "concurrent." See *Commonwealth v. Nickerson*, 236 Mass. 281.

In an opinion to the State Board of Health, dated January 18, 1907 (III Op. Atty. Gen. 81), defining R. L., c. 75, § 8, now G. L., c. 111, § 7, Attorney General Malone said:—

"It appears from this section that the principal duty of the Board created by this section of the statute, with relation to matters of health, was the investigation of contagious or infectious diseases and the prevention of such diseases, and it is therefore provided that the Board shall consult with the local authorities thereon. Then follows the phrase under

consideration, — ‘and shall have co-ordinate powers as a board of health, in every place, with the board of health,’ etc.

The strong reason for assuming that the powers referred to are conferred only where contagious disease exists or is likely to exist is the fact that they are mentioned in a section which purports to treat only of contagious or infectious diseases.”

In my opinion, if a local board of health has established reasonable health regulations it may be that the Department of Public Health has “co-ordinate powers” as a board of health in every town with the board of health thereof with respect to their enforcement, but in the absence of such health regulations, duly enacted by a local board of health, it is my opinion that it is not within the power of the Department of Public Health to establish quarantine regulations under the facts contained in your letter, or to cause the arrest and forcible restraint of the person referred to, under the law as it now exists.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Right of Access to Land taken for Park Purposes — Abutting Owners — Gasoline Filling Station.

The fact that land is taken for a public park does not necessarily give the abutting owners a right of access to such land. The abutting owners may have a right of access to such land used as a parkway, by virtue of and governed by the terms of a deed, given by their predecessor in title, to a city.

DEC. 31, 1926.

Metropolitan District Commission.

GENTLEMEN: — You request my opinion as to the right of the Beacon Oil Company, owner of land abutting on Memorial Drive in Cambridge, to access to said drive in connection with a gasoline filling station maintained or to be maintained on the owner’s premises. You ask specifically: —

1. Does the fact that the land was taken for a public park give the abutting owners a common-law right of access such as was given in the Anzalone case?

2. Do the present owners of the abutting land have a right of access by virtue of the provisions of the deed referred to?

You state: —

“This land was taken by the city of Cambridge for park purposes under the provisions of St. 1892, c. 341, and St. 1893, c. 337. In March, 1897, the then owner of the land to which the Beacon Oil Company petitions for these driveway entrances and of land taken for the park in front, now incorporated in Memorial Drive, conveyed to the city of Cambridge the land included in the taking by a stereotyped form of deed then in use by the city, which contained, among others, the following provision, in substance:

‘And for the above-named consideration and the further consideration that said City of Cambridge shall construct along the boundary line of said park, within said parcel of land, a roadway and walk to which we and our heirs and assigns, owners or occupants of adjoining lands of grantor,

shall have free access, with the right to use the same for the purposes of a way, subject to such reasonable rules and regulations as may from time to time be made by the Park Commissioners of said City or by any other board or department having for the time being the control and management of said park, we hereby, for ourselves and our heirs, executors and administrators, covenant with the said City of Cambridge that we and our heirs and assigns will hold our remaining land abutting upon said park and to a distance of one hundred feet therefrom, subject to the following restrictions, which shall be inserted or referred to in any conveyance hereafter made by us or them of the whole or any part of said restricted land:

1. No building erected or placed upon said premises shall be used for a livery or public stable or for any mechanical, mercantile or manufacturing purposes. . . .

Then followed a provision, in substance, that the restrictions above set forth shall continue in force so long as such roadway and walk shall be maintained by said city of Cambridge, and the grantor, his heirs and assigns, owners or occupants of the grantor's adjoining land, shall have free access thereto and liberty to use the same for the purposes of a way subject to the rules and regulations aforesaid."

It is my understanding that the land described as Memorial Drive became the property of the Commonwealth and came under the control of the Metropolitan District Commission by virtue of St. 1920, c. 509. Section 2 of said act reads as follows:—

"Upon the conveyance of the said lands as provided in section one, the metropolitan district commission shall have all the powers and duties in respect thereto conferred upon the metropolitan park commission by chapter four hundred and seven of the acts of eighteen hundred and ninety-three and acts in addition thereto and in amendment thereof."

I answer your first question in the negative.

In an opinion given by me to your Commission under date of September 19, 1923 (Attorney General's Report, 1923, p. 168), it is said:—

"There are two classes of roads which may be constructed under the terms of our statutes by your Commission. The first of these consists of roads constructed under the provisions of G. L., c. 92, § 33, formerly St. 1893, c. 407, and consists, in general, of roads laid out upon or bordering upon spaces taken by the Commission for exercise and recreation. In the absence of particular facts relative to any one of such roads, these roads may fairly be said not to be public ways (*Gero v. Metropolitan Park Commission*, 232 Mass. 389); and in the absence of an easement given by the Commonwealth to some adjoining landowner, the adjoining landowner will not have any right of way from his land to such road."

The roadway involved in the Anzalone case to which you refer (*Anzalone v. Metropolitan District Commission*, 257 Mass. 32) was constructed under St. 1894, c. 288.

I answer your second question in the affirmative.

Under the reasoning in the Anzalone case the abutting owner has a right of access under the provisions of the deed above referred to. *Anzalone v. Metropolitan District Commission*, 257 Mass. 32, 36. I assume that the landowner is not violating the restrictions set forth in the deed. Also, it is settled by the decision in the Anzalone case and in the case of *Metro-*

politan District Commission v. Cataldo, 257 Mass. 38, that the right of access is "subject to reasonable restrictions and requirements as to location, construction, and use deemed by the Commissioners to be necessary for the public safety and convenience." *Metropolitan District Commission v. Cataldo*, 257 Mass. 38, 42.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Land in Tidewater — Compensation for Rights therein — Licenses.

The Governor and Council may determine the compensation to be paid for rights relative to the placing of structures granted in land of the Commonwealth in tidewater; but if only a revocable license to build structures thereon is granted by the Division of Waterways and Public Lands, no compensation is required by the statute to be paid.

JAN. 4, 1927.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR: — You ask my opinion whether charges can be made by the Governor and Council under G. L., c. 91, § 22, or otherwise, as compensation for rights granted in land of the Commonwealth by licenses to place cables, wires, pipes and similar structures upon such land in tidewater. You ask me also whether G. L., c. 91, requires a license from the Division of Waterways and Public Lands for the placing of cables and wires in the tidewaters of the Commonwealth, whether the Governor and Council may determine the compensation to be paid irrespective of any license, whether such structures may be declared a public nuisance under section 23 if unlicensed or if compensation has not been paid, and whether if compensation is paid permanent rights are acquired that can be revoked only by legislative act or repayment of compensation, notwithstanding the insertion of a revocable clause in the license.

Your inquiry requires first an analysis of the statutory provisions governing the issuing of licenses for structures in tidewater and the interpretation of those provisions by the court and by the Attorney General. In the General Laws these provisions appear in chapter 91, and so far as material to this inquiry are as follows: —

"SECTION 14. The division may license and prescribe the terms for the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of land or flats, or the driving of piles in tide water below high water mark, but not, except as to a structure authorized by law, beyond any established harbor line, nor, unless with the approval of the governor and council, beyond the line of riparian ownership. . . .

SECTION 15. Every authority or license granted since eighteen hundred and sixty-eight or hereafter granted by the commonwealth to any person to build a structure or do other work . . . upon ground over which the tide ebbs and flows, except Boston harbor, or to fill up or to enclose the same, whether such ground is above or below low water mark, or within or beyond one hundred rods from high water mark, or whether private property or property of the commonwealth, shall be subject to the following conditions, whether expressed in the act, resolve or license granting the same or not: such authority or license shall be revocable at the discretion of the general court and shall expire in five years from its date,

except as to valuable structures, fillings or enclosures actually and in good faith built or made under the authority or license during the term thereof; but if compensation has been paid to the commonwealth under section twenty-two or under any similar provision of law, the rights and privileges for which it has been paid shall not so terminate or be revoked unless provision is made for repayment of such compensation.

SECTION 22. If authority or a license is granted by the general court or by the division to a person to build a wharf or other structure upon, or to fill or otherwise occupy, land in tide water, or to build or extend any structure or drive piles, fill land or make any obstruction, encroachment or excavation in, over or upon the waters of any great pond, he shall, before the work is begun, pay to the commonwealth such compensation for the rights granted in any land the title to which is in the commonwealth as shall be determined by the governor and council. . . .

SECTION 23. Every erection made and all work done within tide water, . . . not authorized by the general court or by the division, or made or done in a manner not sanctioned by the division, if a license is required as hereinbefore provided, shall be considered a public nuisance. . . .”

Legislation regulating erections and works in tidewaters was first enacted in St. 1866, c. 149, establishing the Board of Harbor Commissioners and giving to them the general care and supervision of all the harbors and tidewaters and of all the flats and lands flowed thereby within the Commonwealth, except the Back Bay lands, in order to prevent and remove unauthorized encroachments. By section 4 of the act the commissioners were given power to supervise the building of certain structures and the filling of flats in tidewaters authorized by the Legislature, and were required to ascertain the amount of tidewater displaced, for which compensation was to be paid to the Commonwealth. Section 5 declared unauthorized erections and works within tidewaters to be a public nuisance.

St. 1869, c. 432, provided that all authority or license granted during that session of the Legislature, or that might be thereafter granted by the Commonwealth, to build any structure upon ground over which the tide ebbs and flows, or to fill up or enclose the same, should be subject to the condition that such license or authority should be revocable at any time at the discretion of the Legislature and should expire at the end of five years from its date, except where and so far as valuable structures, fillings or enclosures should have been actually and in good faith built or made under the same.

St. 1872, c. 236, in section 1, provided that “any person may build or extend a wharf or construct a pier, dam, sea-wall, road, bridge or other structure, fill land or flats, or drive piles in or over tide water below high-water mark within the line of riparian ownership, on any shore and within whatever harbor lines there may be at the time established by law along such shore: *provided* the license of the board of harbor commissioners is first obtained in the manner provided by” St. 1866, c. 149, § 4. Section 2 provided that the Board of Harbor Commissioners might grant licenses to build or extend such structures or fill land or flats in or over tidewater below high water mark and beyond the line of riparian ownership, upon such terms as they might prescribe, with the provisos that no such license beyond the line of riparian ownership should be valid unless approved by the Governor and Council or except where a

harbor line had been established, and that no such license should have effect beyond such harbor line except in relation to a structure authorized by law outside such line. The power to grant such licenses beyond the line of riparian ownership where no harbor line had been established was given to the board by St. 1874, c. 347, subject to certain restrictions.

St. 1874, c. 284, provided that whenever any authority or license was thereafter granted by the Legislature or by the Board of Harbor Commissioners, with the approval of the Governor and Council, to build any wharf or other structure or to fill or otherwise occupy land in tidewater below low water mark, the person so authorized should pay to the Commonwealth such compensation for the rights and privileges granted in such land as should be determined by the Governor and Council to be just and equitable; and it also provided that when such compensation had been paid the rights and privileges so granted should not, under St. 1869, c. 432, terminate in five years, and should not be revocable unless provision was made in such revocation for repayment by the Commonwealth of the amount thereof.

The provisions of these acts were combined in P. S., c. 19, §§ 6-18, the Board of Harbor and Land Commissioners having then replaced the previous Board of Harbor Commissioners. By subsequent enactments the powers of that board were transferred to the Commission on Waterways and Public Lands and finally to the Division of Waterways and Public Lands. G. L., c. 91, §§ 14, 15, 22 and 23, are substantially continuations, with an exception referred to later, of P. S., c. 19, §§ 9, 12, 16 and 17.

An account of the history of this legislation is given in I Op. Atty. Gen. 412, and in *Attorney General v. Boston & Lowell R.R. Co.*, 118 Mass. 345.

Licenses granted by the General Court to build structures in tidewater prior to St. 1869, c. 432, have generally been construed to be irrevocable. The court has said that it was the common understanding that they operated as grants and not as mere revocable licenses. *Fitchburg R.R. Co. v. Boston & Maine R.R.*, 3 Cush. 58, 87; *Bradford v. McQuesten*, 182 Mass. 80; *Treasurer and Receiver General v. Revere Sugar Refinery*, 247 Mass. 483, 489. In that respect they differ fundamentally from locations granted to public service corporations to occupy the public streets. *Pierce v. Drew*, 136 Mass. 75; *Springfield v. Springfield St. Ry. Co.*, 182 Mass. 41, 47, 48; *Metropolitan Home Tel. Co. v. Emerson*, 202 Mass. 402; *Connecticut Valley St. Ry. Co. v. Northampton*, 213 Mass. 54, 63, 64; *Union Institution for Savings v. Boston*, 224 Mass. 286. This rule of construction is, of course, a rule for determining the legislative intention in granting such licenses. It would therefore not prevail as against an expressed purpose that a license should be temporary or revocable.

St. 1869, c. 432, as amended by St. 1874, c. 284 (G. L., c. 91, § 15), provided, in substance, that such licenses, granted by the Commonwealth after 1868, should expire in five years or might be sooner revoked by the General Court unless in the meantime valuable structures, fillings or enclosures were built or made under the license, and with the further proviso that if compensation had been paid to the Commonwealth for the rights granted the license should not terminate or be revoked unless provision was made for repayment of that compensation. In effect, all licenses thereafter granted, irrespective of other terms and conditions, were made subject in any event to forfeiture for non-user of the rights

granted, with the exception in case compensation had been paid. Cf. *Treasurer and Receiver General v. Revere Sugar Refinery*, 247 Mass. 483, 489. Manifestly it could not and was not intended to curtail the power of future legislatures to grant licenses subject to other conditions as to expiration or revocation.

By St. 1872, c. 236 (G. L., c. 91, § 14), the Legislature as we have seen, authorized the Harbor Commissioners to license and prescribe the terms for the construction or extension of structures, the filling of lands or flats, and the driving of piles in tidewater below high water mark. The purpose of this statute was doubtless to relieve the Legislature of the burden of granting such licenses by special act. 1 Op. Atty. Gen. 412, 415. While the grant of power to prescribe the terms of licenses is without express limitation, it is, of course, subject to such limitations as may be found in the statutes as well as to the general requirement that the terms must be reasonable. *Keefe v. Lexington & Boston St. Ry. Co.*, 185 Mass. 183; *Selectmen of Clinton v. Worcester, etc., St. Ry. Co.*, 199 Mass. 279, 285; *Treasurer and Receiver General v. Revere Sugar Refinery*, 247 Mass. 483, 491; *Grand Rapids v. Braudy*, 105 Mich. 670, 678; *Schwuchow v. Chicago*, 68 Ill. 444.

The only statutory provision which for our purposes needs to be considered here as containing possible limitations on the general power to prescribe terms is St. 1869, c. 432, as amended (G. L., c. 91, § 15), providing for the expiration or revocation by the General Court of licenses under which action has not been taken.

Whether this statute should be construed as governing the subject of revocation so as to preclude the Division from prescribing as a term of any license any provision with regard to the revocability thereof different from that contained in the statute, might, if it were a new question, be a matter of some doubt. But I am informed that it has been the practice of the Board of Harbor Commissioners and its successors, since 1872, to grant licenses for the erection of temporary structures upon condition that they shall be removed at the request of the Board and that the licenses so granted may be revoked or modified, that many such licenses have been issued from that time on, and that the authority to do so has not been questioned. It is a general rule in the interpretation of statutes that the practical construction put upon a legislative act by those charged with its enforcement is entitled to considerable weight. *Burrage v. County of Bristol*, 210 Mass. 299, 301; *Tyler v. Treasurer and Receiver General*, 226 Mass. 306, 310.

Again, the Board of Harbor and Land Commissioners was advised by former Attorney General Herbert Parker, in an opinion dated January 15, 1906, that the Board had the right in granting a license to reserve expressly the right to revoke it for some reasonable cause, and that the provisions of R. L., c. 96, § 21 (G. L., c. 91, § 15), were not in conflict. As to those provisions he said:—

“The Legislature has limited the time in which a man may act under a license to five years from the date thereof, and has made such license revocable at its discretion. But that the Legislature has seen fit to place a maximum limit upon the length of time during which a license shall remain in force, and has retained the power to put an end to it sooner, is not an adequate reason for the position that the Board may not still further limit the existence of the license by virtue of its right to prescribe terms.”

On the whole, therefore, it is my opinion that the Division has the power to prescribe as a term of a license that it shall be revocable and that structures built thereunder shall be removed upon such revocation if, under the circumstances of the particular case, such requirement is a reasonable one. But the last clause in the act of 1869, as amended, does contain a clear limitation of authority in the cases to which it relates. By virtue of that proviso the Division would not have power to prescribe as a term of a license for which compensation had been paid that it should terminate or be revocable without making adequate provision for repayment of such compensation.

The duty imposed upon the Governor and Council by section 22 is to determine the compensation to be paid for rights granted in land of the Commonwealth. Where the license given by the Division is a revocable one, no right in land of the Commonwealth is granted, and therefore no compensation is required to be paid by section 22.

Section 23 provides that "every erection made and all work done within tide water, . . . not authorized by the general court or by the division, . . . if a license is required as hereinbefore provided, shall be considered a public nuisance." While in the General Laws there is no specific provision requiring a license from the Division or from the General Court for the erection of a structure, such requirement is doubtless a plain inference. In that connection the provision in St. 1872, c. 236, § 1, requiring a license for the building or extension of the structures described in section 2 (G. L., c. 91, § 14) should be observed. The court has said that structures cannot be placed in tidewater without a license from public authority. *Wyman v. County Commissioners*, 157 Mass. 55, 57; *N. Ward Co. v. Street Commissioners*, 217 Mass. 381, 385; and the absence of a license has been said to be sufficient evidence that a structure is a public nuisance. *Fuller v. Andrew*, 230 Mass. 139, 145.

Whether cables, wires and pipes are structures, within the meaning of section 14, is a question of considerable doubt. The word "structure" is defined broadly as any production or piece of work artificially built up, or composed of parts joined together in some definite manner. See *Stevens v. Stanton Construction Co.*, 153 App. Div. 82; *Nash v. Commonwealth*, 174 Mass. 335. Railroad tracks have frequently been held to be structures. *Giant-Powder Co. v. Oregon Pac. Ry. Co.*, 42 Fed. 470; *Ban v. Columbia Southern Ry. Co.*, 117 Fed. 21, 30; *New York, N. H. & H. R.R. Co. v. New Haven*, 70 Conn. 390; *Flanagan v. F. W. Carlin Const. Co.*, 134 App. Div. 236. Filling was held to be a structure in *Clement v. Putnam*, 68 Vt. 285, and so were poles and wires in *Forbes v. Willamette Falls Electric Co.*, 19 Or. 61.

The objects and purposes for which licenses may be granted by the Division are described in section 14 as "for the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of land or flats, or the driving of piles in tide water below high water mark." The words "or other structure" are used in conjunction with words describing things which are not merely laid on the land but are constructed thereon. The filling of land and the driving of piles are separately described. In the interpretation of statutes the principle of *ejusdem generis* or *noscitur a sociis* requires that the application of general words should be confined to things of similar import with more particular words preceding. *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75, 77; *Clark v. Gaskarth*, 8 Taunt. 431; *Renick v. Boyd*, 99 Pa. St. 555;

Matter of Hermance, 71 N. Y. 481, 486, 487; *People v. New York, etc., Ry. Co.*, 84 N. Y. 565, 568, 569; *The J. Doherty*, 207 Fed. 997, 999, 1000; *Endlich*, Interpretation of Statutes, §§ 405, 406; *cf. Reed v. Tarbell*, 4 Met. 93, 101.

In determining the extent of the authority granted to the Division by section 14, so far as concerns cables and wires, the effect of G. L., c. 166, § 21, authorizing the construction of lines for transmitting electricity in public ways and waters of the Commonwealth, must also be considered. The Legislature has there expressly authorized the construction of such lines across and under any waters in the Commonwealth so long as navigation is not endangered or interrupted. G. L., c. 166, § 21, is as follows: —

“A company incorporated for the transmission of intelligence by electricity or by telephone, whether by electricity or otherwise, or for the transmission of electricity for lighting, heating or power, or for the construction and operation of a street railway or an electric railroad, may, under this chapter, construct lines for such transmission upon, along, under and across the public ways and across and under any waters in the commonwealth, by the erection or construction of the poles, piers, abutments, conduits and other fixtures, except bridges, which may be necessary to sustain or protect the wires of its lines; but such company shall not incommode the public use of public ways or endanger or interrupt navigation.”

The succeeding sections in that chapter contain provisions for the granting of locations in public ways, but there are no such provisions with respect to the granting of locations across or under the waters in the Commonwealth. The court has held that the general subject of the construction of lines for transmitting electricity is regulated by G. L., c. 166, and that it was intended to govern and be a code for the whole subject. *Metropolitan Home Tel. Co. v. Emerson*, 202 Mass. 402, 406, 407.

On the other hand, I am informed that for many years it has been the custom of the Board of Harbor and Land Commissioners to grant licenses to lay cables and wires in tidewater, reserving the right to require the removal or change in location of such cables and wires.

Notwithstanding this practical construction of the statute as giving authority to the Board to grant licenses in such cases, it is my opinion that it cannot prevail as against the plain language of chapter 166, as interpreted by the court, by which authority is given to companies duly incorporated to construct lines for transmitting electricity across and under any waters in the Commonwealth, that cables and wires, especially if used for transmitting electricity, are not structures within the meaning of G. L., c. 91, § 14, that the Division is not authorized to grant licenses to place them in tidewater, and that the placing of such cables and wires in tidewater cannot be a public nuisance under section 23, since no license is required.

As to water pipes, gas pipes and sewers, while the question whether they are structures within the meaning of sections 14 and 23 is doubtful, I am inclined to hold that they are and that the Division has full authority with respect to them.

My answers to your questions more specifically are as follows: —

I think that the present practice of the Division as to cables and wires is wrong in the respects which I have pointed out, and that charges for compensation as to them cannot be made by the Governor and Council.

Cables and wires authorized under G. L., c. 166, § 21, require no license from the Division, are not subject to payment of compensation, and are not a public nuisance unless they endanger or interrupt navigation. As to pipes, I think, as I have said, that they are structures for which licenses may be issued by the Division and compensation charged if rights in land of the Commonwealth are granted.

You state that the Postal Telegraph-Cable Company has taken the position that, being authorized by the Post Road Act of July 24, 1866 (14 U. S. Stat. 221, Rev. Stat., § 5263, *et seq.*), to lay lines under, over and across any and all navigable waters of the United States, it may construct and operate such lines without any permit from the State. That, however, is not an accurate statement of the law. The effect of the Federal statute was to deny to a State the authority to say that a telegraph company may not operate lines constructed over postal roads within its borders; but the State has, nevertheless, the right to impose reasonable restrictions and regulations. See *Western Union Tel. Co. v. Richmond*, 224 U. S. 160, 169, 170; *Essex v. New England Tel. Co.*, 239 U. S. 313; *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 259; Attorney General's Report, 1926, p. 46.

In my opinion, the State has the power to require the granting of licenses for the construction of interstate lines under its waters, and may delegate the power to supervise such construction. I do not find, however, that it has done so.

Statutory provisions for the regulation of structures and works in tide-water have remained substantially unaltered for fifty years. In several important respects the power of the Division to grant licenses, to prescribe their terms and to supervise works in tidewater needs definition and, it may be, enlargement. This is a matter which you may think it wise to bring to the attention of the General Court.

Yours very truly,

JAY R. BENTON, *Attorney General*.

State Employees — Mechanics' and Tradesmen's Pay — Permanent Employees.

The Commonwealth is not required by G. L., c. 149, § 26, to pay mechanics and tradesmen, permanently in its employ on an annual and full time basis, the customary and prevailing rate of wages.

JAN. 18, 1927.

Hon. CHARLES P. HOWARD, *Chairman, Commission on Administration and Finance.*

DEAR SIR: — You request my opinion as to whether or not the Commonwealth is by law required to pay mechanics and tradesmen not less than the customary and prevailing rate of wages for a day's work in the same trade or occupation in the locality where public works are under construction if such mechanics and tradesmen are on the regular maintenance payroll and are part of the permanent force of employees maintained by the various State institutions.

You state that the various State institutions maintain a permanent force of employees, such as carpenters, masons, plumbers, steamfitters and like skilled tradesmen, who are paid on an annual basis and employed full time throughout the year. In fixing the compensation of such employees the factors of permanency and year-round employment are taken into con-

sideration and balanced against the going rates for intermittent employment in such trades under private employers.

The answer to your question depends upon the construction of G. L., c. 149, § 26, which provides as follows:—

“In the employment of mechanics, teamsters and laborers in the construction of public works by the commonwealth, or by a county, town or district, or by persons contracting therewith for such construction, preference shall first be given to citizens of the commonwealth who have served in the army or navy of the United States in time of war and have been honorably discharged therefrom or released from active duty therein, and who are qualified to perform the work to which the employment relates; and secondly, to citizens of the commonwealth generally, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States; and every contract for such work shall contain a provision to this effect. The wages for a day's work paid to mechanics and teamsters employed in the construction of public works as aforesaid shall be not less than the customary and prevailing rate of wages for a day's work in the same trade or occupation in the locality where such public works are constructed; provided, that no town in the construction of public works shall be required to give preference to veterans not residents of such town, over citizens thereof. Any contractor who knowingly and wilfully violates this section shall be punished by a fine of not more than one hundred dollars.”

In my opinion, this section does not apply to the permanent force of State employees, who are paid on an annual basis and employed full time throughout the year. Such permanent employees are not paid “wages for a day's work” but are paid compensation for regular services throughout the year, in the fixing of which compensation the factors of permanency and year-round employment are taken into consideration. A per diem employee may usually recover wages only on proof of actual work on a particular job, while a permanent employee who is paid on an annual basis and employed full time throughout the year usually receives his compensation at the rate fixed by his contract, regardless of the particular job he is called upon to do from day to day within the scope of his employment.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Soldier — Dishonorable Discharge — World War.

A soldier who received a “bad conduct” discharge from the service prior to the expiration of his full term of enlistment is not entitled to the benefits of Gen. St. 1919, c. 283, even though such discharge was subsequent to the close of the World War and the enlistment prior thereto.

JAN. 18, 1927.

Hon. WILLIAM S. YOUNGMAN, *Treasurer and Receiver General*.

DEAR SIR:— You request my opinion as follows:—

“Under date of October 9, 1919, Hon. Henry A. Wyman advised this department that Gen. St. 1919, c. 283, § 5, should be construed to exclude from the benefit of the act all persons discharged for causes other than honorable. This section provides, in part, as follows:—

‘No person shall be eligible for any benefit accruing under this act who

. . . shall have received a dishonorable discharge from the service of the United States.'

- Does this opinion refer to those persons discharged prior to November 11, 1918, or does it include those discharged subsequent to that date for causes other than honorable?

The specific case before me is that of a man who enlisted for four years in December, 1917, performed honorable service until June, 1919, subsequent to which his conduct became so bad as to necessitate a 'bad conduct' discharge in August, 1920."

In the opinion to which you refer (V Op. Atty. Gen. 405), my predecessor, Attorney General Henry A. Wyman, in considering Gen. St. 1919, c. 283, § 5, said:—

"In my judgment, this provision, when read in the light of the purpose of the act as declared in section 1, must not be strictly construed as referring only to persons who receive discharges expressly declared by their terms to be dishonorable. It should, rather, in my judgment, be given a broader construction and be held to exclude from the benefits of the act all persons who did not receive an honorable discharge. It was the purpose of the statute, as declared in section 1, to recognize all services rendered in the army or navy by citizens of Massachusetts 'to the full extent of the demands made upon them and of their opportunity.' I cannot persuade myself that the services rendered by a man who so conducted himself as a member of the army of the United States that it became necessary to discharge him therefrom for misconduct were services of the character intended to be recognized. I am unwilling to assume that the General Court intended thus to reward any man who so failed to perform his duties that he was discharged for misconduct."

In the specific case you mention the term of enlistment was for four years, to wit, from December, 1917, to December, 1921. Before this term expired, the soldier received a "bad conduct" discharge, to wit, in August, 1920.

It accordingly follows that the soldier in question did not render the service his term of enlistment called for, "to the full extent of the demands made upon him and of his opportunity."

The opinion does not refer only to those persons discharged prior to November 11, 1918, but includes those who actually entered the official service during the period specified in the statute, but who were discharged subsequent to that date for causes other than honorable.

Yours very truly,

JAY R. BENTON, *Attorney General*.

Metropolitan District Commission—Charles River Basin—Private Canal—Repairs.

The Metropolitan District Commission has no authority to compel the owners of land abutting on the private canal known as Broad Canal to make repairs to walls and wharves thereon.

JAN. 31, 1927.

HON. DAVIS B. KENISTON, *Commissioner, Metropolitan District Commission*.

DEAR SIR:—You have requested my opinion as to the authority of the Metropolitan District Commission to require owners of lands abutting on Broad Canal, East Cambridge, on the west bank of the Charles River

Basin, to remedy conditions on their premises which threaten to cause obstructions to the canal and expense to the Commonwealth in removing the same in order to maintain certain depths of water required by statute.

You have also submitted to me a letter from the Boston Sand & Gravel Company, which, assuming the facts therein stated to be accurate, tends to show that certain buildings and bulkheads situated on lands formerly owned by the Mead-Morrison Company, title to which is now in the Holland System Company, are in such condition that they are likely to fall into the canal and obstruct the passage of boats. I am informed that the Boston Sand & Gravel Company is the owner of land bordering on said canal and maintains thereon a wharf for unloading boats which come up Broad Canal from the Charles River Basin; that the land of the Holland System Company, 31-45 Main Street, Cambridge, to which attention has been particularly directed, also borders the canal between the property of the Boston Sand & Gravel Company, 77-89 Main Street, and the entrance to the canal.

Broad Canal, on the westerly side of the Charles River, did not exist prior to 1806, when steps towards its construction were taken by private owners of flats who desired suitable access to the river from their lots by boat. By an agreement and deed dated July 8, 1806, recorded Middlesex South District Deeds, January 11, 1808, book 172, page 496, all the owners of the land over which Broad Canal was to be laid out entered into an agreement among themselves for the construction of such canal, and jointly conveyed to each other all the land over which the canal was to be laid in designated undivided proportions, and by agreement provided for the payment of the expenses incident to the construction of the canal, by an allocation of such expenses to each of such owners, based apparently upon the frontage of lots owned by them severally on the proposed canal. This agreement and deed does not appear to have been signed by one of the named grantors, Josiah Mason, Jr., from whom both the Holland System Company and the Boston Sand & Gravel Company derive title to their respective lots, but the projected canal was laid out immediately after the execution of the deed, according to a plan dated May 31, 1806, and recorded with Middlesex South District Deeds, record book 166, at end, and said Mason accepted the benefits of the canal as laid out, and after his death in 1839 subsequent holders of the title to the land which had been his referred to it in the descriptions in their conveyances of all portions sold as being bounded by the canal. The other owners whose parcels at the present time now abut on the canal derive their titles from Mason or from others named as grantors in the agreement of 1806.

The canal was laid out and constructed and has been maintained since 1808 as private property, the title in the fee of the strip of land in which the canal was dug resting in the owners of the adjoining lands or in the heirs of the original parties to the agreement.

Prior to the enactment of the statutes hereinafter referred to no action had been taken by the Commonwealth with relation to the canal, nor was anything done by any subdivision thereof which disturbed or in any way tended to abrogate private ownership of the canal, its walls or wharves, and it is operated at the present time as a private canal, title to which is in individuals, above described. Before the enactment in 1903 of legislation providing for the Charles River Basin and its dam along its present lines, a report was made to the Legislature by a committee appointed

under chapter 105 of the Resolves of 1901, in which it was stated as follows:—

“The Broad Canal is owned by the proprietors of the banks as tenants in common under an agreement dated in 1806, by which they are authorized to maintain a Canal at a depth of 9 feet, and they undoubtedly have certain riparian rights of access to tidewater. Any act authorizing the building of a dam should contain a provision that the owners of private property above the dam should recover damages for any injury occasioned to their property by reason of the construction of a dam and the consequent reduction of the water level.”

It is apparent, then, that the Legislature, in enacting the statutes relative to the Charles River Basin, hereinafter referred to, had in mind the fact of private ownership of Broad Canal. In subsequent statutes the Legislature provided against the reduction of the water level in the canal, and thereby prevented an occasion for the recovery of damages.

In 1903, under chapter 465 of the acts of that year (and subsequent amendments), the Charles River Basin Commission was appointed and constructed a dam across the Charles River below Broad Canal, forming a basin above the dam. St. 1909, c. 524, transferred all the powers, rights, duties and liabilities of the Charles River Basin Commission to the Metropolitan Park Commission, and the Charles River Basin Commission was abolished. By Gen. St. 1919, c. 350, § 123, the Metropolitan Park Commission was abolished and all its rights, powers, duties and obligations were transferred to the Metropolitan District Commission.

In this connection it may be noted that another canal, constructed and situated much as is Broad Canal, leading from the Charles River between the dam and Broad Canal, is referred to by the Supreme Judicial Court in *Wellington v. Cambridge*, 214 Mass. 35, and is there held to be private property. It is also to be noted that the Charles River Basin Commission, before proceeding under the terms of St. 1903, c. 465, at the beginning of the work to dredge and to strengthen the walls and wharves in Broad Canal, took a release from the owners of the parcels abutting on the canal discharging the Commonwealth from liability for all claims for damages which might accrue to the owners through the acts of the Commission in doing such work, the parties to the release apparently recognizing by its execution the fact that there had been no appropriation of any of the property in question to a public use. It follows from these considerations that Broad Canal and its walls and wharves are private property. As it lies over flats situated within the line of private ownership and not within the lines of the Charles River Basin, the Commission, in the absence of specific statutory authority, could have had no obligation to prevent the filling up of such canal nor any duty relative to its maintenance.

The situation of the Commission in its relation to Broad Canal is not affected by St. 1909, c. 524, § 5, as amended by St. 1910, c. 582, § 1, which authorizes the Commission to make reasonable rules and regulations “for the care, maintenance, protection and policing of the Charles River Basin as herein defined,” since the definition of the word “basin” in said chapter 524, while it includes the Charles River, the water thereof, public navigable arms, tributaries and inlets, does not mention the canals which open thereon.

The relation of the Commission to Broad Canal is not affected by St. 1913, c. 741, wherein the Commission is required to rebuild the wall on

the premises of the estate of John J. Horgan, the predecessor in title to the property of the Boston Sand & Gravel Company, because this act is entirely special in its application, requiring the then landowner to pay one-third of the cost and to sign an agreement holding the Commonwealth harmless on account of the work which it might do on such wall, and providing further that no repairs or rebuilding of such wall thereafter should be required to be done by the Commonwealth. The special requirement made by the Legislature for repairs to this particular piece of wall bordering the canal, referred to in the statute as a sea wall on the estate of Horgan, tends to show that in the legislative mind, in 1913, there was still no intent to treat Broad Canal or the walls along its borders as anything other than private property.

The only statutory provision which has been made relative to this canal, from which it might conceivably be said that a duty relative to the maintenance of its walls rested upon the Commission, lies in St. 1910, c. 583, § 2, amending St. 1909, c. 524, § 6, and is as follows:—

“The metropolitan park commission throughout the year shall operate the locks and any drawbridges connected with said dam, without charge, and shall maintain said locks and the channels and canals authorized by section four of said chapter four hundred and sixty-five, at the depths provided for in said act and clear of obstructions caused by natural shoaling or incident to the building of said dam, and shall maintain the water in the basin at such level, and the locks, channels and canals sufficiently clear of obstructions by ice, so that any vessel ready to pass through the lock, and requiring no more depth of water than is provided for by said section four, can pass through to the wharves therein mentioned.”

St. 1903, c. 465, § 4, referred to in said section 6, reads as follows:—

“The commission shall dredge navigable channels in the basin from the lock to the wharves between the dam and Cambridge bridge, to Broad canal and to Lechmere canal, the channel to be not less than one hundred feet in width and eighteen feet in depth; shall dredge Broad canal to such depths as will afford to and at the wharves thereon not less than seventeen feet of water up to the Third Street draw, not less than thirteen feet of water from the Third Street draw to the Sixth Street draw, and not less than eleven feet of water from the Sixth Street draw to the railroad draw, and not less than nine feet of water for one hundred and twenty-five feet above the railroad draw; shall dredge Lechmere canal to such depths as will afford to and at the wharves thereon not less than seventeen feet of water up to and including Sawyer's lumber wharf, and not less than thirteen feet of water from said wharf up to the head of the canal at Bent Street; all depths aforesaid to be measured from the water level to be maintained in the basin.

“The commission shall do all such dredging and all strengthening of the walls of the canals and of the basin where dredging is done by the driving of prime oak piles two feet on centres along the front of said wharves or walls, and all removing and relocating of pipes and conduits made necessary by such dredging, so that vessels requiring a depth of water not exceeding the respective depths above prescribed can lie alongside of, and in contact with, the wharves; and this work shall be done in such manner as to cause the least possible inconvenience to abutters, and shall be finished on or before the completion of the dam; and after

the walls or wharves have been so strengthened, all repairs on or rebuilding of the walls and wharves shall be done by the abutters."

It is apparent that the duty placed upon the Commission by said section 6 relates only to maintaining water at a certain level in the canal, keeping the canal clear of obstructions caused by natural shoaling or incident to the building of said dam (which latter contingency is now a thing of the past), and keeping the canal clear of obstructions by ice, which duties I understand your Commission discharges. No other provision relative to duties connected with the canal after the completion of the work of constructing the basin is provided by any statute.

As the Commission is not now charged with the duty of removing from the canal obstructions caused by other means than natural shoaling and ice, a cave-in of the walls of the canal or the wharves would not necessarily add to the burdens of the Commission in discharging their duties. The requisite depth of water in the canal might be maintained notwithstanding obstructions therein not resultant from natural causes, and the Commission, as has been pointed out, has no duty placed upon it to remove such obstructions.

St. 1903, c. 465, does not purport to take from the owners of the land bordering Broad Canal any of their real property nor any of the rights or easements which they possessed with relation thereto, nor has there ever been any such taking by any subdivision of the Commonwealth. In providing, by the provisions of the various statutes noted, for the doing of work of the various sorts mentioned, upon and about the canal by the commissions charged with the control of the basin, it may be assumed that the Legislature had determined that the doing of such work, which immediately benefited and still benefits the owners of this private property, ultimately inures to the benefit of the public as a necessary part of the general scheme for the creation and maintenance of the basin as a whole. To construe the act otherwise would render its constitutionality in such parts as deal with the canals extremely doubtful, as providing in effect for the application of money to a purely private purpose, namely, the benefit of the private owners of the canals and their walls and wharves. Moreover, since there has been no taking from the owners of the canal and they are left in possession of their private property, the Legislature could not impose upon them without compensation a duty to perform work upon their own property by repairing, rebuilding or otherwise. To do so would exceed the constitutional power of the Legislature, and would amount, in effect, to a taking of rights without compensation. The words of St. 1903, c. 465, § 4, to the effect that "after the walls and wharves have been so strengthened (by the original commission) all repairs on or rebuilding of the walls and wharves shall be done by the abutters," must be construed as limiting the duties of the Commission to the doing of the original work, and as making it plain that no duty of repairing from time to time rested upon such body, rather than as a mandatory provision requiring the owners to make repairs upon their own private property.

I am of the opinion, therefore, that your Commission has no authority to compel the owners to make repairs upon their private property abutting on the private canal known as Broad Canal. Doubtless, as between themselves, rights to unobstructed usage of the canal exist by virtue of the agreement of 1806 in the various owners of the canal and adjoining land, which they may be able to enforce by appropriate proceedings in

the courts, but the Commission is not the possessor or holder of such rights and cannot enforce them as between the owners or on its own behalf.

Your Commission is charged with the performance of certain specific duties with relation to the canal by the statutes, which have been already cited. These consist in freeing the canal of natural accumulations therein, of removing ice therefrom and of maintaining the depth of the water at a designated level. No contractual obligations exist on the part of the owners with the Commonwealth to do or to refrain from doing any acts upon their own property, and none arise under the circumstances from the provisions of the statutes. If a situation should occur by reason of failure to make repairs on the part of the owners whereby the canal became filled with obstructions not arising from natural causes but from the acts or omissions to act of such owners, so that it became physically impossible to perform the duties with relation to the canal which have been placed upon your Commission, then, inasmuch as at the present time it would seem that the performance of such duties benefits the private owners chiefly, at least in the first instance, the Commission might appropriately seek for relief in connection with such duties from the Legislature.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Constitutional Law — Interstate Commerce — Quarantine on Plants.

G. L., c. 128, §§ 16–31, the Massachusetts Nursery Inspection Law, is effective as regards plants in interstate commerce, by reason of a joint resolution of Congress, approved by the President on April 13, 1926.

FEB. 1, 1927.

DR. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:— I have your letter of January 11, 1927, in which, in view of the circumstances recited therein, you ask for a reconsideration by this department of the question whether or not it will be necessary for the General Court to reenact certain sections of the Massachusetts Nursery Inspection Law, which is now G. L., c. 128, §§ 16–31.

The sections in question seem to be sections 20 and 27. They may be briefly summarized as follows:—

Section 20 provides that no nursery stock shall be brought into the Commonwealth unless it bears an unexpired certificate of inspection. Section 27 provides that the Director of the Division of Plant Pest Control may, after a public hearing, prohibit the delivery within the Commonwealth of nursery stock from outside thereof, under certain circumstances.

In view of the opinion I have reached, I do not deem it necessary to make any more elaborate summary of the act and of its 1923, 1925 and 1926 amendments.

Section 20 was first enacted by the General Court as St. 1902, c. 495, § 5. Section 27 was first enacted by the General Court as chapter 103 of the Resolves of 1911, and took effect in June of that year.

By the Act of Congress of August 20, 1912, 37 Stat. 315, c. 308, the Federal Congress forbade the shipment from one State to another of any nursery stock imported into the United States without notifying the Secretary of Agriculture. By the Act of Congress of March 4, 1917,

39 Stat. 1165, c. 179, the Federal Congress authorized the Secretary of Agriculture to quarantine any State when he should determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation new to or not already widely prevalent or distributed within and throughout the United States.

On March 1, 1926, the Supreme Court of the United States decided the case of *Oregon-Washington Railroad & Navigation Co. v. State of Washington*, 270 U. S. 87. That action was a suit in equity begun by the State of Washington against the Oregon-Washington Company to restrain that company from transporting infected alfalfa from Idaho into Washington in violation of a quarantine established on September 17, 1921, by the Washington Director of Agriculture under a Washington statute passed in 1921. The company defended the suit on the ground that the quarantine and the Washington statute were in contravention of the interstate commerce clause of the Federal Constitution and in conflict with the acts of Congress stated above. A majority of the court, in an opinion by Chief Justice Taft, decided, as I read the opinion in that case, the following points:—

1. In the absence of action by Congress a State may, in the exercise of its police power, establish quarantines against infected plants or trees, in spite of the fact that such quarantines necessarily affect interstate commerce.

2. That the Washington statute and the action of the Director of Agriculture of that State created a genuine quarantine.

3. That the exercise by a State of its police power of quarantine, in spite of its interfering with interstate commerce, is permissible under the interstate commerce clause of the Federal Constitution, "subject to the paramount authority of Congress if it decides to assume control."

4. That it is impossible to read the Act of Congress of August 20, 1912, as amended by the Act of March 4, 1917, without attributing to Congress the intention to take over to the Agricultural Department of the Federal government the care of the horticulture and agriculture of the States, so far as these may be affected injuriously by the transportation in foreign and interstate commerce of anything which by reason of its character can convey disease to and injure trees, plants and crops.

5. That in the relation of the States to the regulation of interstate commerce by Congress there are two fields:—

- (a) One in which the State cannot interfere at all, even in the silence of Congress; and

- (b) One in which the State may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded State action. Quarantine is in the latter field.

6. That when Congress has acted and occupied the field, as it has here, the power of the States to act is prevented or suspended.

7. That pending the existing legislation of Congress as to quarantine, the statute of Washington on the subject cannot be given application.

8. That the States may not act even in the absence of any action by the Secretary of Agriculture.

9. That with the Federal law in force, State action is illegal and unwarranted.

On April 13, 1926, the President approved a joint resolution of Congress further amending the Act of August 20, 1912, as already amended

by the Act of March 4, 1917, by providing that, until the Secretary of Agriculture shall have duly established a quarantine, nothing in the act shall be construed to prevent any State "from promulgating, enacting and enforcing" any quarantine prohibiting or restricting the transportation of any class of nursery stock, etc., into or through such State, and providing further that any nursery stock, etc., a quarantine with respect to which shall have been established by the Secretary of Agriculture, shall, when transported into any State, in violation of such quarantine, be subject to the operation and effect of the laws of that State enacted in the exercise of its police powers to the same extent and in the same manner as though it had been produced in that State.

On the above facts I am of opinion that it will not be necessary for the General Court to reenact the above-described sections of G. L., c. 126, and I will give you briefly my reasons.

It was unquestionably within the police power of this Commonwealth to enact chapter 103 of the Resolves of 1911 at the time it was enacted. Up to that time Congress had not occupied the field of plant quarantine with respect to interstate commerce. When, in 1917, the Congress did occupy that field the efficacy of the State law was suspended, and action by State officials under it was prevented, and if taken would have been illegal and unwarranted. But I do not think that the State statute was, by the Federal act of 1917, nullified. The facts and decision in the case of *In Re Rahrer*, 140 U. S. 545, are of assistance in this connection. In the *Rahrer* case the Kansas Legislature had passed an act prohibiting the sale of intoxicating liquor, which by its terms was broad enough to apply to sales of imported liquor in original packages. At that time the Federal law was that a State could not interfere with sales of imported liquor in original packages. On August 8, 1890, there went into effect an Act of Congress which provided, in substance, that intoxicating liquor transported into a State should, upon arrival therein, become subject to the operation and effect of the laws of that State as though it had been produced there, even though it was still in the original package. In July, 1890, a carload of intoxicating liquor was shipped from Missouri to Rahrer in Kansas. On August 9, 1890, Rahrer sold a part of that liquor, still in the original package. For that sale he was arrested by a Kansas sheriff, and he applied to a Federal court for a writ of habeas corpus. By appeal his case went to the Supreme Court, which, by a majority decision written by Chief Justice Fuller, decided adversely to Rahrer. In the course of the opinion the court used the following language:—

"This (the Kansas prohibitory statute) is not a case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a reenactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property."

In Re Rahrer has been followed in *First National Bank in St. Louis v. Buder*, 8 Fed. (2d) 883, 885, and in *Missouri Pacific R.R. Co. v. Boone*, 270 U. S. 466.

On the approval, on April 13, 1926, by the President of the joint resolution of Congress, the Federal obstacle to the efficacy of a Massachusetts

quarantine on plants in interstate commerce was removed, and thereupon the Massachusetts statute (and the powers of Massachusetts officials to act under it) became again in full force and effect.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Taxation — Corporate Excess — Excise.

Classification of corporations for the purpose of taxation may not be made in an unreasonable manner.

FEB. 3, 1927.

Joint Committee on Taxation.

GENTLEMEN: — You have asked my opinion as to the legality and constitutionality, if enacted into law, of House Bill No. 506, entitled "An Act relative to the taxation of business corporations."

This act, by amendment of G. L., c. 63, as previously amended, makes certain changes in the manner of ascertaining and determining the "corporate excess" of business corporations for the purpose of taxation and the levying of excise taxes upon such corporations.

These changes, in brief, consist for the most part in providing that such corporate excess shall be the fair value of capital stock on the last day of the taxable year, as determined by G. L., c. 63, § 30, par. 6, instead of on the first day of April, and in determining that the surplus and undivided profits shall be included when estimating the value of the capital stock. This manner of estimating is rather a declaration of the manner as substantially in use at the present time, rather than an adoption of any radical departure from the existing practice. These changes and others, such as that made in G. L., c. 57, bring the provisions of the statute into harmony, and as to these there does not appear to be any illegality or unconstitutionality.

A change of a different character is made in the existing law by the clause placed by the proposed act at the end of section 31, namely:

"No debt shall be considered which arises or is allowed to remain as a medium whereby the parent or affiliated corporation supplies any such corporation with the capital reasonably necessary to carry on or continue business."

The practical application of this provision, applied as an exception to the general deductions to be made from the corporate excess of a domestic or foreign corporation for the purpose of determining the amount of a tax, would result in such a distinction being made between corporations of the same general class as would work an improper and unreasonable discrimination among them. For example, one corporation might borrow money from an individual or from a bank for the purpose of enabling it to continue in business without the necessity of a sale of capital stock, and such corporation would be entitled to have the amount of such debt deducted from the fair value of its capital stock in determining the amount of its tax, whereas another corporation borrowing a similar amount of money for a similar purpose from a parent or affiliated corporation would not be entitled to a like deduction. A classification of corporations, for the purpose of ascertaining the amount of a tax, into those which borrow from parent or affiliated corporations and those which borrow from individuals, partnerships or unaffiliated corporations is not a reasonable mode of classification.

While the Legislature possesses a very wide measure of discretion in making classifications of individuals and corporations for purposes of taxa-

tion, nevertheless, such classifications must not be arbitrary or unreasonable, and discriminations may not be made in tax statutes between persons or corporations in substantially like situations.

Though taxation is to a very great degree a matter of public policy and the determinations of the Legislature with relation thereto not to be lightly treated, yet the principle of equality of protection of the law cannot *constitutionally* be disregarded. While the matter is not entirely free from doubt, I am of the opinion that the enactment into law of the proposed clause of section 31 under consideration would be unconstitutional, as a violation of the Fourteenth Amendment to the Constitution of the United States.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

State Teachers' Retirement Association — Retirement Fund — Beneficiaries.

A regulation of the Teachers' Retirement Board prohibiting members from designating beneficiaries who are to receive a payment only in the event of the death of other named beneficiaries is not improper.

FEB. 24, 1927.

Teachers' Retirement Board.

GENTLEMEN: — You have asked my opinion as to whether or not your Board had the right to make the following regulation, which you have previously established: —

"A member shall not be permitted to provide that the amount due his estate from the retirement fund shall be divided and paid to two or more beneficiaries, nor shall a member be permitted to provide for payment to one beneficiary, with the additional provision that in the event of the death of the named beneficiary, the payment shall be made to a second beneficiary."

You advise me that your request for my opinion had the sanction, and was made at the request, of the Commissioner of Education, who is at the present time away from the city on official business, and for that reason the letter of request was not signed by him but by the secretary of your Board. Under these peculiar circumstances I am complying with your request and give my opinion to your Board.

G. L., c. 32, § 11, as amended by other acts and by St. 1926, c. 212, provides: —

"(5) All sums due the estate of a deceased member from the annuity and pension funds of the association shall be paid to such beneficiary as he shall have named in writing on a form furnished by the board and filed with the board, properly executed, prior to his death, and such payment shall be a bar to recovery by any other person; provided, that if there be no named beneficiary surviving the deceased member, the amount due the estate shall be paid in accordance with section thirty-three. A member may at any time revoke or change the designation of a beneficiary by a written instrument duly executed by him and filed with the board prior to his death, the form for this purpose to be furnished by the board."

The language of the foregoing statute does not indicate any intention on the part of the Legislature that a member of the State Teachers' Retirement Association should be entitled to the privilege of naming more than

a single beneficiary to receive the benefits accruing by virtue of his membership in the retirement system after his death. Changes in the beneficiary are permissible, but not more than one person at any given time may stand in such relation to a member and to the association. The words used in the statute relative to the beneficiary referred to therein are such as indicate provision for only one individual at a time in such capacity. My opinion in this respect is confirmed by reference to other parts of G. L., c. 32, as amended, more particularly section 5, as amended by St. 1925, c. 244, where a similar intent to limit the privilege of naming beneficiaries of other classes of persons subject to the terms of the same statute is plainly shown. Your Board has authority to make regulations for the management of the teachers' retirement system not inconsistent with law, and I am of the opinion that the regulation which you have laid before me is such as may be established within the authority of the Board.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Division of Highways — Alteration — "Cut-off" Line.

An alteration in a State highway is the substitution of one way for another, and its character is not necessarily changed by the fact that it calls for the construction of a "cut-off" line one and one-half miles in length.

FEB. 25, 1927.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You request my opinion as to whether your department has power to proceed under G. L., c. 81, § 6 (St. 1921, c. 446), in straightening an existing State highway by constructing a "cut-off" line running practically one and one-half miles in length and at a variable distance of about 500 feet from the old line.

G. L., c. 81, § 6, as amended by St. 1921, c. 446, reads as follows:—

"The division may alter the location of a state highway in a city or town by filing a plan thereof and a certificate that the division has laid out and taken charge of said state highway, as altered in accordance with said plan, in the office of the county commissioners for the county where said highway is situated, and by filing a copy of the plan or location as altered in the office of the clerk of such city or town."

I understand that the proposed new line will be merely a part of the same highway of which the present line forms a part, that when constructed it will be used in substitution for the old line, which will be abandoned, and that both the old and the proposed new line lie wholly within one town.

The doubt in the matter arises from the fact that the proposed change involves the highway line to a rather great extent. Must the making of such a change be held to be something more than to "alter" the location of the highway?

In my opinion, the department has power to proceed under the section of the statute above quoted. The question does not, I think, depend upon the number of feet involved in the change. "An 'alteration' *ex vi termini* means a change or substitution of one thing for another." *Johnson v. Wyman*, 9 Gray, 186, 189. "A technical alteration is the substitution of

one way for another." *Bigelow v. City Council of Worcester*, 169 Mass. 390. See, also, *Bliss v. Deerfield*, 13 Pick. 102; *Bennett v. Wellesley*, 189 Mass. 308; III Op. Atty. Gen. 113.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Reclamation Districts — Towns — Assessments.

Towns are not underwriters of the assessments of reclamation districts, and may not borrow money for the advance payment of such assessments.

FEB. 26, 1927.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR: — You have asked my opinion in connection with two matters pertaining to the reclamation service.

1. In relation to the first matter referred to in your communication, namely, the authority of towns to borrow money for the purpose of paying, in advance of collection, amounts assessed upon certain proprietors of land within their boundaries for the financing of the improvements of a reclamation district, governed by St. 1923, c. 457, as amended, I am constrained to advise you that towns possess no authority to borrow money for such a purpose.

There is no specific authority given by any statute to towns to negotiate loans for such an object as that described in your communication. The creation of a reclamation district and the assessment upon individual proprietors therein of their proportionate shares of the expense incident thereto does not of itself create any debt upon the part of a town wherein such proprietors' land may lie, such as the town is required by legal obligation to discharge. It is provided by St. 1923, c. 457, that towns shall collect the sums assessed upon individual proprietors and pay over the same to the district's treasurer. The manner of collecting the assessment is to be the same as that provided for the collection of the town tax (G. L., c. 252, § 11, as amended by St. 1923, c. 457, § 1), and it is to be noted that by G. L., c. 80, § 4, it is provided "that the owners of the land assessed shall not be personally liable for the assessment thereon," but the relation of the town to the reclamation district, under the statute, is merely that of an agency for the purpose of effecting the necessary collection. The statute does not make the towns underwriters or insurers of the amount of the total assessment or of any part thereof.

It follows as a necessary corollary of the foregoing considerations that a town is without power to borrow money to carry out such a scheme for the advance payment of the assessments made by the district as you have outlined in your communication. The duty of the towns is to collect the assessments certified to them, respectively, and to pay over such collections to the district. If the payments of the assessments are spread over a term of years by virtue of G. L., c. 80, § 13, the obligation of the town still remains the same, to collect by its collector of taxes the assessments when due and to pay such collections to the district. The duty of the town does not include the borrowing of money to pay advancements thereon to the district.

2. The second matter set forth in your communication concerns the administration of a district established under G. L., c. 252, before its

amendment. The statutory provisions with relation to such a district and the towns lying therein differ from those affecting towns in St. 1923, c. 457, as amended, hereinbefore considered, and are not subject thereto (St. 1923, c. 457, § 1).

Under G. L., c. 252, the expense of contemplated improvements is to be apportioned by commissioners to, and paid for by, those towns, respectively, in which any of the land in the district which is to be improved may lie. Each town is required to pay the sum ascertained to be due from it, by its treasurer to the county wherein it lies, in equal annual installments, these installments to be collected by the town from its inhabitants in the same manner as town taxes, but by section 14 the amount to be paid to the town is to be divided by the assessors among the owners of the various parcels of land in the town actually benefited by the improvements of the district, and these owners, and not the taxpayers generally, are the ones from whom the collection is to be made by the town. These payments by the owners of the land beneficially affected are to be assessed as betterments, under G. L., c. 80, and such payments may be apportioned or spread over a given succession of equal annual installments, and the payment by the town is likewise to be spread over a given number of years (G. L., c. 252, § 13). The particular questions upon which you desire my opinion in regard to this second matter are set forth in your communication as follows:—

“(a) Since only one town is concerned, can the district commissioners omit the hearing called for in the first sentence of section 13? This hearing is to determine only the portion to be paid by each town when more than one town is involved.

(b) Will there be any legal obstacle to prevent the assessors requesting the land owners to pay before March 31, and the town treasurer paying the amount so collected to the county?

(c) Can the additional interest paid by the county on sums uncollected after March 31, as noted in (b), be charged against the owner who elects to wait for the regular fall assessment before paying?

(d) Or will it be necessary to include in the assessment, interest on the county note from March 31 to December 31, and to abate for those paying before March 31 their proportion of this interest?”

It is required by G. L., c. 252, § 13, that the commissioners shall determine what portions of the total expenses of the improvement are to be paid by each town in which any of the land lies, and the commissioners are required to return their award as to this to the drainage board, which in turn transmits copies to the towns, and any town aggrieved has an appeal to the courts. I am of the opinion that the above-noted provisions of section 13 are to be observed and should be complied with even if only a single town appears likely to be affected, and I therefore answer your question (a) in the negative.

It is provided by said chapter 252 that the county commissioners may vote to pay, in the first instance, the total expense of the proposed improvement, except such as is borne by the Commonwealth, and the county may borrow money for such purpose. The total expense incurred by the county, including the money advanced to the district and the interest or cost of borrowing the same, is ultimately to be repaid to the county by the towns where the improved land lies. The money may be collected by the towns from the individuals benefited, in the same manner as other similar betterments are assessed and collected.

If the county commissioners have made a loan which expires on March 31, it might be advantageous if money were paid to them by the several towns, and, as a necessary preliminary, paid to the towns by the individuals ultimately benefited, on or before March 31. There can be no objection to proper requests for such payments being made. I therefore answer your question (b) in the affirmative. Nevertheless, the assessments due the town from the individuals in this matter are to be collected in the ordinary manner under the provisions of G. L., c. 80, § 4, and, as I assume from such facts as are set forth in your communication that assessments of this character, like town taxes, are not required by vote or by-law of the town to be paid prior to October 15 (see G. L., c. 59, § 57), I am of the opinion that their collection by the town cannot be enforced prior to March 31, nor can individuals paying before March 31 receive any benefit by reason thereof over other individuals who pay later but at a proper time, nor can such individuals so paying later be penalized for thus doing. If, therefore, the amount necessary to discharge the obligation of the county on March 31 is not voluntarily paid prior to that date, whatever new loan is necessary to be obtained by the county should be negotiated, and the expense or interest thereon added to the expense or interest of the original loan plus the amount of the principal will be the total expense which is to be paid by the towns, and by them collected from the individual proprietors by assessments made and collected in the usual course, so that the burden of the entire sum will fall equally upon all such proprietors by a proper allocation of the same. I therefore answer your questions (c) and (d) in the negative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Constitutional Law — Governor — Pardoning Power.

Under the Constitution of the Commonwealth the power of pardoning cannot be shared with the Governor by the courts.

FEB. 28, 1927.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR: — You request my opinion as to the advisability of a constitutional amendment affecting the pardoning power of the Governor, as recommended in your address of this year to the two branches of the Legislature.

Your recommendation is in the following form: —

“AUTHORITY TO GRANT RESPITES.

At present it occasionally happens in capital cases, after the courts have set the period within which the sentence pronounced by them shall be carried out, that hearings on exceptions or other court proceedings necessitate postponing the execution of the sentence. Strangely enough, the courts themselves have no power of postponement in such cases, and were it not for the intervention of the Governor the accused might be executed before the courts had finally determined the questions of law presented. The Governor has nothing to do with court proceedings, and the state of the law which requires his intervention under these circumstances should not continue. The power of respite should at such times belong to the courts. I am informed that the necessary change can be brought about only by an amendment to the Constitution.

I recommend that the necessary proceedings be instituted to place the courts in complete control of this matter."

I believe that by statute the courts could be given additional powers relative to staying and modifying sentences; and so far as the court should see fit to exercise such powers, if granted, the Governor would be relieved of the burden of passing upon petitions for respite. Such a statute might provide, in effect, that when, after sentence has been imposed in a capital case, a motion for a new trial is made within the time allowed by law, the court which imposed sentence shall have power, in its discretion, until said motion is finally disposed of, to suspend and modify said sentence from time to time by refixing the date set for the execution thereof. But, without an amendment to the Constitution, by which the pardoning power is vested in the Governor, it is impossible "to place the courts in complete control of this matter." In my opinion, a constitutional amendment would be inadvisable. The people of this Commonwealth have for generations regarded the pardoning power of the Governor as a safeguard. An amendment impairing this power probably could not, and I think should not, be obtained. Moreover, as is stated in your address, the situation referred to occurs only "occasionally," and the question then presented, namely, whether respite should be granted pending the disposal of proceedings in court brought after sentence, is one regarding which the Governor might well rely largely upon the advice of the judges and the Attorney General, and is one which in most cases should not be difficult of solution.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

State Boxing Commission — Licenses — Boxing Matches and Exhibitions.

The State Boxing Commission is not required to perform the duties laid upon it by G. L., c. 147, except as to matches or exhibitions which are required to be licensed.

MARCH 3, 1927.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You have asked my opinion as to the jurisdiction of the State Boxing Commission, which serves in the Department of Public Safety and of which the Commissioner of the said Department is, *ex officio*, chairman. You have directed my attention in particular to boxing matches held in clubs.

G. L., c. 147, §§ 32–51, provide, in substance: (1) that no boxing or sparring match or exhibition for a prize or purse shall take place or be conducted, except a license therefor be granted by the State Boxing Commission; (2) that no boxing or sparring match or exhibition at which an admission fee is charged shall take place or be conducted, except a license therefor be granted by said Boxing Commission. A fee, to be established by the Commission within certain amounts and upon a basis set forth in section 32, is to accompany the application for the license as to both classes, and there are provisions as to the giving of a bond.

(1) The necessity for a license as a prerequisite to holding a boxing or sparring match or exhibition for a prize or purse under all conditions, irrespective of whether admission is or is not charged to spectators of the same, is absolute and without exception. Certain exceptions to the requirements relative to the prescribed license, which are set forth in the statute

and which will be dealt with hereafter, are not applicable to this class of matches or exhibitions. Whether a given event is a match or exhibition, whether it consists of boxing or sparring, whether it is for a prize or purse are questions of fact, to be determined in the first instance by the Commission.

(2) As to the second class of events for which a license is a prerequisite, they must, as a matter of fact, be matches or exhibitions, they must consist of boxing or sparring, and they must be ones at which an admission fee is charged.

Section 32 provides, in substance, that the admission fee charged will be such as to bring the match within the requirement of the statute for a license, if it be charged "directly or indirectly, in the form of dues or otherwise."

The fee referred to in the statute is by its terms one for admission to a match. No evasion of the terms of the statute can be successfully accomplished, as a matter of law, by calling, levying or applying the particular admission fee as dues to a club or organization. If, as a matter of fact, charges made to individuals attending are for admission to a match or exhibition, the bout falls within the class for which a license is necessary. Questions of fact, difficult of solution, may arise under various circumstances, but if payments, under whatever name, are made as a charge for admission to a match, that match is one requiring a license.

Conditions under which club dues were charged specifically upon members attending a match, for the purpose of giving them admission thereto, are described in some detail in *Commonwealth v. Mack*, 187 Mass. 441. In a case where a match is held by a club, for members only, as an unusual form of entertainment, dues being payable annually and without any relation to such match, it might be said, as a matter of fact, that no admission fee to the match is charged, either directly or indirectly in the form of dues or otherwise. In another instance members might pay annual dues to a club purporting to hold boxing matches from time to time, for club members only, with the understanding that the payment of such dues would entitle them to admission to matches to be held, and with that prospect as the compelling motive in joining the club and paying the dues, under circumstances which, as a matter of fact, might make such dues constitute an indirect payment of an admission fee to a match or matches subsequently held; such match or matches would then be of such a character as to fall within the second class mentioned above, and would require to be licensed. The view that dues which are capable of classification under the provisions of section 32 must of necessity be dues paid with relation to an allocation to a particular match or matches and not as annual dues to a club or organization covering in general a variety of privileges, to which a match is only an occasional and unspecified addition, is confirmed by the provisions of section 40 with relation to payments to the State Treasurer from gross receipts of matches by licensees. These provisions are obviously intended to relate to admission charges capable of allocation by reason of their manner of payment, even though indirect, to a particular match.

It is to be noted that by the last sentence of section 32 an exception is made among licensees conducting matches or exhibitions where admission is charged, in favor of those conducting amateur bouts. A special license without the requirement of a bond may be issued to them, whereas a bond is required of other licensees of this class. A special provision is made in

section 46 permitting the granting of special permits to certain exhibitions of boxing where no decision is to be made, when provision is made for such permit by the rules and regulations of the Commission.

Your request does not call for an expression of opinion as to the manner of performance of the various duties laid upon the State Boxing Commission by the pertinent sections of chapter 147. Such duties are to be performed in connection with all boxing or sparring matches or exhibitions which by the terms of the statute are required to receive any of the kinds of licenses specified therein, in the manner and to the extent prescribed in sections 32 to 51, but the Commission is not required to perform such duties with relation to any events other than those which must be licensed, all of which have been noted herein.

A boxing or sparring match or exhibition which is not for a prize or purse and for which no admission fee is charged, within the meaning of the phrase as outlined above, whether it be for a decision or not, does not require the grant of a license as a prerequisite to its being held, and the authority of the Commission does not extend to such a match or exhibition, nor do the provisions of sections 32 to 51 apply thereto. In the absence of rules and regulations made by the Commission under section 46, which I am advised do not exist, no license is required for the particular form of boxing exhibition described in its provisions.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Board of Dental Examiners — Graduates of Dental Colleges — Examinations.

The Board of Dental Examiners is required to examine graduates of foreign dental colleges.

MARCH 7, 1927.

MR. W. F. CRAIG, *Director of Registration*.

DEAR SIR:— You have asked my opinion as to whether the Board of Dental Examiners is required, under G. L., c. 112, § 45, to examine graduates of all reputable dental colleges, whether within the United States or of foreign countries, with particular reference to graduates of dental colleges of foreign countries which refuse to examine graduates of reputable dental colleges within the United States.

If an applicant otherwise satisfies and conforms to the provisions of G. L., c. 112, and amendments thereto, the mere fact that he is a graduate of a reputable dental college of a foreign country which refuses to examine graduates of reputable dental colleges of the United States does not justify the Board in refusing to examine him. Section 45 of said chapter states:—

“Any such applicant twenty-one years or over and of good moral character who shall furnish the board with satisfactory proof that he has received a diploma from the faculty of a reputable dental college as defined in the following section shall, upon payment of twenty-five dollars, be entitled to be examined by the board.”

Section 46 of said chapter, as amended by St. 1926, c. 215, sets no limitation or restriction based upon the location of the dental college.

G. L., c. 112, § 48, provides for the registration without examination of a dentist who has been lawfully in practice for at least five years in another State, provided that such other State shall require a degree of competency equal to that required of applicants registered in this Commonwealth.

This section is amended by St. 1922, c. 221, which adds a further proviso that the dentist must have practiced in a State which extends a like courtesy to dentists registered in this Commonwealth.

In view of the fact that the language in sections 45 and 46, above referred to, is mandatory and makes no exceptions based upon the location of the dental college, and in view of the fact that the Legislature, by the amendment to section 48 above referred to, added a proviso restricting the application of that section to such States as extend a like courtesy to dentists registered in this Commonwealth, but did not so restrict or limit section 45, I am of the opinion that the Board of Dental Examiners is required to examine graduates of all reputable dental colleges, whether within the United States or of foreign countries, provided such applicants otherwise comply with, and conform to, the requirements of the law.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Secretary of the Commonwealth — Ballot — Question for Voters.

If a question proper to be submitted to voters of a city at a certain annual election is not placed upon the ballot at such election, it may not be submitted at a later time.

MARCH 12, 1927.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR: — You have submitted to me copies of certain correspondence had between your office and certain officials and others in the city of Lowell, and you request my opinion upon the question whether the official ballot for use in the city of Lowell at the annual State election held November 2, 1920, should have had placed upon it the question of the acceptance by that city of St. 1920, c. 166, entitled "An Act to provide for one day off in every eight days for certain police officers."

This act, the tenor of which is for present purposes sufficiently indicated by its title, contained the following provisions with respect to its application to the various cities and towns and with respect to its submission to the voters in such cities and towns for acceptance.

St. 1920, c. 166, §§ 4 and 5, are as follows: —

"SECTION 4. This act shall not apply to the police force of the city of Boston nor to the police force of the metropolitan district commission, nor to any city or town already granting one day off in eight to the members of its police department.

SECTION 5. This act shall be submitted to the voters of every city and town to which it is applicable at the annual state election in the current year, and shall take effect in any such city or town upon its acceptance by a majority of the voters voting thereon; otherwise it shall not take effect. The act shall be submitted in the form of the following question to be placed upon the official ballot: — 'Shall chapter _____ of the acts of nineteen hundred and twenty which authorizes the granting of one day off in every eight days to police officers without loss of pay, be accepted by this city (or town)?'"

As I gather the situation from the correspondence submitted by you, your predecessor in office refrained from placing this question upon the ballot for use in the city of Lowell because of a communication received by

him from the city clerk, advising him that on September 30, 1920, which date was subsequent to the passage of the statute but prior to the annual State election of that year, the council of the city of Lowell voted to direct the commissioner of public safety to grant the members of the Lowell police department one day off in eight. Apparently he assumed that the exemption from the operation of the act given by section 4 to cities and towns "already" granting one day off in eight to the members of its police department was available to any city or town which should grant this privilege to its police force at any time prior to the date when the preparation of the ballots had finally to be completed.

The language in St. 1920, c. 166, itself, seems to cast considerable doubt upon the soundness of this construction. The word "already" is found in that portion of the statute under which the cities and towns in which the act is to be submitted for acceptance are determined, and is, therefore, in the portion of the statute which takes effect without acceptance, and speaks from the date of such taking effect. The vote of the city council was passed a number of months after the statute, in this aspect, went into effect. To speak of a state of affairs created by a vote had at a subsequent date as having been "already" in existence at a prior date is not in accordance with the common use of the language.

However that may be, it seems to me clear that the annual State election in 1920 having gone by without the submission of this act to the voters in the city of Lowell for acceptance, there is no authority for a late submission, and that the question whether the judgment of your predecessor was sound is not a question upon which any practical consequences in the administration of your office now attend. I therefore do not feel that it is a question upon which I am called upon to arrive at a definite conclusion.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

State Fire Marshal — Storage of Gasoline — Appeal.

The State Fire Marshal has authority to entertain an appeal from a decision of the board of license commissioners of Quincy refusing a license for the storage of gasoline.

MARCH 15, 1927.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You have requested my opinion whether the State Fire Marshal may, under G. L., c. 148, § 45, entertain an appeal from a decision of the board of license commissioners of Quincy refusing a license for the keeping, storage and sale of gasoline.

The board of license commissioners of the city of Quincy was established by St. 1920, c. 70, sections 1, 2 and 4 of which are as follows: —

"SECTION 1. There is hereby established in the city of Quincy a board of license commissioners to consist of the city clerk of the city and the chiefs of the police and fire departments all of whom shall serve without extra compensation.

SECTION 2. All authority to grant licenses and permits and, except as is hereinafter provided, to suspend and revoke the same, now or hereafter vested by law in the mayor and city council of said city or in the mayors and city councils and boards of aldermen of cities of the commonwealth, except the authority to grant licenses for the sale and transportation of

intoxicating liquors and permits to public service corporations for locations in the streets and ways of the city for any purpose, shall hereafter be exercised exclusively by said board of license commissioners: *provided*, that nothing herein shall affect the authority of the director of the division of fire prevention of the department of public safety succeeding to the powers of the fire prevention commissioner for the metropolitan district.

SECTION 4. The city council of said city shall retain all authority which it now possesses or which is hereafter granted to it, or to cities generally, to establish ordinances relating to the manner in which the holder of any such license or permit may exercise the rights granted thereunder. The board of license commissioners shall not establish any rules or regulations relating to licenses or permits inconsistent with the provisions of any law of the commonwealth or any ordinance of the city of Quincy."

The powers of the Fire Marshal in the premises are derived from G. L., c. 148, §§ 30, 31 and 45, which are as follows: —

"SECTION 30. The marshal shall have within the metropolitan district the powers given by sections ten, thirteen, fourteen, twenty, twenty-one and twenty-two to license persons or premises, or to grant permits for, or to inspect or regulate, the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, nitro-glycerine, camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, firecrackers, or any other explosives, and the use of engines and furnaces as described in section one hundred and fifteen of chapter one hundred and forty; *provided*, that the city council of a city or the selectmen of a town may disapprove the granting of such a license or permit, and upon such disapproval the permit or license shall be refused. In Boston certificates of renewal of licenses as provided in section fourteen shall be filed annually for registration with the fire commissioner, accompanied by a fee of one dollar.

SECTION 31. The marshal may delegate the granting and issuing of any licenses or permits authorized by sections thirty to fifty-one, inclusive, or the carrying out of any lawful rule, order or regulation of the department, or any inspection required under said sections, to the head of the fire department or to any other designated officer in any city or town in the metropolitan district.

SECTION 45. The marshal shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons acting or purporting to act under his authority, done or made or purporting to be done or made under the provisions of sections thirty to fifty-one, inclusive, and shall make all necessary and proper orders thereon. Any person aggrieved by any such action of the head of a fire department or other person may appeal to the marshal."

The powers given to the Fire Marshal within the metropolitan district by G. L., c. 148, § 30, were originally taken away from the local authorities in the cities and towns and vested in the Fire Prevention Commissioner for the metropolitan district by St. 1914, c. 795, § 3. For a time thereafter local officers had no control over the granting of gasoline licenses, except as they might, by delegation under St. 1914, c. 795, § 4, exercise in the first

instance the powers of the Fire Prevention Commissioner. By St. 1916, c. 138, however, a proviso was added as follows:—

“Provided, however, that the mayor and city council of a city or the board of selectmen of a town may disapprove the granting of such a license or permit, and upon such disapproval the permit or license shall be refused.”

This proviso is now found in G. L., c. 148, § 30.

Prior to March 31, 1920, the outstanding delegation of power under what is now G. L., c. 148, § 31, was a delegation by the Fire Prevention Commissioner to the mayor and city council of Quincy of the power to grant or refuse gasoline licenses. After March 31, 1920, there was in force a similar delegation running from the State Fire Marshal to the board of license commissioners.

If the effect of St. 1920, c. 70, was to transfer to the board of license commissioners the power of disapproval theretofore vested by Gen. St. 1916, c. 138, in the mayor and city council, the license commissioners, when they acted upon the license now in question, may be considered as having exercised two separate powers emanating from two distinct sources,—the power to grant or refuse, delegated to them by the Marshal, and the power to “disapprove,” derived directly from the authority of the statutes.

It is to be noted that these two powers differ with respect to the possibility of appeal. The exercise of the delegated power is always subject to appeal to the Fire Marshal under G. L., c. 148, § 45, while the exercise of the power of disapproval, being a veto power intended as a local check upon the action of the Fire Marshal, is never subject to such an appeal.

Strictly, it would be a sufficient answer to your question to say that the decision of the board of license commissioners, in its aspect as an exercise of the delegated power, is always subject to appeal, and that the Fire Marshal may entertain an appeal therefrom. But your inquiry is, as I understand it, really directed to the further question whether, upon such an appeal, the Marshal will not be bound by the decision of the local board if that decision, in another aspect, was a valid exercise of the power of “disapproval” under G. L., c. 148, such “disapproval” by the express words of the law compelling the refusal of the license.

It is therefore necessary to examine the provisions of St. 1920, c. 70, quoted above, and upon such examination it is not wholly clear whether the power of “disapproval” was thereby transferred from the mayor and city council to the board of license commissioners or not.

The authority which is purported to be transferred by St. 1920, c. 70, § 2, is the authority to “grant,” “suspend” and “revoke,” none of which terms appropriately describe the power of disapproval, which is a power to veto the granting of a license by that body in whom the power to “grant, suspend or revoke” is vested.

In the second place, it is provided by that same section that —

“nothing herein shall affect the authority of the director of the division of fire prevention of the department of public safety succeeding to the powers of the fire prevention commissioner for the metropolitan district.”

This proviso clearly excludes from the operation of the act the authority derived by delegation from the Fire Prevention Commissioner (and later from the Fire Marshal); but it is also capable of being construed as excluding from the operation of the act the “authority” of the officer succeeding

to the powers of the Fire Prevention Commissioner, in every aspect of that authority, including the limitation placed upon that authority by Gen. St. 1916, c. 138, conferring the power of disapproval upon the mayor and city council.

It is true that it appears from St. 1920, c. 70, § 4, that the legislature adverted to the question of what powers, if any, were to be retained by the council, and, nevertheless, made no express provision that the power of disapproval should be so retained. Such a provision, however, might well have been deemed unnecessary after the proviso of section 2.

On this state of things I am of the opinion that the power of disapproval under Gen. St. 1916, c. 138, and G. L., c. 148, § 30, remains in the city council of Quincy, and that the decision of the board of license commissioners cannot be deemed an exercise of that power. Consequently, not only has the Fire Marshal jurisdiction to entertain the appeal, but there is no outstanding disapproval of the granting of the license by any competent authority, so far as the decision of the board goes or your letter discloses.

Yours very truly,

ARTHUR K. READING, *Attorney General*.

Commissioner of State Aid and Pensions — Soldiers' Relief — Widow — Conflict of Laws.

It is the duty of the Commissioner of State Aid and Pensions to recognize as valid a foreign divorce, in the absence of a judicial determination thereon in this Commonwealth.

MARCH 16, 1927.

HON. RICHARD R. FLYNN, *Commissioner of State Aid and Pensions*.

DEAR SIR: — You have asked my opinion relative to the performance of your duties under G. L., c. 115, §§ 17 and 18, in connection with the payment of soldiers' relief to a certain person claiming to be the widow of an officer in the Army of the United States in the World War. You have submitted to me certain statements of fact and the findings of a justice of the Superior Court made in a suit in equity, wherein the claimant was a party. You do not advise me whether an appeal is pending from such findings. The findings of the justice contain a determination of a great number of facts relative to the status of the claimant, and certain rulings of law applicable to her status under the laws of this Commonwealth.

It is not the province of the Attorney General to pass upon questions of fact. For the purpose of this opinion I assume that the facts relative to the status of the claimant, as found by the justice of the Superior Court, are true. I also assume from the statements in the letters submitted to me that the claimant has a legal settlement in the city of Fitchburg. I am also advised by the communications submitted that another woman is at the present time receiving State aid or soldiers' relief and adjusted compensation from the United States as the widow of the deceased soldier.

Although upon the facts placed before me, as aforesaid, it may well be that the courts of this Commonwealth, in a proceeding before them where the direct issue as to the status of the claimant as the widow of the deceased soldier was presented for adjudication, would determine that she was such widow, yet, a divorce obtained from her by her husband in the State of Washington still stands. It does not devolve upon you, as an administrative official, to refuse to recognize such divorce as valid, and to treat

the claimant as the deceased's widow for the purposes of soldiers' relief, as against the other woman who married the deceased subsequent to such divorce, whom you have heretofore dealt with as the true widow and who is now, under your rulings, in receipt of aid. Pending a final decision by a court of this Commonwealth in a proceeding to determine the right of the claimant to the relief which she seeks, you are justified in continuing to recognize the other woman as the widow of the deceased and in making no recommendation to the city of Fitchburg for soldiers' relief for the claimant.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Treasurer and Receiver General — Registers of Probate — Fees.

It is the duty of the Treasurer and Receiver General to institute proceedings against registers of probate to collect from them for the Commonwealth the amount of fees which have been collected by such registers, or which they were required by law to collect, from persons filing certain papers with them.

MARCH 17, 1927.

HON. WILLIAM S. YOUNGMAN, *Treasurer and Receiver General*.

DEAR SIR:— You have asked my opinion regarding your duties in relation to fees collected by registers of probate, which are required by law to be paid to you by such registers under St. 1926, c. 363.

It is provided by G. L., c. 217, § 20, that —

“The register shall annually, on the first Mondays of January, April, July and October, account for and pay over to the state treasurer all fees and compensation which have been received by him otherwise than by salary.”

Inasmuch as there are reciprocal duties upon the register of probate and yourself, on the part of the former to account for and pay over and on your part to receive the accounting and the payment of sums due from the register as designated by the statutes, it is proper for you to ascertain whether such accounts and payments are correct and are the full payments required to be made by the register to you, and if the payments are not correct the duty rests upon you, as the direct representative of the Commonwealth, which is the ultimate recipient of such payments, to institute proper proceedings to enforce full and complete payments by the register of the money due from him to the Commonwealth.

By G. L., c. 217, § 12, registers of probate, upon their induction into office, are required to give bond to the Treasurer and Receiver General for the faithful performance of official duties, with sureties. This bond runs directly to you in your capacity as Treasurer, and may be sued upon by you as well as by your predecessors. If a register of probate fails to pay over to you funds which he has actually collected as fees, you may bring an action against him upon his bond, in your own name for the benefit of the Commonwealth, to recover the sums which he has illegally withheld. Furthermore, in a suit upon this bond, which is for the faithful performance of his duties, you may also seek to recover the amount of fees which a register should have collected from litigants, under the provisions of the applicable statutes, but which he refused or neglected so to collect and failed to indemnify the Commonwealth therefor.

A register or clerk of courts who neglects or refuses to collect fees inuring to the benefit of the county or State, collection being required by law, or who extends credit to litigants for fees which they are required by law to pay, does so at his own peril as far as regards his liability for the amount of such fees to the sovereign body to which he is required himself to make payment, and a suit against a register upon his official bond, which in the instant case runs to you as Treasurer, is an appropriate mode of collecting sums so due. *State v. Gideon*, 158 Mo. 327; *Sheibley v. Dixon County*, 61 Neb. 409; *Boettcher v. Lancaster County*, 74 Neb. 148; *Cavender v. Cavender*, 10 Fed. 828. See *Clemens Electrical Mfg. Co. v. Walton*, 168 Mass. 304.

It is not necessary that a public officer be specifically authorized by statute to bring suit upon a bond given to him by another officer, for he has an implied authority, as incident to his office, to bring all suits which the proper and faithful discharge of his official duties require. There may be other remedies open to you, but the suit upon the bond given by the register, which runs to you, would seem to be a simple and direct mode of procedure with which to obtain judicial determination of the questions involved and to seek the collection of funds which should have been paid over to you. By G. L., c. 35, § 45, provision is made for the examination of accounts and vouchers of registers of probate by the Director of Accounts of the Department of Corporations and Taxation, but whatever procedure may be open to such director against a register of probate whose accounts are incorrect, such procedure does not supersede your right to proceed by suit upon the register's bond.

It then becomes necessary to consider, for your guidance, whether or not, upon the facts stated in your letter, such a default can be said to exist upon the part of a register of probate, in the collection of fees required to be made by him, as would justify the institution by you of a suit against him upon his bond. It is to be borne in mind that it is not part of the duty of the Attorney General to advise registers of probate, and that they are not bound by his opinion. Moreover, ultimate judicial interpretation must give the conclusive answer as to the question of precisely what fees are to be collected by registers of probate under St. 1926, c. 363, § 2, amending G. L., c. 262, § 40, which reads as follows:—

“The fees of registers of probate and insolvency, payable in advance by the petitioner or libellant, shall be as follows:—

For the entry of a libel for divorce or for affirming or annulling marriage, five dollars.

For the entry of a petition for the probate of a will, for administration on the estate of a person deceased intestate, of a petition under section thirty-five or thirty-six of chapter two hundred and nine by a husband or wife for authority to convey land as if sole, of a petition for partition, of a petition for change of name, of a petition for leave to carry on the business of the deceased, and for filing a representation of insolvency, and, *except when the petition is certified by the register or assistant register to be incidental to proceedings already pending in the same county, for the entry of a petition for the appointment of a special administrator, conservator, trustee, receiver of the estate of an absentee, or of a guardian except when the petitioner certifies that the ward's estate does not exceed one hundred dollars, three dollars.*

For each certificate issued by the register, fifty cents.

For copies of records or other papers in the charge of said registers at the rate of forty cents a page, except as otherwise provided by law.”

You direct my attention in your letter particularly to the clause in the third paragraph providing that "except when the petition is certified by the register or assistant register to be incidental to proceedings already pending in the same county," and have specifically requested my opinion relative to an interpretation thereof. Your questions referring to this statutory exception are as follows:—

First. — Does the exception apply to the entry of a petition for the appointment of a special administrator alone, or does it apply to all the other petitions thereafter mentioned?

Second. — If it does apply to special administrators and all others thereafter, what is meant by the word 'incidental' used in the exception?

Third. — If in any of these petitions, a previous petition has been filed upon which an entry fee has been paid and an appointment has been made, but the appointee has failed to qualify and another petition is filed, should there be a fee collected on the second petition?"

1. I answer your first question to the effect that the exception referred to applies to each and all of the petitions mentioned after the words "pending in the same county," in the third paragraph of said section 40, as amended.

2. I answer your second question to the effect that the word "incidental" as used in said third paragraph means arising out of or in connection with the subject matter of another probate petition or proceeding previously commenced in the same county. In other words, when a petition for the appointment of a special administrator or a petition for the appointment of any one of the other officials mentioned thereafter in the third paragraph of section 40 is filed, the duty devolves upon the register to determine whether or not such petition is incidental to some other probate proceeding already begun in the same county, and if he determines that it is so incidental, and certifies that to be the fact, no entry fee is to be paid; if he determines that it is not so incidental, a fee of three dollars is to be paid to him.

The act of certifying is a ministerial act imposed on the register by law; it is not judicial or quasi-judicial in character. It involves no employment of discretion but calls only for an examination of the files and a statement, under a correct interpretation of the law, as to existing conditions disclosed therein.

3. Although the matter is not without some doubt, I am of the opinion that, under the facts stated in your third question, a second petition is so incidental to the proceedings already begun that a fee for the filing thereof ought not to be exacted. Rule I of the Probate Court, to the effect that "each petition shall be considered a separate proceeding," does not affect a determination by the register under the provisions of the statute as to whether one of the designated petitions is incidental to proceedings already pending. I am of the opinion that no right of appeal from the determination of the register relative to certification of a petition as incident to a pending proceeding is vested in the State Treasurer, as such, but that, as I have pointed out, he may have recourse to a suit upon the register's bond, in a proper case, to recover from him the amount of moneys collected or which should have been collected as fees under said section 40 by the register.

Very truly yours,

ARTHUR K. READING, *Attorney General.*

Motor Vehicles — Locomotive — Steam Shovel.

A certain machine used as a steam shovel, self propelled and mounted on a railroad car, is neither a locomotive nor a motor vehicle, within the meaning of G. L., c. 146, § 46.

MARCH 23, 1927.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You request my opinion as to whether or not, under G. L., c. 146, § 46, a certain machine and boiler may be classified as a locomotive or motor vehicle, and the facts which you give me are as follows: "A machine is under consideration at the present time, being a steam shovel mounted on a standard gauge railroad car and self propelled." In response to a request from this department for further information you add the following facts: "Upon making inquiry as to whether or not this machine can continue for any great distance self propelled, I find that the machine is used solely to move under its own power for a short distance while being used for purposes of excavation. When moved from one location to another, it is drawn away by a locomotive or other transportation." You then ask: "Is this machine to be considered a locomotive or a motor vehicle within the meaning of G. L., c. 146, § 46?"

G. L., c. 146, § 46, provides: —

"No person shall have charge of or operate a steam boiler or engine or its appurtenances, except boilers and engines upon locomotives, motor vehicles, . . . unless he holds a license as hereinafter provided."

R. L., c. 102, § 78, as amended, contained the same provision as the above quotation, except that the words "motor road vehicles" were used instead of "motor vehicles."

In an opinion of a former Attorney General (IV Op. Atty. Gen. 19) with reference to R. L., c. 102, § 78, it was said: —

"Whether a person operating a boiler or engine is within the exception of the statute depends, by its very wording, upon whether it is upon a locomotive. There is no restriction as to the use of a locomotive in the enactment. The question whether it is a locomotive or not is determined by its design and its potentiality rather than by any use to which it may be temporarily applied."

The term "motor vehicles" is defined by the statute (G. L., c. 90, § 1) as follows: —

"'Motor vehicles,' automobiles, motor cycles and all other vehicles propelled by power other than muscular power, except railroad and railway cars and motor vehicles running only upon rails or tracks."

In view of the facts which you have submitted to me, I am of the opinion that under G. L., c. 146, § 46, the machine you describe is neither a locomotive nor a motor vehicle.

Very truly yours,

ARTHUR K. READING, *Attorney General.*

Boston Elevated Railway Company — Trustees — Term of Office.

At the expiration of the ten-year period designated in Spec. St. 1918, c. 159, the Governor may appoint a board of trustees for the Boston Elevated Railway Company composed entirely of new members.

APRIL 1, 1927.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR:— You have asked my opinion “as to whether the terms of the trustees of the Boston Elevated Railway Company, or their successors, appointed by the Governor of the Commonwealth under the provisions of Spec. St. 1918, c. 159, commonly called the Public Control Act, expire at the end of the ten-year period designated in the act, and if he then can appoint an entire new board of trustees.”

The pertinent portions of chapter 159, relating to the appointment and terms of office of such trustees, are as follows:—

“SECTION 1. The board of trustees of the Boston Elevated Railway Company is hereby created, to consist of five persons to be appointed by the governor, with the advice and consent of the council. The persons so appointed shall be sworn before entering upon the performance of their duties; shall own no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased or operated by it; shall serve for the term of ten years from the date when they assume the management of the company as hereinafter provided, and until their successors are duly appointed and qualified. . . . In case of any vacancy in said board by reason of death, resignation or otherwise, the governor, by and with the consent of the council, shall fill the vacancy. The board shall designate one of the trustees so appointed to serve as chairman. Any member of the board may be removed for cause by the governor, with the advice and consent of the council.

If the public management and operation of the railway system of the Boston Elevated Railway Company shall continue beyond the original period of ten years the governor shall, with the advice and consent of the council, at the expiration of each ten-year period during the continuance of public management and operation, appoint five successor trustees to serve for a period of ten years and until their successors are appointed and qualified, but not exceeding the period of public management and operation. Said trustees shall assume the management and operation of the company's property on the first day of the month next following their appointment and qualification.”

The term for which the original trustees were appointed was ten years from the date when they assumed the management of the company.

As regards persons appointed to fill vacancies in the board, there is no provision in the statute relative to such appointments which prevents the application of the statutory rule embodied in R. L., c. 18, § 1, now in G. L., c. 30, § 10, that vacancies in the office of a member of a board shall be filled for the unexpired term. The terms of the last paragraph of section 1 indicate that there was no legislative intent to have vacancies in the board filled in any other manner, for it is expressly provided therein that at the expiration of each ten years of public management of the road the

Governor shall appoint five successor trustees, the entire membership of the board being five.

I am of the opinion that at the end of the ten-year period designated in the statute the Governor can appoint a board composed entirely of newly appointed trustees.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Board of Dental Examiners — Registration — Examination.

The Board of Dental Examiners, with relation to registration and examination of applicants, can act only in accordance with statutory provisions and the rules and regulations prescribed for the proper conduct of its duties.

APRIL 8, 1927.

Hon. PAYSON DANA, *Commissioner of Civil Service*.

DEAR SIR:— You ask: "Whether or not the Board of Dental Examiners has the right to suspend or revoke the license of practicing dentists of this Commonwealth, and if so, for what causes?" This is covered by G. L., c. 112, § 61, as amended by St. 1921, c. 478, § 1, wherein power is given to the Board of Dental Examiners to suspend or revoke licenses for causes which are set out at length therein; that is to say, if "the holder of such certificate, registration, license or authority, is insane, or is guilty of deceit, malpractice, gross misconduct in the practise of his profession, or of any offence against the laws of the commonwealth relating thereto."

You further ask: "Would it be illegal for the secretary of the Board of Dental Examiners to issue interne certificates to candidates who are eligible to take the dental examination without calling a meeting of the full Board?" G. L., c. 112, as amended by St. 1921, c. 365, provides that "an applicant for limited registration" is required to "furnish the board with proof entitling him to be examined for registration," and that he may, "upon payment of five dollars, be registered by the board as a dental interne." It is further provided that "limited registration under this section may be revoked at any time by the board." From the wording of this section (G. L., c. 112, § 45A) it is evident that the Board must act, and its action be, in accordance with the regular practice under the laws of this Commonwealth and the rules and regulations for the proper conduct of its duties, prescribed by G. L., c. 112, § 43. The secretary of the Board of Dental Examiners would have no authority to issue such certificate except as the result of action taken by the Board.

You further ask: "Would it be illegal for the Board of Dental Examiners to give an unofficial examination to a candidate who is within a short period of the legal age for examination, the Board withholding the certificate of registration until the candidate reaches the legal age?" G. L., c. 112, § 45, states:

"Applications for registration hereunder shall be in writing upon blanks furnished by the board, which shall be signed and sworn to by the applicant, presenting proof of the requirements herein specified. Any such applicant twenty-one years or over and of good moral character who shall furnish the board with satisfactory proof that he has received a diploma from the faculty of a reputable dental college as defined in the following

section, shall, upon payment of twenty-five dollars, be entitled to be examined by the board."

There is no exception in said section whereby a person less than twenty-one years of age may be examined.

Since an applicant for registration must be twenty-one years of age before he is entitled to file an application, and since an examination of said applicant, according to the terms of said section, is to be granted upon certain proof set out in said application, it follows that an applicant is not entitled under the law to an examination by said Board prior to arriving at the age when he is entitled to file an application. The Board of Dental Examiners, therefore, would be acting outside the scope of its powers in giving an unofficial examination of a candidate prior to his reaching the age which entitles him to apply for registration.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Hours of Labor — Sunday Employment — Paper Mill.

An employee whose duties do not specifically include work on Sunday other than caring for machinery in a manufacturing establishment may be employed on Sunday in duties designated by G. L., c. 149, § 50, even if this necessitates his working seven days a week.

APRIL 27, 1927.

Gen. E. LEROY SWEETSER, *Commissioner of Labor and Industries*.

DEAR SIR: — You have asked my opinion as to whether an employee in a paper mill may lawfully perform on Sunday the work of caring for machinery in an establishment, provided he works therein on the other six days of the week. The statutes in question are sections 48 and 50 of G. L., c. 149. Section 47 of said chapter is not applicable to manufacturing or mercantile establishments.

Section 48 of said chapter states: —

"Every employer of labor engaged in carrying on any manufacturing or mercantile establishment in the commonwealth shall allow every person, except those specified in section fifty, employed in such manufacturing or mercantile establishment at least twenty-four consecutive hours of rest in every seven consecutive days. No employer shall operate any such manufacturing or mercantile establishment on Sunday unless he has complied with section fifty-one. Whoever violates this section shall be punished by a fine of fifty dollars."

Section 50 states that section 48 shall not apply to employees whose duties include no work on Sunday other than caring for machinery. (There are other exceptions enumerated in this section which are not material to the issue presented.)

Section 48, allowing twenty-four consecutive hours of rest in every seven consecutive days, by its own terms and by the terms of section 50, does not affect persons whose duties include no work on Sundays other than caring for machinery. It follows, therefore, clearly, in my opinion, that such an employee may work on Sunday at any of the duties set forth in section 50 without violating the law, even though he also works all other days of the week in the establishment. However, an employee who works in the establishment the other six days of the week may not do any

work on Sunday, other than that specified in section 50, unless he is granted twenty-four consecutive hours of rest in every seven consecutive days.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Public Health — Inspectors — Slaughtering.

In cities, at least one inspector of animals should be a registered veterinary surgeon, but it is not necessary that one inspector of slaughtering in every city should be such a surgeon.

APRIL 27, 1927.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have asked my opinion as to whether the provision contained in G. L., c. 129, § 15, in relation to inspectors of animals, that "in cities at least one such inspector shall be a registered veterinary surgeon," applies to inspectors of slaughtering, provided for by G. L., c. 94, § 128.

G. L., c. 94, § 128, provides that inspectors of slaughtering —

"shall be appointed and compensated, and may be removed in the manner provided for inspectors of animals, under sections fifteen to seventeen, inclusive, of chapter one hundred and twenty-nine, except that with respect to such first named inspectors, local boards of health and the department of public health shall perform the duties and exercise the authority imposed by said sections upon the aldermen or selectmen and upon the director of animal industry, respectively, as to inspectors of animals."

G. L., c. 129, § 15, reads as follows:—

"The mayor in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the director. In cities at least one such inspector shall be a registered veterinary surgeon."

This latter section deals specifically with inspectors of animals, a type of inspector whose duties are to some extent set forth in said chapter 129, and a different kind of inspector from the inspectors of slaughtering, whose duties are to a certain extent set forth in G. L., c. 94, §§ 118-128. That there is a distinction made in the statutes between the two classes of inspectors is apparent from the wording of said section 128, wherein inspectors of slaughtering are referred to as "said inspectors" and inspectors of animals are referred to specifically by name.

While the inspectors of slaughtering are to be appointed, compensated and removed in the manner provided for inspectors of animals under G. L., c. 129, §§ 15-17, it does not follow that all the provisions of said section 15 are applicable to inspectors of slaughtering. The provision in section 15 that "one such inspector shall be a registered veterinary surgeon" applies specifically to the inspectors of animals mentioned by name in section 15, and the requirement as to one of their number being a registered veterinary surgeon was not intended by the Legislature to be made applicable to inspectors of slaughtering by virtue of the provision for the

appointment, compensation and removal of the latter kind of inspectors by reference to section 15.

In brief, then, the provisions of the statutes require that in cities at least one inspector of animals, such as is provided for under said chapter 129, is to be a registered veterinary surgeon, and that it is not necessary that one inspector of slaughtering in every city where an appointment is made shall be a registered veterinary surgeon.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Structures in Tidewater — Acushnet River — Licenses.

The provisions of G. L., c. 91, § 21, granting authority to exact compensation for tidewater displacement, are not limited by St. 1806, c. 18, relative to riparian owners on the Acushnet River. The boundary line of the grant given to such owners by St. 1806, c. 18, is at the present time to be taken as the existing low-water mark.

MAY 9, 1927.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You have requested my opinion upon several questions of law arising in connection with a certain petition for a license to construct bulkheads and make solid fillings in and over the tidewaters of Acushnet River in the city of New Bedford. You have transmitted to me with your communication various documents and data bearing upon the petitioner's title to riparian land, and relating to various facts bearing upon the matter, and you have stated further facts in your letter.

The specific questions which you ask in your communication are as follows:

"1. Has the city of New Bedford, owing to the extension of North Street, any rights in the land under water. If so, can the Division issue a license for a structure which would cut off the city from its right of approach to the harbor line? (G. L., c. 91, § 17.)

2. If the rights in the land under water, 40 feet wide, in the continuation of North Street, do not belong to the city, do they belong to the owners of the adjoining piers, or do they remain in the Commonwealth?

3. Do the provisions of the statute of 1806 prohibit the Division from making a charge for the displacement of tidewater under G. L., c. 91, § 21?

4. Do the provisions of the statute of 1806 prevent the Governor and Council from fixing the proper compensation for the rights granted by the license in the lands of the Commonwealth under G. L., c. 91, § 22?"

You state that the petitioner, claiming to be a riparian proprietor on the tidewaters of the Acushnet River, asks for a license to erect a structure described in your letter, which on the facts as stated is, in my opinion, a pier or wharf and is not to be considered filled land on which structures may be erected.

By virtue of St. 1806, c. 18, riparian owners on the tidewaters of the Acushnet River are authorized to erect wharves extending from their lots "to the channel of said river." St. 1806, c. 18, is to be considered in the nature of a grant of the right to erect wharves to the riparian owners, but this right is confined to areas directly in front of the riparian owner's land, and before such a license can be issued by the Commission it must be

apparent that the petitioner for such license is the owner of the fee of the land in question. It appears from the data which you have submitted and from the facts as you have set them forth in your letter that the city of New Bedford, on or about September 8, 1787, laid out a way to the then high-water mark, and by later proceedings extended the same to the present high-water mark over land which is now claimed by the petitioner. It cannot be ascertained with accuracy from such data whether the city, which was a town in 1787, acquired a fee in the strip so taken as a way, or whether it acquired merely an easement for highway purposes. It is probable that the latter right was all that was acquired by the city, and if so, it would not become a riparian owner within the meaning of St. 1806, c. 18, and the Commission would not be acting in derogation of any rights of the city in granting a license to the owner of the fee of the land over which the way was laid out. If, however, the city acquired a fee in the portion of land taken for the way, it would become a riparian proprietor and the Commission could not, under the provisions of G. L., c. 91, § 17, read in connection with St. 1806, c. 18, issue a license to any individual for the erection of a structure which would be a continuation of the line of the city's taking. It would seem as if the establishment of the petitioner's title as against the city of New Bedford would be a matter to be determined judicially before action was taken upon the petition by the Commission.

You also advise me that a claim is made by the owner of the land adjoining that of the petitioner, who has erected a wharf under license in front of its land, of a prescriptive right to use the waters on the side of its wharf toward the land claimed by the petitioner so freely as to exclude the petitioner from erecting a wharf in front of the land claimed by the petitioner, which is stated to be within a few feet of the existing wharf. I am of the opinion that no such prescriptive right has been acquired by the owner of the land adjoining that claimed by the petitioner which would prevent the licensing by the Commission of a wharf to be erected as specified in the petition.

Assuming that title to the land occupied by the way is not in the city, it appears from the facts stated in your letter and the data submitted, and from statements made to this Department by counsel for both owners, that the owner of the land adjoining that claimed by the petitioner, over which the said way extends, claims title to so much of said land as is occupied by the way extended, or a portion thereof, as against the petitioner. It is impossible to ascertain from the facts stated, the data submitted or the statements of counsel which of these two owners, if either, actually has title to the fee in that portion of the land occupied by the way, as extended. As a prerequisite to a license to erect a wharf in front of so much of the land claimed by the petitioner as is disputed with relation to ownership, the petitioner is bound to establish a good title. It would seem that in the existing situation the question as to the ownership of the land in question was one for judicial determination, and that until it has been determined by some competent judicial tribunal that the petitioner is the sole owner thereof no license in relation to a wharf to be erected in front of such land should be issued to it by the Commission.

I think that the foregoing statements constitute a complete answer, so far as one may be given, to your first and second questions.

Your third and fourth questions, in view of the foregoing answer to the first two questions, do not require an answer at the present time as far

as they relate to land the title to which is not established as being in the petitioner, but they require an answer in view of the possibility of the issuance of a license by your Commission for a wharf in front of other riparian land of the petitioner adjoining the said way, as to which you state that the petitioner's title to the fee is not in dispute.

In relation to your third question, St. 1806, c. 18, provides as follows:

"SECTION 1. That the owners and proprietors of lots of land adjoining Accushnett River, in the town of New Bedford, in the county of Bristol, between Clark's Point, so called, and the head of navigation in said river, their heirs and assigns, shall be, and hereby are authorized and empowered to erect, continue and maintain, wharves parallel with the line of their several lots, as they abut upon said river; said wharves *to extend to the channel of said river*, if the owners of said lots think proper; and each owner of said lot shall have authority to provide docks, or erect wharves, as aforesaid on the aforesaid extended portion of his said lot, in such way and manner as he may think proper, not exceeding the limits of said channel of said river.

SECTION 2. That if at any time hereafter, it shall be made to appear to the satisfaction of the General Court of the Commonwealth of Massachusetts, that the erection, maintaining, or continuing said wharves or docks, mentioned in the first section of this act, operates any obstruction to the navigation of said river, or to the right of taking shell or other fish in said river, in that case the said General Court shall have a right, notwithstanding this act, to make such provisions respecting the navigation of said river, and the right of taking said fish, as they may think the public interest requires."

While the statute is to be construed as an irrevocable grant to the riparian owners of the right to erect wharves within the lines established by the statute (*Bradford v. McQuesten*, 182 Mass. 80; *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51), a reservation in the grant is contained in section 2, whereby the grant is made subject to future restrictions which may be imposed by the Legislature "respecting the navigation of said river, . . . as they (the General Court) may think the public interest requires."

The provision of G. L., c. 91, § 21, granting authority to exact compensation for tidewater displacement, is a provision which falls within the meaning of the reservation in the statute of 1806, relative to future restrictions respecting navigation of the river. The reservations embodied in section 2 make inapplicable to the instant case the opinion in *Bradford v. McQuesten*, *supra*, in so far as that opinion held that such compensation could not be exacted from the riparian proprietor whose rights were considered therein, for that owner's rights were established by St. 1851, c. 26, which did not contain any such reservations as does the statute of 1806. I therefore answer your third question in the negative.

In relation to your fourth question, G. L., c. 91, § 22, provides for the payment of compensation to the Commonwealth for the right granted under a license to drive piles or to fill land in tidal waters, the title to which land is in the Commonwealth. The compensation required to be paid by this statute for the use of tidewater lands is not of a similar character to the compensation required by section 21 for tidewater displacements. It does not bear such relation to the navigation of the river as to bring it within the reservation contained in St. 1806, c. 18, § 2. Compensation for tidewater displacement, in lieu of earlier provisions of law for excavation, is an enactment directly in respect to navigation, whereas

compensation for the exercise of a license to drive piles or to fill land is not made directly in respect to navigation, and it cannot be imposed upon licensees driving piles or filling land within the boundaries of the grant made them by St. 1806, c. 18. It becomes necessary, therefore, in this connection to determine what are the boundaries of the grant provided for in St. 1806, c. 18. It is provided in said chapter 18 that the riparian owners may "erect, continue and maintain, wharves parallel with the line of their several lots, as they abut upon said river; said wharves to extend to the channel of said river." It has been held in a number of opinions of the Supreme Judicial Court that a conveyance to or a boundary by the channel line in flats over which the tide rises and falls and through which a tidal stream runs is in effect a boundary by the low-water mark. *Ashby v. Eastern R.R. Co.*, 5 Met. 368; *Tappan v. Boston Water Power Co.*, 157 Mass. 24. In the latter case the court, after reviewing earlier decisions, says:—

"There is no suggestion in these cases that a tidal channel, from which the tide ebbs and through which a fresh-water stream flows at low tide, will constitute a boundary to flats. . . . And we think it plain that a channel to be a boundary to flats must be one from which the tide does not ebb at low water."

Although an examination of the circumstances which surrounded the enactment of the statute of 1806 tends in some degree to show that in the use of the word "channel" in said statute the Legislature may have intended to signify the tidal channel itself rather than the low-water mark, yet such considerations are not sufficient to require an interpretation of the words as used by the Legislature in this statute as having other than the meaning attached to such words in similar statutes by the court; and it follows that today the boundary line of the grant given to the riparian owners under St. 1806, c. 18, is low-water mark as it now exists. It will not be proper to fix compensation for use of the Commonwealth's lands inside the present low-water mark, but such compensation may be fixed for the use of such lands beyond low-water mark, and I answer your fourth question in this manner.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Banking — Co-operative Banks — Loans — Shareholders.

The authority of a co-operative bank in respect to loans is limited by G. L., c. 170, § 12, and in making loans otherwise than in accordance with such limitations the officers of a co-operative bank are performing acts outside the scope of their authority which are not capable of ratification.

MAY 9, 1927.

Hon. ROY A. HOVEY, *Commissioner of Banks*.

DEAR SIR:— You have asked my opinion upon various questions, all of which relate to certain practices of co-operative banks in connection with loans to shareholders.

There are certain general considerations in connection with the law relating to co-operative banks, contained in G. L., c. 170, as amended, which must underlie the answers to your several questions. It is apparent from the language of G. L., c. 170, as amended, and the earlier statutes dealing with co-operative banking, that it was the intent of the

Legislature, in providing for this form of banking, that it should not be conducted in the manner in which general commercial banking is carried on nor in the manner in which institutions for savings operate. The statute originally authorizing the formation of corporations to do a co-operative form of banking, St. 1854, c. 454, provided in section 1 that the purpose of the organization should be —

“Accumulating a fund to be lent on real estate security, or divided among its members.”

Section 4 provided: —

“Every such corporation shall lend its funds on real estate security only . . . and no loan shall be made to any person not a member.”

St. 1877, c. 224, and all subsequent statutes have stated the purposes of the corporation to be substantially those now set forth in G. L., c. 170, namely —

“Accumulating the savings of its members in fixed periodical installments and loaning such accumulations” —

and every statute has limited the number of shares in the banking association which any one individual might hold, and has limited the amount which might be loaned upon real estate security, to a given amount for each share held by a member of the corporation or association.

It is apparent from the provisions of the statute that it was the intent of the Legislature, in so limiting the number of shares which a member might hold and in limiting the amount which a member might borrow, to provide a form of banking which would encourage saving by persons of relatively small means, and would extend this privilege and the privilege of obtaining moderate-sized loans widely throughout the community among a class of persons not ordinarily engaging in large financial transactions.

It has been said of co-operative banks by the Supreme Judicial Court: —

“They are not authorized to do a general banking business and their rights and powers are strictly limited for the protection and benefit of their members.”

G. L., c. 170, § 12, as amended, now provides as to a co-operative bank as follows: —

“The capital . . . shall be divided into shares of the ultimate value of two hundred dollars each; . . . No person shall hold more than forty unmatured shares, ten matured and ten paid-up shares in any one bank at the same time.”

Sections 22 and 26 are as follows: —

“SECTION 22. Any person whose application is accepted shall be entitled, upon proper security, to receive a real estate loan of a sum not exceeding two hundred dollars for each unpledged share held by him. . . .

SECTION 26. For every loan made upon real estate a note shall be given, accompanied by a transfer and pledge of the requisite number of shares standing in the name of the borrower, and secured by a mortgage of real estate situated in the commonwealth, the title to which is in the

name of the borrower. . . . No loan upon one parcel of real estate shall exceed eight thousand dollars. . . ."

There are other provisions relative to shares owned jointly and by trustees, but their terms in no way modify the general intent of the statute in respect to the matters as to which you have inquired.

It is plain that the authority of the bank and its officers in respect to loans is limited to making them to shareholders, not in excess of \$200 for each unpledged share held by a member, upon the security of real estate, the title to which is in the borrower. Such limits upon the authority of the co-operative bank in this respect were intended to carry out the general purpose of the institution, already referred to. It was not the intention of the Legislature, in enacting the statute, to provide a system of banking whereby a single shareholder or a small group of shareholders might borrow all or any very large part of the working capital. Loans made otherwise than in accordance with the limitations imposed by the statute are unauthorized, and in making them the officers of the bank are performing acts outside the scope of their authority which are not capable of ratification by the bank, its directors, or its shareholders. Shareholders dealing with the bank are bound to take notice of the statutory limitations of its authority to make loans. *Davis v. Old Colony R.R. Co.*, 131 Mass. 258.

Of the three cases which you advise me that you have before you and which you have submitted to me for consideration upon facts stated, the first two involve situations in which a shareholder of a co-operative bank, for the purpose of obtaining for his own benefit a loan greater in amount than the bank is authorized to make to one person upon the number of shares actually held by the particular shareholder, which I assume in each instance, from the facts as you state them, to be the maximum number of shares which one individual is entitled to hold, or loans on a single parcel owned by him in excess of \$8,000, resorts to a scheme which results in his obtaining such a loan. In the third case a similar result is achieved, but as a result of circumstances arising after the making of a proper loan by the bank to a shareholder and without intent to evade the provisions of the statute.

I. The first case which you have stated and your question of law based thereon are as follows:—

"A is the owner of record of several parcels of real estate, each of sufficient value to warrant a co-operative bank loan thereon of \$8,000. He obtains in the usual manner a loan of that amount on one parcel, but in order to obtain loans on the other parcels, he deeds them to various admittedly fictitious owners, commonly called 'straws.' Each of these 'straws' applies to the same co-operative bank for a loan secured by the property placed in his name, the applications are accepted and the loans are made, the notes and mortgage deeds being signed by the 'straws' and recorded. After the mortgages are recorded each 'straw' owner re-transfers his parcel to A, and these deeds in turn are recorded. Thus the books of the bank reflect several apparently separate and distinct loans to as many individuals, but the proceeds of each loan went to A, who in the end is still owner of record of each parcel of real estate involved in the transaction. He makes payment of all monthly dues and interest. The insurance policies held by the bank show that the insurance equities are payable to A.

The question arising from transactions of this nature is, —

If the officers of the co-operative bank have knowledge of the circumstances of the transaction, have they violated or permitted the violation of G. L., c. 170, §§ 12 and/or 26?"

The facts set forth in relation to case number I indicate the formation by the shareholder of a scheme to accomplish by indirection what the statute expressly prevents him from doing directly. The bank and its officers are without authority to make him, as an individual shareholder, such a loan as he desires to obtain. Such a scheme, if successfully carried into effect, might enable a single shareholder to borrow for himself all the working capital of the bank, and it might also enable him to borrow for himself upon a single piece of property a like sum. If, knowing the facts relative to the expedient which he is adopting to obtain such a loan, the officials of the bank connive with him to make a loan of the funds of the bank in the manner indicated, they have violated and permitted the violation of G. L., c. 170, §§ 12 and 26. I answer your question in the affirmative.

II. The second case and the question relating thereto which you set forth in your letter are as follows:—

"This case is similar to case number I, except that after the title to the property is transferred to the 'straw' owner it remains in his name and is *not* re-transferred to A. In some cases A holds unrecorded deeds executed by the 'straw' owner, in order that he may place them on record, should any attempt be made by the 'straw' owner to benefit by having the property in his name. As in case number I, A makes payment of all monthly dues and interest.

The question arising from such transactions is, —

If the title to each of the various parcels involved is allowed to stand in the name of the 'straw' to whom the loan ostensibly was made, have the provisions of G. L., c. 170, §§ 12 and/or 26, been violated?"

I assume that in this case, as well as under the facts stated in case number I, the officials of the bank have knowledge relative to the intent of the shareholder to obtain loans, by means of such "go-betweens," which he would not otherwise be able to negotiate. It is immaterial in what manner the scheme is carried out. Its purpose is to accomplish a result not permissible under the statutes.

The powers of the bank and its officers are defined by the statute. It was not the intent of the Legislature, as expressed in the statutes, that they should have authority to negotiate a loan in any other manner or to any greater extent than is indicated by the terms of the statute. The intentional negotiation by them of a loan in any other manner or to any greater extent than that specified by the statute is *ultra vires*, being outside the objects for which the corporation was created and beyond the powers expressly conferred to attain such objects. See *Jewett v. West Somerville Co-operative Bank*, 173 Mass. 54. Where the officials of a co-operative bank know that a loan in excess of the amount permitted by the statute to a single shareholder, or upon a single piece of property, is in fact being made to one shareholder, or upon the security of one piece of property, their authority is not enlarged by a colorable scheme, devised with their knowledge, by which it is made to appear of record as if the loan were being made to several shareholders or upon several pieces of

property. Their acts are no less *ultra vires* in the latter instance than in the former. All persons dealing with co-operative banks, as with savings banks, are bound to take notice of the limitations of the powers of the institution and its officers (see *Gilson v. Cambridge Savings Bank*, 180 Mass. 444), and the borrower who has manipulated such a scheme as that outlined in the latter instance stands in *pari delicto* with the corporation. Whether or not an individual has the right in any given instance to attack the validity of the transactions of a co-operative banking corporation as *ultra vires*, the State may make them the basis of a direct proceeding against the corporation. Ample authority is given to the Commissioner of Banks by the statutes to have set in motion appropriate proceedings against a co-operative bank which, through the acts of its officers, has exceeded its authority.

I answer your second question in the affirmative.

Under case number II you also ask the following question:—

“With respect to cases numbers I and II, are the officers who invest the funds of the bank charged with the duty of obtaining such information concerning applicants for loans, which may be available on a reasonable inquiry, as would enable them to prevent the obtaining of loans by such subterfuge or deception?”

I answer this question in the affirmative.

III. The facts and questions relative to the third case which you lay before me are as follows:—

“A and B, the owners of record of two separate and distinct parcels of real estate, have been granted thereon, properly and at different times, by the same co-operative bank, loans of \$8,000 each. At a later date B, by bona fide sale conveys his parcel to A, subject to the co-operative bank mortgage, and assigns to A the value of his unmatured shares pledged under the mortgage. If the bank on its books transfers to A these assigned shares he becomes thereby the holder of eighty unmatured shares, twice the maximum number of shares permitted under the provisions of G. L., c. 170, § 12. The general practice, however, is for A to hold the assignment of B's unmatured shares without requesting that they be transferred to his name on the books of the bank, the assumption being that violation of the provisions of section 12 is thereby avoided.

The question in this instance is, —

(a) If the officers of the bank have knowledge of the sale of the mortgaged property and the assignment of the unmatured shares pledged under the mortgage, can they legally permit both loans and shares to stand unchanged in the name of A and B, respectively, when both parcels of real estate stand of record in the name of A and monthly payments of dues and interest are made by him and he holds an assignment of B's interest in the shares?

(b) This also raises the question — What is the duty of the officers of the bank upon being notified either through a change in the person to whom insurance equities are payable, or otherwise, of the transfer of property upon which the bank holds a first mortgage?

(c) If in any of the transactions outlined above there has been a violation of the statutes relating to co-operative banks but no breach of the conditions of the mortgage, is it thereby within the power of a co-operative bank to demand payment of the loan?”

From the facts as you state them, it does not appear that there is involved in the third question any scheme or design on the part of any shareholder to obtain from the bank any loans which it was not specifically authorized by statute to make. This case presents a different aspect from that of the two foregoing situations. The loan in question has been duly made by the bank's officers, acting within their authority, and the question of a colorable design in relation to negotiations of the bank does not here appear.

Transfer of shares in a co-operative bank is permitted by section 39, but inasmuch as there is a prohibition in section 12 on the holding of more than forty unmatured shares by a single individual, the bank has no legal authority to make a transfer which will bring one of the shareholders into a position where he owns on the books of the company more than the limited number. As the possession of the two parcels of real estate mentioned in case number III has come into the hands of a single shareholder subsequent to the making of a bona fide loan, although the situation created is not one contemplated by the statute, there is no specific provision which calls for action on the part of officers of the bank. I answer your question 3 (a) in the affirmative.

I answer your question 3 (b) to the effect that there are no duties incumbent upon the officers of a co-operative bank under the circumstances described in your question, provided such information reaches them subsequent to a bona fide loan made within their specific authority under the statute.

I answer your question 3 (c) in the negative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Master Plumber — License — Registration.

A master plumber in a town to which the statutes relative to the plumbing business apply is not entitled to a certificate of registration or a license without an examination.

Neither certificates of registration of plumbers nor licenses to those duly registered need be renewed annually, under the provisions of the General Laws.

In towns to which G. L., c. 142, § 3, is applicable, registration or license is a prerequisite to engaging in the plumbing business, and a regular place of business is essential to being a master plumber.

MAY 9, 1927.

MR. WILLIAM F. CRAIG, *Director of Registration*.

DEAR SIR:— You have requested my opinion as to whether or not a person engaged in the plumbing business in a town to which the plumbing acts hitherto have not been applicable is entitled to a certificate of registration as a master plumber or to a master plumber's license without an examination when his town properly accepts the rules relative to plumbing formulated by the Examiners under G. L., c. 142, §§ 8 and 9.

In my opinion, he is not so entitled but must subject himself to the examination. This is so, even though he was engaged in the plumbing business prior to July 10, 1893. When his town accepts the Examiners' rules, G. L., c. 142, §§ 1 and 3 (among others), becomes binding upon his town, and these sections prohibit him from engaging in the business of a

master plumber unless he is lawfully registered or duly licensed by the Examiners. He may not be licensed until he has successfully passed the examination, as provided in said chapter 142. He is not lawfully registered unless he has been registered in accordance with that part of section 1 of said chapter 142 which defines the word "registered." This part of section 1 states that "registered" means a person who has been registered under certain named acts, which provided for the issuing of certificates of registration as master plumbers to persons already registered as such on September 1, 1894. None of these acts contemplated the issuing of certificates of registration to persons who would subsequently come under the operation of the act, but they were designed to exempt from examination those persons who already were engaged in the plumbing business in towns to which the original act of 1894, when passed, applied.

All of the acts, including the original plumbing act (St. 1894, c. 455), contemplated the issuing of certificates of registration only to such persons who were duly registered on or before September 1, 1894, and there is no provision to be found in the law which allows any other person to engage in the business of a master plumber unless he is duly licensed after an examination.

You have also asked my opinion as to whether or not holders of certificates of registration must renew annually and pay a renewal fee. In my opinion, it is not necessary to renew these certificates annually, as the act of 1894 and acts supplementary thereto provided for the issuance of a certificate to certain plumbers, with no limitation as to its duration.

With reference to licenses, G. L., c. 142, § 6, specifically provides that such licenses shall be issued for one year and may be renewed annually upon the payment of the required fee. In the event that a person became registered properly, it is my opinion that the Legislature did not intend that he should pay any further fee or be required to renew annually. Certain specific acts, such as St. 1910, c. 597, § 2, St. 1909, c. 536, § 3, and St. 1912, c. 518, provided for the re-registration of holders of certificates on or before a certain date, but none of these acts contemplated that such persons should renew the certificates except on the one occasion prescribed by the particular act.

You ask whether or not a person who has never been licensed by the Board may advertise as a plumber or engage in the business of plumbing. G. L., c. 142, § 3, provides:—

"No person shall engage in the business of a master plumber or work as a journeyman unless he is lawfully registered, or has been licensed by the examiners as provided in this chapter."

It follows, therefore, clearly, that no person may engage in the business of a master plumber or work as a journeyman, as these are defined in section 1 of said chapter 142, unless he is lawfully registered or duly licensed by the Examiners.

It is to be borne in mind, however, that these sections apply only to certain cities and towns, as set forth in section 2 of said chapter 142. In those towns to which this act is not applicable, a person may engage in the business of plumbing and advertise as a plumber without being registered or licensed.

With reference to your question as to whether or not a person may advertise as a plumber, I am of the opinion that he may advertise to the same extent as he may lawfully perform plumbing work.

You further ask my opinion as to whether or not a master plumber must have a regular place of business, and also you ask what constitutes a regular place of business.

In my opinion, a master plumber must have a regular place of business. The definition of "master plumber," as contained in G. L., c. 142, § 1, is as follows: "A plumber having a regular place of business and who, by himself or journeymen plumbers in his employ, performs plumbing work." This definition clearly requires that a person must have a regular place of business in order to be a master plumber.

However, it is to be noted that a person need not have a regular place of business in order to secure a master plumber's license. The license is merely a permit to do legally those things which when done would constitute him a master plumber, and which would be contrary to law if done by an unlicensed person. It is therefore possible for a man legally and properly to hold a master plumber's license and at the same time not be a master plumber. The license does not create the status of master plumber but gives to the licensee the right to do those things which when done cause that status to arise by operation of law.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Insurance — Adjusters of Fire Losses — Solicitation of Business.

An unlicensed adjuster of fire losses may not solicit employment as the representative of an insured in the settlement of a loss, but the statutes do not prohibit him from soliciting business from insurers.

MAY 12, 1927.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR: — You have asked me certain questions relative to advertisements and solicitations by persons who are not licensed as adjusters of fire losses, in accordance with G. L., c. 175, § 162.

An adjuster of fire losses is defined by G. L., c. 175, § 162, as follows: —

"Whoever, for compensation, not being an attorney at law . . . or a trustee or agent . . . directly or indirectly solicits from the insured or his representative the settlement of a loss under a fire insurance policy shall be an adjuster of fire losses."

Section 172 requires that such adjusters of fire losses shall be licensed.

Section 175 provides: —

"Whoever, not being duly licensed as an insurance agent or broker or as an adjuster of fire losses, represents or holds himself out to the public as being such an agent, broker or adjuster, or as being engaged in the insurance business, by means of advertisements, cards, circulars, letterheads, signs or other methods, or whoever, being duly licensed as such agent, broker or adjuster, advertises as aforesaid or carries on such business in any other name than that stated in his license, shall be punished by a fine of not less than ten nor more than one hundred dollars."

You advise me of certain types of advertising cards which various unlicensed adjusters of fire losses have caused to be inserted in a certain insurance journal. It is largely a question of fact as to whether any or all of these cards, appearing in connection with other matter on an advertising page of an insurance journal, are of such a character as to constitute a

representation to the public by the persons inserting them that such persons, respectively, are adjusters of fire losses. The Attorney General does not pass upon questions of fact, but I think it would not be unreasonable to say that all of the advertising cards, with the possible exception of the fifth, read in connection with their place in an insurance journal, were intended as solicitations to insureds who had sustained fire losses to avail themselves of the services of those whose names were set forth on the cards. So regarded, the advertiser causing such cards to be published would plainly be soliciting the business of adjusting fire losses from insureds. In this respect it would be immaterial whether or not such solicitation was successful.

I answer your first question, both as to (a) and (b), in the affirmative.

As to your second question, it is of the nature of a solicitation that it be intended in some way to be made to or to reach the person from whom something is sought. It may be made otherwise than face to face or by direct communication — a third person may be made the agent of the solicitor's plea. The statute uses the words "directly or indirectly." With this proviso, I answer your second question in the negative.

I answer your third question in the affirmative.

The answer to your fourth question is, I think, fully comprised in what I have already written.

The prohibition of section 175 applies to any person, not licensed as an adjuster of fire losses, who solicits the settlement of a fire loss from an insured; that is, solicits employment by the insured as the latter's representative. It has no application to one who does not desire to act for insureds and holds himself out only as the representative of an insurance company. If, as a matter of fact, any card to which you have called my attention reasonably indicates the status of the advertiser as one who does not desire by his card to gain employment from insureds, as to which I express no opinion, then the advertiser would not be within the prohibition of section 175.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Comptroller — Firemen's Relief — Allowance to Families of Deceased Firemen.

It is the duty of the Comptroller, before certifying for payment a claim under G. L., c. 48, § 83, as amended, to the family of a deceased fireman, to satisfy himself as to the existence of all the conditions specified in said section which are necessary prerequisites to obtaining the relief provided by the statute.

MAY 12, 1927.

HON. JAMES C. McCORMICK, *Comptroller*.

DEAR SIR:— You have asked my opinion relative to your authority to act upon a certain claim presented to you under the provisions of G. L., c. 48, § 83, as amended by St. 1923, c. 362, § 54, and you have submitted to me certain documents bearing on the said claim which have been presented to you. The section of the instant statute falls under the heading "Firemen's Relief," and deals with an allowance to families of firemen killed or fatally injured while "in the performance of their duty at a fire or in going thereto or returning therefrom, or while engaged in company drills, when such drills are ordered by the chief, acting chief or

board of engineers of the fire department, or required by city ordinance or town by-laws." G. L., c. 48, § 81. Section 83 reads as follows:—

"If a person entitled under either of the two preceding sections to the benefits provided in section eighty-one is killed, or dies within sixty days from injuries received, while in the performance of duties entitling him to such benefits, and his death is certified to the comptroller by the town clerk and the attending physician or medical examiner, the comptroller shall certify for payment to the executor or administrator of such person, out of the appropriation annually made for the purpose, the sum of twenty-five hundred dollars for the use equally of his widow and minor children; or if there are minor children but no widow, to their use; or if there is no minor child, to the use of the widow; and if there is no widow or minor child, to the use of the next of kin if dependent on such deceased person for support. A child of full age dependent upon such person for support shall be regarded as a minor child."

You advise me that a claim for \$2,500 has been presented by the administratrix of the estate of a deceased fireman who would have been entitled to relief under section 81.

Your duty under section 83 consists in certifying for payment the sum of \$2,500 designated by the statute. Your authority, however, so to certify depends upon the existence of four sets of facts which the statute sets forth as prerequisites to the right of the administratrix to have such payment made to her. These facts are as follows:—

1. The administratrix' intestate must be a person entitled under section 81 or section 82 to receive benefits.

2. Such person must have deceased within sixty days from receiving injuries which are claimed to be the cause of his death.

3. He must have received such injuries while in the performance of duties entitling him to such benefits as are enumerated in section 81 or section 82.

4. The injuries which such person received while in the performance of his duties must have been the cause of his death.

In relation to each of these sets of facts you must be satisfied that they exist before you can rightly exercise your authority to certify payment. It is not the province of the Attorney General to pass upon questions of fact. The determination of these issues of fact rests with you. There are, however, certain considerations which I will indicate for your guidance in making your determination.

1. I assume from the statements in your letter that you are satisfied that the deceased was a person entitled to receive benefits under section 81, and consequently a person for whose death an allowance might be paid under section 83.

2. The statute provides that the fact of death shall be proved by the submission to you of a certificate made by the town clerk and the attending physician or medical examiner. You have submitted to me a sworn certificate of death within sixty days of the time when it is claimed by the administratrix that the injury occurred, made by the city clerk of Lynn, and a similar statement as to the fact and time of death made by a person whom I assume to be a physician. It is immaterial that this latter statement is unsworn. It would seem that this certificate and this statement furnish you with evidence of the death and the time when it took place, in accordance with the mode described for determining these facts by the statute.

3. The physician's statement, which has been filed with you and which you have submitted to me, does not appear of itself to set forth facts from which it can be ascertained with reasonable certainty whether a cold, which it is said the deceased contracted sixty days before his death while in the performance of his duties, was the cause of his death. The facts set forth in such statement fall short of furnishing such definite proof of the causal connection between the immediate injurious results said to have arisen from the performance of duty and the subsequent death as was furnished by the facts submitted in a somewhat similar case in which an opinion was rendered by a former Attorney General (IV Op. Atty. Gen. 427). In addition to the statements made by the physician, you have before you and have submitted to me an affidavit by the administratrix of the estate which contains certain statements relative to the history of the deceased's injury and illness. These statements, read in connection with those made by the physician, do not necessarily establish such connection between the injury and the death as would make it necessary to determine such fact in favor of the claimant's contention. The word "injury" as used in connection with the deceased's disability is sufficiently broad to include illness or a cold received while in the course of duty, as was determined in IV Op. Atty. Gen. 427.

The statute does not specify the precise mode or manner in which the causal connection between the injury and the death is to be proved. It may be proved in a variety of ways, but it must be so proved that you can make a determination that death was caused by an injury received while the deceased was in the performance of his duties.

4. There is no direct proof in the documents which you have submitted to me and which are before you that the deceased did not leave a widow or minor children. If such be the fact, a dependent next of kin, if any is living, would be the designated beneficiary under the statute. Among these documents is a statement signed by the administratrix tending to show that the deceased's mother was such a dependent relative.

If a finding upon these various questions of fact which I have outlined is to be made by you upon adequate proof, you are to be satisfied as to the existence of each requisite set of facts before certifying this claim for payment.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Department of Education — School Children — Towns — Transportation.

If a town has not made an appropriation for the free transportation of school children, a denial of a request for such transportation by the school committee, on the ground of lack of funds, is such a declination that the Department of Education may, upon a proper appeal therefrom, require the town to furnish such transportation.

MAY 16, 1927.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR: — You have asked my opinion upon two questions relative to the powers of your Department concerning the transportation of school children by a town in which the children's residences are more than two miles from the high school of the town, which they are entitled to attend, which I assume is maintained under authority of G. L., c. 71, §§ 4 and 5.

G. L., c. 71, § 68, is as follows:—

“Every town shall provide and maintain a sufficient number of school-houses, properly furnished and conveniently situated for the accommodation of all children therein entitled to attend the public schools. If the distance between a child’s residence and the school he is entitled to attend exceeds two miles, and the school committee declines to furnish transportation, the department, upon appeal of the parent or guardian of the child, may require the town to furnish the same for a part or for all of the distance. If said distance exceeds three miles, and the distance between the child’s residence and a school in an adjoining town giving substantially equivalent instruction is less than three miles, and the school committee declines to pay for tuition in such nearer school, and for transportation in case the distance thereto exceeds two miles, the department, upon like appeal, may require the town of residence to pay for tuition in, and if necessary provide for transportation for a part or for the whole of said distance to, such nearer school. The school committee, unless the town otherwise directs, shall have general charge and superintendence of the schoolhouses, shall keep them in good order, and shall, at the expense of the town, procure a suitable place for the schools, if there is no schoolhouse, and provide fuel and all other things necessary for the comfort of the pupils.”

You have advised me that in response to a petition by ten residents of a town, some of whom, I assume, are parents of children entitled to attend the high school maintained by the town, the school committee answered the petitioners as follows:—

“Inasmuch as its request for an appropriation for the purpose of transporting pupils to the high school had been refused at town meeting, the committee could not grant the request for transportation of pupils to high school because it had no funds which could be used for this purpose.”

I assume that this answer was an official communication from the school committee, as such.

You have also advised me that the inhabitants of the town, in town meeting, refused to make an appropriation for the transportation which was the subject of the school committee’s communication; and you have further advised me that four of the residents of the town have appealed from the declination of the school committee to your Department. I assume that at least one of these applicants is a parent or guardian of a school child entitled to attend the town high school.

Your questions are as follows:—

“1. Has the school committee declined to furnish transportation according to G. L., c. 71, § 68?

2. In case the Department decides to require the town to furnish transportation for a part or for all of the distance, to what official or board should its communication, making this requirement, be addressed?”

Upon the assumptions which I have made from the facts stated in your letter, I answer your first question in the affirmative.

The statute specifically provides that upon appeal to your Department by a parent or guardian of a child for whom the school committee has declined to furnish transportation your Department may require the town to furnish the same. Any communications from your Department

requiring the town to furnish transportation should be addressed to the Inhabitants of the Town of ———, and should be served on the board of selectmen. A penalty for failure to comply with your requirement in this respect is provided as against the town by G. L., c. 71, § 34.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

State Retirement Association — Income Tax Assessors — State Employees.

Income tax assessors are not exempt from compulsory membership in the Retirement Association, with all the consequences which flow therefrom.

MAY 25, 1927.

State Board of Retirement.

GENTLEMEN: — You have requested my opinion as to whether income tax assessors, appointed under G. L., c. 14, § 4, are exempt from the provisions of G. L., c. 32, §§ 1-5. It has been the practice of this office to be somewhat reluctant to give opinions in response to general inquiries, for the reason that in so doing, while the answers given may, in general, be correct, some feature or qualification may be overlooked which upon the particular facts of some particular situation might be determinative. I am undertaking to answer your question, however, in such manner as I think will cover most of the situations which are likely to arise under the law as it now exists.

In G. L., c. 32, § 1, the term "employees" was defined as —

"permanent and regular employees in the direct service of the commonwealth or in the service of the metropolitan district commission, whose sole or principal employment is in such service."

While this definition stood thus, it was ruled by one of my predecessors that the commissioners composing the Department of Public Works, appointed by the Governor, with the advice and consent of the Council, for short and definite terms of years, were not employees within that definition.

By St. 1922, c. 341, the definition of "employees" was altered to read as follows: —

"Persons permanently and regularly employed in the direct service of the commonwealth or in the service of the metropolitan district commission, whose sole or principal employment is in such service."

Thereafter, another of my predecessors ruled that the clerk of the Supreme Judicial Court, appointed by the justices of that court for a term of five years, was not an employee within this definition.

In the first of those opinions it was pointed out that the persons concerned were the holders of public office and not in public employment, in a technical or restricted sense, and that by reason of their limited tenure, at least, they were not within the spirit of the retirement act and not within the definition of "employees." In the second of those opinions emphasis was principally laid upon the fact that the clerk was the holder of a public office.

G. L., c. 32, § 2, reads, in part, as follows: —

"There shall be a retirement association for the employees of the commonwealth, . . . organized as follows:

(1) All persons who are now members of the state retirement associa-

tion established on June first, nineteen hundred and twelve, shall be members thereof.

(2) All persons who are members of the teachers' retirement association at the time of entering the service of the commonwealth, and persons who were or are in the employment of a department or institution formerly administered by a city, county or corporation when taken over by the commonwealth shall become members of the association, irrespective of age, but no such person shall remain in the service of the commonwealth after reaching the age of seventy. Except as provided in paragraph (3) all other persons who enter the service of the commonwealth hereafter shall, upon completing ninety days of service, become thereby members of the association, except that such persons over fifty-five shall not be allowed to become members of the association, and no such person shall remain in the service of the commonwealth after reaching the age of seventy.

(3) No officer elected by popular vote shall be a member of the association, nor any employee who is or will be entitled to a non-contributory pension from the commonwealth; but if such employee leaves a position for which such a pension is provided, before becoming entitled thereto, and takes a position to which this section applies, he shall thereupon become a member of the association."

St. 1921, c. 439, § 1, added at the end of the provision last quoted above the following:—

"An official under fifty-five years of age when appointed or reappointed by the governor for a fixed term of years, may, if his sole employment is in the service of the commonwealth, become a member of the association by making written application for membership within one year from the date of his original appointment or subsequent reappointment to the same office. An official who is a member of the association shall not receive credit for any period of service which he may have rendered as an official from June first, nineteen hundred and twelve, to the date of his appointment or reappointment which immediately preceded his membership in the association."

By section 2 of the same act it was further provided as follows:—

"Officials in the service of the commonwealth who are members of the state retirement association when this act takes effect, may, upon written application to the state board of retirement within six months after said date, withdraw their membership and their accounts in the association."

It seems fairly clear that the purpose of St. 1921, c. 439, was to settle the status, with respect to the retirement laws, of the group of superior public officers holding office for specified limited terms of years. That it did not refer to all public officers whatever, but rather to those of superior grade and limited tenure, is, it seems to me, shown by the use of the word "official" and by the fact that the permission of section 1 is extended only to officials "when appointed or reappointed by the governor for a fixed term of years." It recognizes that there might be officers of this grade, not members of the Retirement Association, who would like to become such, and also officials, already members of the association, at least *de facto*, who might desire to withdraw therefrom; and it afforded to the persons in each group a limited opportunity to carry out their desires in this regard. The words "officials in the service of the Commonwealth,"

in section 2, would thus have reference to officials of the type referred to in section 1, namely, those deriving their office by appointment of the Governor for a fixed term of years.

That some persons who were technically public officers, and not merely servants or agents, were intended to be brought into the retirement system is shown by the fact that in paragraph 3 of G. L., c. 32, § 2, quoted above, it was thought necessary to provide that "no officer elected by popular vote shall be a member of the association." As the law now stands, therefore, the provisions of the retirement act apply, so far as they can be spoken of in general terms, to public officers whose sole or principal work consists in the performance of their official duties, and whose tenure of office may be deemed "permanent," as that word is used in G. L., c. 32, § 1, as amended. They apply, in addition, to such public officers as hold superior posts by appointment of the Governor for a fixed term of years, and who, under the provisions of St. 1921, c. 439, shall have elected to remain or to become members. They do not apply, however, to officials who, being entitled to exercise the choice afforded by St. 1921, c. 439, have elected to be or remain outside the association; nor to other public officials whose tenure cannot fairly be described as permanent.

Income tax assessors are appointed by the Commissioner of Corporations and Taxation, with the advice and consent of the Governor and Council, for terms of indefinite duration; and they may be removed in the same way. G. L., c. 14, § 4, as amended by St. 1922, c. 330. They have such duties and powers, consistent with G. L., c. 62, as the Commissioner may prescribe. G. L., c. 14, § 8. It is contemplated that they shall have subordinates. G. L., c. 14, § 4, as amended. They are expected to have offices within their several districts, at which offices returns may be filed and taxes paid. See G. L., c. 62, §§ 24, 32 and 39. There is a strong implication that they receive taxes paid to them in an independent capacity, somewhat like that of the collector of local taxes, for which they may be personally accountable to the Commissioner. See G. L., c. 62, § 40. In my opinion, income tax assessors are public officers as distinguished from employees, in the technical sense. *Brown v. Russell*, 166 Mass. 14; *Attorney General v. Drohan*, 169 Mass. 534; *Attorney General v. Tillinghast*, 203 Mass. 539; *Rich v. Mayor of Malden*, 252 Mass. 213.

They do not, however, fall within the class of officials to whom the right of choice given by St. 1921, c. 439, is extended, for they are not appointed by the Governor but by the Commissioner. Neither is there anything temporary about their tenure of office. They are not appointed for definite terms of years but for terms of indefinite duration which may extend for a lifetime. They are not removable solely at the will of the Commissioner, but only "with the advice and consent of the governor and council." Their time in office may therefore be expected to extend beyond the term of any particular commissioner. They are thus about as nearly permanently and regularly employed as any employee of the Commonwealth who is not under civil service. I am assuming, without further inquiry, that their sole or principal employment is in the service of the Commonwealth.

It follows that these officers are not exempt from compulsory membership in the Retirement Association, with all of the consequences which

flow therefrom, and that if upon their appointment they fail to become members of the association by reason of being over the age of fifty-five, they are, nevertheless, subject to the provision that they may not remain in the service of the Commonwealth after reaching the age of seventy.

Yours very truly,

ARTHUR K. READING, *Attorney General*.

Department of Education — School Committees — Special Classes.

The Department of Education may provide by regulation for an appropriate examination of pupils by school committees with relation to the formation of special classes for those of retarded mental development, and attendance at such classes may be compelled as in other public school classes.

Regulations of the Department relative to the type of child to be required to attend such special classes are binding upon school committees.

MAY 27, 1927.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR: — You have asked my opinion upon three questions relative to the power of school committees of towns, under G. L., c. 71, § 46, as amended, in connection with special classes for the instruction of children of retarded mental development, but not with relation to any particular case or to any set of facts before you for determination. It has been the practice of this office to be somewhat reluctant to give opinions in response to general inquiries upon questions of law or of statutory interpretation, for the reason that in so doing, while the answers given may be correct in their application to the general inquiry, some feature or qualification may not be stated which upon the particular facts of an existing situation might be determinative. Inasmuch, however, as you advise me that my opinion is desired to aid your Department in the preparation of regulations applicable to the enforcement of the law, I answer your questions with a view to affording you an interpretation of such portions of the statute as you inquire about and to assist you in determining the scope of the regulations which you are authorized to establish.

G. L., c. 71, § 46, as amended by St. 1922, c. 231, to which you direct my attention, reads as follows: —

“The school committee of every town shall annually ascertain, under regulations prescribed by the department and the commissioner of mental diseases, the number of children three years or more retarded in mental development in attendance upon its public schools, or of school age and resident therein. At the beginning of each school year, the committee of every town where there are ten or more such children shall establish special classes for their instruction according to their mental attainments, under regulations prescribed by the department. No child under the control of the department of public welfare or of the child welfare division of the institutions department of the city of Boston who is three years or more retarded in mental development within the meaning of this section, shall, after complaint made by the school committee to the department of public welfare or said division, be placed in a town which is not required to maintain a special class as provided for in this section.”

You have addressed to me the following questions:—

“1. Can the school committee require that any child of school age shall be examined in order to ascertain the number of children who are mentally retarded?”

2. Can the school committee compel the attendance at the special classes established under this section of children who are found to be three or more years mentally retarded?

3. Must the school committee require all children who are found to be three or more years retarded to attend such classes or may they use their discretion?”

1. The character of the examination to which you refer in your first question is, I assume, of a different and somewhat more extended form than the medical examinations of school children provided for by G. L., c. 71, §§ 54–59, as amended, and seeks data not readily to be obtained by the requirements for the registration of minors of school age under G. L., c. 72, as amended. Nevertheless, the examination for which you desire to provide by regulations is, I assume, though different in form and in degree of thoroughness, not different in kind from the examination by a school doctor or from such examination as is necessary to obtain the data for the registration of minors of school age. Its purpose, as it appears from the provisions of the instant statute, is in a general way the same as that of the others heretofore referred to. Like them, it seeks to make available knowledge of the condition of the school child, with a view to providing for his well-being, physically and mentally, in the most appropriate way under the general provisions of our laws for education. A regulation of your Department providing for such an appropriate examination, under G. L., c. 71, § 46, could not necessarily be said to be unreasonable or arbitrary, and in ascertaining the number of mentally retarded children of school age a school committee would be bound to follow such a regulation of your Department, and the committee's requirement that a child should be so examined under your regulations would not, in my opinion, be unlawful.

2. As to your second question: The special classes for school children of retarded mental development, established under G. L., c. 71, § 46, as amended, appear from the provisions of that statute to be a regular part of the school system as much as other classes or grades to which children in the schools may be assigned, and I am of the opinion that attendance at these special classes may be compelled in the same manner as is provided for the attendance of school children in other classes of the public schools.

3. As to your third question: The regulations of your Department relative to the establishment, for school children of the retarded mental development specified in the instant statute, of “special classes for their instruction according to their mental attainments,” in so far as such regulations cover the field of requirements as to what children shall be required to attend such classes, are binding upon a school committee, and it cannot exercise discretion as to requiring attendance within such field. If there are individual cases which are not covered by your regulation, a school committee may exercise discretion, within the requirements of the statute, in determining the form of instruction suited to the attainments of the mentally retarded children under its care.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Banking — Commissioner of Banks — Trust Company — Assessments.

The Commissioner of Banks may require trust companies to levy assessments upon stockholders whenever and as often as he deems the capital stock to be impaired.

MAY 27, 1927.

HON. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR:— You have requested my opinion upon the following question:—

“If the Commissioner of Banks has levied, under the provisions of G. L., c. 172, § 25, as amended by St. 1922, c. 488, § 3, and the stockholders of a trust company have paid, an assessment or assessments aggregating 100% of the capital stock, has he (the Commissioner) authority to levy and enforce the collection of further assessments in the event that the capital subsequently becomes impaired?”

It is necessary to consider three sections of the General Laws in answering the above question.

G. L., c. 172, § 24, as amended by St. 1922, c. 488, § 2, is as follows:—

“The stockholders of such corporation shall be personally liable, equally and ratably and not one for another, for all contracts, debts and engagements of the corporation, to the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares, and no stockholder shall be allowed to set off any claim as a depositor in or creditor of either the commercial or savings departments against such liability. Sections forty-six to fifty-four, inclusive, of chapter one hundred and fifty-eight shall apply to and regulate the enforcement of such liability by creditors of the corporation.”

G. L., c. 167, § 24, as amended by St. 1922, c. 488, § 1, provides, among other things, that the Commissioner of Banks, after he has properly taken possession of the property and business of a trust company, may, if he deems it necessary to enforce the liability of stockholders described in G. L., c. 172, § 24, file a bill in equity against all persons who were stockholders therein at the time of such taking possession to enforce such individual liability.

G. L., c. 172, § 25, as amended by St. 1922, c. 488, § 3, is as follows:

“Any such corporation whose capital stock has, in the opinion of the commissioner, become impaired by losses or otherwise, shall, within three months after receiving notice from the commissioner, pay the deficiency in the capital stock by assessment upon the stockholders pro rata to the shares held by each. If such corporation shall fail to pay such deficiency in its capital stock for three months after receiving such notice, the commissioner may apply to the supreme judicial court for an injunction; and if a stockholder of such corporation neglects or refuses, after three months' notice, to pay the assessment as provided in this section, the board of directors shall cause an amount of his stock sufficient to make good his assessment to be sold by public auction, after thirty days' notice given by posting such notice in the office of the corporation and by publishing it in a newspaper of the city or town where the corporation is located or in a newspaper published nearest thereto; and the balance, if any, shall be returned to such delinquent stockholder. This section shall not take away the right of creditors to enforce the liability of stockholders

in such corporations, as provided in the preceding section, or the right of the commissioner to enforce such liability as provided in section twenty-four of chapter one hundred and sixty-seven, nor increase the general liability of such stockholders."

G. L., c. 172, § 24, creates liability on the part of such stockholders for all contracts, debts and engagements of the corporation, to the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. This section also, by reference to G. L., c. 158, prescribes the method of enforcing this liability by the creditors. This liability is solely a creature of statute and was unknown to the common law. *Cosmopolitan Trust Co. v. Cohen*, 244 Mass. 128. Both the liability on the part of the stockholders and the method of enforcing this liability are created and defined by this section, which confers rights to creditors only.

G. L., c. 167, § 24, as amended, provides that after the Commissioner has taken possession of such a bank, he may (among other powers), if he deems it necessary to enforce the liability of stockholders as described in the first sentence of G. L., c. 172, § 24, file a bill in equity against all persons who were stockholders therein at the time of taking possession. His determination that this liability should be enforced is final. *Cunningham v. Commissioner of Banks*, 249 Mass. 401, 426.

Clearly, this section does not create a new liability on the part of the stockholders of trust companies but simply provides that the Commissioner, after he has properly taken possession, may also enforce this liability. In so enforcing this liability he is governed by the procedure and regulations set forth in G. L., c. 172, § 24. *Cosmopolitan Trust Co. v. Cohen*, 244 Mass. 128. The Commissioner of Banks in enforcing this liability is not exercising a different right from that given to creditors under G. L., c. 172, § 24, but acts for them in a representative capacity. *Commissioner of Banks v. Cosmopolitan Trust Co.*, 253 Mass. 205, 226. The stockholders, in my opinion, could not be subjected to liability by the creditors acting under G. L., c. 172, § 24, and by the Commissioner of Banks acting under G. L., c. 167, § 24.

Coming now to G. L., c. 172, § 25, it is there provided that if, in the opinion of the Commissioner, the capital stock of a trust company has become impaired, the Commissioner may call upon the corporation to pay the deficiency by assessment upon the stockholders; and further, that if a stockholder neglects or refuses to pay such assessment, after notice, the board of directors shall sell, at public auction, a sufficient amount of his stock to make good his assessment. It is also provided that this section shall not take away either the right of the creditors to enforce the stockholders' liability under G. L., c. 172, § 24, or the right of the Commissioner to enforce the same under G. L., c. 167, § 24. It is further provided that the general liability of the stockholders shall not be increased by this section.

Apparently this section has not been passed upon by our courts, the only reference thereto being contained in the case of *Commissioner of Banks v. Prudential Trust Co.*, 242 Mass. 78, 86, where the court said:—

"The present suit is not grounded on G. L., c. 172, § 25. That relates to a different matter from that here involved."

That case was a proceeding by the Commissioner of Banks under G. L., c. 167, § 24, and the court, in the opinion, stated that the action was not

related to proceedings instituted under G. L., c. 172, § 25. The inference is strong that the court meant that the actions under G. L., c. 172, § 24, and G. L., c. 167, § 24, on the one hand, are separate and distinct from action under G. L., c. 172, § 25, and are cumulative rather than alternative measures. *Delano v. Butler*, 118 U. S. 634; *Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 91.

Section 25 expressly states that the rights of creditors under G. L., c. 172, § 24, and of the Commissioner under G. L., c. 167, § 24, shall not be taken away by that section. It also adds that the general liability of stockholders shall not be increased by this section.

The precise question asked by you is whether or not the Commissioner, after having caused to be collected an assessment of one hundred per cent from the stockholders, under section 25, could levy and enforce the collection of a further assessment in the event that the capital stock subsequently becomes impaired. I am of the opinion that he may take the steps outlined in section 25 as often as he deems it necessary to do so for the purpose of restoring the impaired capital stock. Does this increase the stockholders' general liability? This section does not create any personal liability upon the stockholders. A stockholder may refuse to pay the assessment, and the only remedy available is a sale of the stock of such stockholder by the board of directors for the purpose of raising the amount assessed to him. No personal action can be had against him by any one under this section, and it therefore seems to be clear that the section does not increase his "general liability," or, indeed, any liability. Further, the "general liability" which may not be increased seems to refer to such liability as is defined and imposed elsewhere than in this section, which, as we have said, creates no liability at all, or at the most a very special liability.

The section, obviously, is of a regulatory and protective character. Its purpose is not to benefit creditors or any other particular group or class, but rather to protect the general public from the manifest dangers of dealing with a bank which is not in a proper condition to carry on the important business of banking, which vitally affects the interests of those who directly or indirectly deal with it. The Commissioner, in the exercise of his discretion, is the sole judge of the necessity of proceeding under this section, and his duty to act is just as clear and as necessary to the public welfare upon the second or third occasion of impairment of capital as upon the first. It could not have been the legislative intent to limit the exercise of this power of the Commissioner to one occasion, when, obviously, at a subsequent time the identical need for its exercise might arise.

The words of section 25 seem also to indicate that no limitation is to be put upon the number of times that the Commissioner may exercise this power. That statute says:

"Any such corporation whose capital stock has, in the opinion of the commissioner, become impaired . . . shall, . . . pay the deficiency."

These words not only suggest no limitation as to the number of times the Commissioner may exercise this power but seem to imply that the Commissioner shall act whenever and as often as the capital stock has, in his opinion, become impaired.

I therefore answer your question in the affirmative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Taxation — Stockholders — Voting Trust — Taxable Gain.

A deposit of shares in a voting trust of limited powers does not of itself create a taxable gain under G. L., c. 62, § 5, as amended, nor is such a trust one of the bodies designated in G. L., c. 62, §§ 1 and 5.

JUNE 1, 1927.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You request my opinion as to whether a taxable gain under G. L., c. 62, § 5, par. (c), as amended, is realized by stockholders in an association, trust or corporation when such stockholders deposit their shares with the trustees under a voting trust of the type employed in the "Share Trust Agreement" of North Boston Lighting Properties dated March 15, 1927, and in the "Stock Trust Agreement" of the Fitchburg Gas and Electric Light Company dated January 2, 1926. You further ask whether, in my opinion, such a voting trust constitutes a "partnership, association or trust, the beneficial interest in which is represented by transferable shares," within the meaning of G. L., c. 62, §§ 1 and 5.

G. L., c. 62, § 5, provides, in part: —

"Income of the following classes received by any inhabitant of the commonwealth during the preceding calendar year shall be taxed as follows:

(c) The excess of the gains over the losses received by the taxpayer from purchases or sales of intangible personal property, whether or not said taxpayer is engaged in the business of dealing in such property, shall be taxed at the rate of three per cent per annum. Any trustee or other fiduciary may charge any taxes paid under this paragraph against principal in any accounting which he makes as such trustee. If, in any exchange of shares upon the reorganization of one or more corporations or of one or more partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, the new shares received in exchange for the shares surrendered represent the same interest in the same assets, no gain or loss shall be deemed to accrue from the transaction until a sale or further exchange of such new shares is made."

The trusts created by voting agreements such as those which you have submitted to me for examination are for a very limited purpose. Briefly stated, the machinery of the trusts consists of:

(1) The deposit of shares with trustees, giving the trustees the power to vote the shares deposited during the term of the trust, to transfer the shares for convenience into their own name, and to sell all, but not less than all, of the shares at not less than a stated price.

(2) The issuing by the trustees or depositaries to the depositor stockholders of certificates stating the number of shares deposited; in effect a negotiable receipt (subject to the terms of the agreement) for the shares.

(3) The payment to the stockholder, either directly or through the trustees (in the event that the shares are transferred to the trustees' names on the company books), of the dividends upon the precise shares of stock deposited during the term of the trust, or until all the shares are sold according to the agreement.

(4) If all the shares are not sold before the date named in the agreement, the retransfer of the deposited shares to their original owners.

(5) In the event of a stock dividend during the term of the trust, the

receipt by the depositor of the dividend stock, which must be deposited with his shares already subject to the agreement.

(6) The payment to the stockholder by the trustees or the depositaries of the amount received by them from the sale of the deposited stock, in the event of such a sale according to the terms of the voting agreement.

At the most, such an agreement creates a bare trust of specific property with named powers as to that property vesting in trustees for limited purposes. Strictly speaking, for a time the stockholder technically exchanges legal ownership of the shares for an equitable interest in the same shares. Practically speaking, he limits by contract the *jus disponendi* of his property for the common benefit of himself and the other stockholders joining in the agreement by giving to the trustees or depositaries power to act for him in certain particulars. See *Brightman v. Bates*, 175 Mass. 105. By the deposit he clearly gains no interest in any new property. He receives nothing but a receipt for precisely the same shares which he had before. It cannot be said that there is any such accession of wealth to him by the transaction as will constitute a realized gain. The reasoning in *Van Heusen v. Commissioner of Corporations and Taxation*, 257 Mass. 488, is applicable, and no taxable gain is recognizable until the deposited shares or the voting trust certificates representing the deposited shares are themselves sold or exchanged for money or other property having a fair market value, at which time a taxable gain, if gain there be, accrues to the depositor stockholder, measured by the tax cost basis of the stock to him.

In my opinion, a voting trust is not a "partnership, association or trust, the beneficial interest in which is represented by transferable shares," within the meaning of G. L., c. 62, §§ 1 and 5. The purposes of the deposit under the voting trust are extremely limited, and the transaction, in substance, is little more than an irrevocable agency for sale, under which, until the sale, the depositor retains nearly all of the incidents of ownership. The Legislature unquestionably intended to include within the category quoted above "Massachusetts trusts" of the usual business type, partnerships and unincorporated associations issuing shares reasonably comparable to shares of corporate stock. The situation under a voting trust for the limited purpose of sale of the specific stock deposited is so different from that under any of the types of association actually engaged in active business which are included within the statutory provision, that it seems highly unlikely that the Legislature intended to place both groups within the same classification.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Teachers' Retirement Association — Teacher of Music — Term of Service in Public Schools.

A period of service in the public schools by a teacher of music for two years and three months, even though such service during such period was given on only one day a week, should be counted as two years and three months in determining whether such teacher has served in the public schools for fifteen years.

JUNE 2, 1927.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR: — You have asked my opinion as to whether or not service of one day a week in the public schools of the Commonwealth by an instructor of music for a period of two years and three months should be counted as two years and three months of service in determining

whether or not this teacher "has served fifteen years or more in the public schools," so as to entitle him to receive a pension under G. L., c. 32, § 10 (5). This paragraph is as follows:

"Any member who served as a regular teacher in the public schools prior to July first, nineteen hundred and fourteen, and who has served fifteen years or more in the public schools, not less than five of which shall immediately precede retirement, on retiring as provided in paragraph (1) or (2) of this section, shall be entitled to receive a retirement allowance as follows:"

This man is admittedly a member of the Association; he has served as a regular teacher in the public schools prior to July 1, 1914; he will have served as a teacher in the public schools for more than five consecutive years immediately preceding July 1, 1927, the date upon which he must retire. The only remaining question is whether he will have served fifteen years or more in the public schools so that he may be eligible for the pension provided by G. L., c. 32, § 10 (5).

Of the necessary fifteen years of service he will have had to his credit on July first, next, thirteen years, four and one-half months of regular employment as a teacher, dating from February 15, 1914, to July 1, 1927. He also served as teacher of music in the town of Hamilton for a period of two years and three months beginning in September, 1898, during which time he served one day a week while school was in session. The school committee of Hamilton duly elected him to this position and he was paid a yearly compensation. The above constitutes the entire service of this man as a teacher in the public schools of the Commonwealth.

I am of the opinion that this service should be included, so that he will have served fifteen years, seven and one-half months on July 1, 1927, and thereby be entitled to the pension set forth in paragraph (5) of section 10. That the time spent in teaching music was not full time does not alter the situation. "Public school" is defined in G. L., c. 32, § 6, as "any day school conducted under the superintendence of a duly elected school committee." I assume that the schools of Hamilton conform to this definition. Nothing is said in paragraph (5) of section 10 as to full time or part time, and as long as the teacher is regularly employed it seems that the service should be counted.

This view is strengthened by the change made by St. 1925, c. 228, which amends the definition of "teacher" contained in G. L., c. 32, § 6, by adding (among other things) that a person to be a teacher within the meaning of the act must be employed on a full time basis. The inference is strong that until this act was passed a person could be a teacher without being employed on a full time basis. Further, this act of 1925 stated that it should not be construed to affect the rights of any person then enrolled as a member of the State Teachers' Retirement Association. Similarly, it seems that the words "who has served fifteen years or more in the public schools" do not import full time service. These words, as contained in paragraph (5) of section 10, have not been amended, and in so far as the question arises as to whether they import full time service it is fair to assume that they would be construed to have the same meaning as that which was given to the word "teacher" prior to the passage of St. 1925, c. 228.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Taxation — Banks — Rate of Taxation.

The rate at which bank taxes are to be levied is to be determined in a manner consistent with U. S. Rev. Sts., § 5219.

JUNE 13, 1927.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:— You have requested my opinion on certain questions with respect to fixing a rate to be applied in levying bank taxes under G. L., c. 63, § 2, as amended by St. 1925, c. 343, § 1, reading as follows:—

“Every bank shall pay annually a tax measured by its net income, as defined in section one, at the rate assessed upon other financial corporations; provided, that such rate shall not be higher than the highest of the rates assessed under this chapter upon mercantile, manufacturing and business corporations doing business in the commonwealth. The commissioner shall determine the rate on or before July first of each year after giving a hearing thereon and shall seasonably notify the banks of his determination. Appeal by a bank from the determination of the commissioner may be taken to the board of appeal from decisions of the commissioner of corporations and taxation, in sections five and six called the board of appeal, within ten days after the giving of such notice.”

Under this section the rate at which bank taxes are to be levied is the rate assessed upon other financial corporations. There is no classification of corporations as “financial corporations” in the General Laws or amendments thereto, but the wording of section 2, above quoted, is that used in U. S. Rev. Stat., § 5219, 1 (c). It is a matter of historical fact that section 2 of G. L., c. 63, as amended, was enacted in the light of U. S. Rev. Stat., § 5219, although enacted prior to the amendment to section 5219 contained in the subsection of that statute numbered 1 (c). It is necessary, therefore, for us to adopt a construction of section 2 of G. L., c. 63, which will not conflict with Rev. Stat., § 5219.

The definition of “banks,” contained in G. L., c. 63, § 1, as amended, includes banks “existing by authority of the United States” as well as banks organized under the laws of this Commonwealth. It is fundamental that national banks may be taxed under State authority only in so far as Congress consents to such taxation, and only in conformity with the restrictions attached to the consent of Congress. *First National Bank of Hartford v. Hartford*, 273 U. S. 548; *First National Bank v. Anderson*, 269 U. S. 341, 347. The words “at the rate assessed upon other financial corporations,” therefore, must be taken to have the same meaning as those words when used in Rev. Stat., § 5219.

Subsection 1 (c) of Rev. Stat., § 5219, has not yet been given judicial construction. From the debates in Congress at the time this section was amended by the addition of subsection 1 (c) (Act of March 25, 1926, 44 Stat. at L. 223), it is clear that what was desired by the amendment was to provide an additional way by which the States might tax national banks without discriminating against them [Congressional Record, vol. 67, pt. VI, pp. 5760, 5822, 6082–6089, 69th Congress, 1st ses. (1926)], and it is apparent from these debates that no greater discrimination against national banks in the matter of taxation was to be permitted under subsection 1 (c) than under any other methods provided by Rev. Stat., § 5219, by which the State might tax national banks.

In construing the provisions of section 5219 enacted prior to the amend-

ment of March 25, 1926, it has always been held that national banks may not be taxed by any method in a way which would discriminate against them and in favor of moneyed capital in the hands of institutions or persons, other than national banks, employed in substantial competition with any of the direct or incidental activities of national banks. *First National Bank of Hartford v. Hartford, supra*; *Minnesota v. First National Bank of St. Paul*, 273 U. S. 561; *First National Bank v. Anderson, supra*; *Merchants National Bank v. Richmond*, 256 U. S. 635.

The excise tax permitted by subsection 1 (c) of Rev. Stat., § 5219, specifically protects national banks only from discrimination by State taxation in favor of "other financial corporations." It does not, as, for instance, does subsection 1 (b) of section 5219, protect national banks from discrimination by taxation in favor of moneyed capital in the hands of individual citizens. What is meant by "other financial corporations" in subsection (c) is therefore unquestionably corporations employing moneyed capital in substantial competition with any phase of the business of national banks, including not only State banks and private banks but also corporations engaged substantially in conducting the loan and investment features of banking in making investments by way of loan, discount, or otherwise in notes, bonds, or other securities with a view to sale or repayment and investment. See *First National Bank v. Anderson, supra*, 348.

It was decided in *Mercantile Bank v. New York*, 121 U. S. 138, 161, that savings banks were not engaged in substantial competition with national banks. The decision is broad enough to include insurance companies, co-operative banks and credit unions in the same classification. Although it is an open question whether this decision would now be followed, because of the growth of the activities of national banks, it must be deemed to be law until expressly overruled, and it is the duty of the Commissioner to fix the rate, under G. L., c. 63, § 2, as amended, according to the method hereinafter indicated, excluding from consideration as "other financial corporations" co-operative banks, savings banks and insurance companies.

Rev. Stat., § 5219, requires that the burden upon national banks of any tax assessed must not be greater than the burden upon "other financial corporations" of a similar tax imposed upon them nor greater than the burden of the highest similar tax imposed upon mercantile, manufacturing and business corporations doing business within the Commonwealth. First should be determined the total net income (in the case of corporations doing business outside the Commonwealth that allocable to Massachusetts) of corporations coming within the definition of "other financial corporations." Then should be found the amount of tax, not including interest or penalties, actually paid under chapter 63 by such "other financial corporations," exclusive of any compensation or adjustment for credits or deductions. In my opinion, the rate of tax under section 2 of G. L., c. 63, is the percentage which the net tax thus determined is of the total net income, as above determined.

The burden of the tax on the corporation is the amount which the corporation actually has to pay out on account of the tax assessed under the chapter, and the rate is the relation of that amount to the basis or measure of the tax, the total net income. A penalty for late payment, or interest because of late payment, is not part of the tax burden but is imposed for some other reason, and should not be taken into account in determining what the rate of tax burden is, despite the provisions of

G. L., c. 63, § 49. For the same reason, deductions made in determining the basis of the tax should not be added to the amount of the net tax in determining the rate, for they decrease the burden of the tax (in computing which they are allowed), and it is by that burden that the rate, within the meaning of Rev. Stat., § 5219, is to be measured.

It is also provided both by Rev. Stat., § 5219, and by G. L., c. 63, § 2, as amended, that the rate assessed on banks, namely, that assessed on other financial corporations, shall not be higher than the highest of the rates assessed under chapter 63 upon mercantile, manufacturing and business corporations. The only clear classification drawn by the Legislature among mercantile, manufacturing and business corporations as to the rate of tax under chapter 63 is between domestic and foreign corporations. I do not agree with the proposition that, because of the deduction from net income under section 38A of machinery used in manufacturing, there is a separate classification of manufacturing corporations, or that there is a separate classification because of the provisions of section 32A. These provisions of the statute merely provide for a compensating variation from the general situation under the chapter, which is too slight to indicate any legislative intent to classify certain types of corporations separately. Therefore, grouping together all domestic corporations coming within the group of "business corporations" as classified by chapter 63, and grouping together all foreign business corporations, the rate for each group should be determined as in the case of "other financial corporations," according to the method outlined above, the total net tax actually paid being taken without any addition to its total amount because of deductions in the basis of the tax, of dividend credits against the tax, or of penalties or interest. If the higher of these two rates thus determined is lower than the rate determined for "other financial corporations" by the method indicated above, that higher business corporation rate should be taken as the rate for the assessment of the bank tax under section 2 of G. L., c. 63; otherwise the rate already determined for "other financial corporations" will prevail.

In your request for an opinion you ask what figures for what years shall be taken in fixing the rates according to the method outlined above. You have informed me that it is impractical to take the tax figures for the year in which the tax is assessed, because of their incompleteness. In my opinion, the figures taken in determining the rate should be the most recent available statistics which are substantially complete, making adjustment wherever possible in these figures for any changes which may have become apparent from more recent data not entirely complete. In most cases, however, I believe that any such adjustment will be impractical, and the general rule to follow would be to take the figures for the most recent year in which the returns are complete.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Constitutional Law — Governor — Pardons — Insane Person.

The power to pardon does not in itself contain authority to release one committed as insane.

JUNE 21, 1927.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You have asked my opinion as to whether Your Excellency may grant a pardon to a man confined in an insane institution. With

your request for an opinion you transmit the petition, reports and letters in the specific case of a person who was convicted of murder in the second degree and sentenced to the State Prison in 1911, but was transferred to the Bridgewater State Hospital in 1915 as an insane person, and is still confined there as such.

I assume that your request intended to include the specific case, and my opinion is rendered accordingly.

Mass. Const., pt. 2nd, c. II, § I, art. VIII, provides: —

“The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council: but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.”

This is the only warrant in the Constitution enabling the Executive to mitigate or remit sentences imposed by the courts as penalty for crime.

The words of the Constitution contain a grant of authority which is clear in its terms, and which has long been recognized by the courts as an executive prerogative. *Kennedy's Case*, 135 Mass. 48; *Opinion of the Justices*, 210 Mass. 609; *Juggins v. Executive Council*, 257 Mass. 386.

It follows, therefore, that, unless in the specific case the original status of the petitioner has been changed by his commitment to the Bridgewater State Hospital and his continued confinement there, Your Excellency may pardon him.

This is not a case in which a defendant has been committed to an insane hospital because of an acquittal by the jury by reason of insanity, after trial on an indictment for murder or manslaughter. In such instances, whether a defendant be sane or insane, the test of the extent of the power of the Executive, with the advice and consent of the Council, hinges upon the question whether, after investigation by the Department of Mental Diseases, his discharge will cause danger to others. G. L., c. 123, § 101; *Gleason v. Inhabitants of West Boylston*, 136 Mass. 489.

The present case presents the duofold aspect of a person under sentence of life imprisonment and, in addition, legally insane.

G. L., c. 123, § 102, provides: —

“The department shall designate two persons, experts in insanity, to examine prisoners in the state prison, the Massachusetts reformatory, the prison camp and hospital or the reformatory for women, alleged to be insane. If any such prisoner appears to be insane, the warden or superintendent shall notify one or both of said experts, who shall, with the physician of such penal institution, examine the prisoner and report the result of their investigation to the superior court of the county where such penal institution is situated or to the appropriate district court mentioned in the following section.”

G. L., c. 123, § 103, provides: —

“The superior court upon a report under the preceding section, if it considers the prisoner to be insane and his removal expedient, shall issue a warrant, directed to the warden or superintendent, authorizing him to cause the prisoner, if a male, to be removed to the Bridgewater state hospital, and, if a female, to be removed to one of the state hospitals for

the insane, there to be kept until, in the judgment of the superintendent and the trustees of the institution to which the prisoner has been committed, *he should be returned to prison.*"

Were the sentence for a term of years, the period of confinement in the State hospital would be credited to the defendant, and if he recovered before his sentence expired he would be returned to the prison from which he was removed, in order that he might serve out the remainder of his sentence. *Le Donne, petitioner*, 173 Mass. 550.

In order to justify a defendant's return to prison and the credit to him of the period of time during which he was receiving treatment in a hospital, it is reasonable to conclude that the original sentence has always been in effect.

Consequently, the Governor, with the advice and consent of the Council, could pardon the defendant. Such a pardon would remove from him the onus of the sentence of life imprisonment imposed after his conviction for murder in the second degree, but would not serve to release him from the Bridgewater State Hospital.

A compliance with G. L., c. 123, §§ 88-94, would accomplish this latter result. These sections in no way relate to the power of the Executive.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Treasurer and Receiver General — Deposit — Insurance — Trust Fund.

A deposit made, under provisions of law, with the Treasurer and Receiver General as an emergency fund by an assessment insurance company constitutes a trust for the benefit of the policyholders of such company, as existing at the time of the deposit, and may not be applied, upon the transformation of the company into an ordinary life insurance company, for the benefit of new policyholders of the company as reorganized.

JUNE 21, 1927.

HON. WILLIAM S. YOUNGMAN, *Treasurer and Receiver General*.

DEAR SIR: — You have asked my opinion as to whether certain securities held by your Department in trust may be withdrawn.

I am advised that the securities in question, amounting to \$50,000, or others for which they have been exchanged from time to time, were set apart as an emergency fund by the Boston Mutual Life Association, an assessment insurance company, under the provisions of St. 1890, c. 421, § 14; that under the provisions of St. 1899, c. 229, permitting life associations to transact business as life companies, the Mutual Life Association became the Boston Mutual Life Insurance Company; and that some of the policyholders of the old association did not exchange their old policies for new ones of the life company, and have been for the most part carried by the life company on the plan of renewable term insurance, under St. 1899, c. 299, § 4, with increasing yearly cost to the insured.

The fund as originally established, under the name of an emergency fund, constituted a trust for the payment of death and disability claims for the benefit of the policyholders of the assessment company, some of whom, I am informed, are still living, and are carried as a separate group by the new life company into which the assessment company was changed. The fund is still charged with the purposes of the trust so established, one of which is the application of a designated excess of the minimum amount

required to be held in the trust fund to the reduction of assessments upon the old policyholders. Sums to be so applied to the foregoing or other purposes of the trust, all of which are similar in character, may be drawn by a requisition upon the Treasurer and Receiver General signed by two-thirds of the directors and indorsed by the Commissioner of Insurance, setting forth that such sums are to be used for the purposes of the trust.

St. 1899, c. 229, provided for the transaction of the business of the old assessment life company to be carried on as a general life insurance business under the statute applicable to life insurance companies. The act specifically authorized the company, under the new scheme, "to carry out in good faith its contracts heretofore made with its members," and repealed the provisions of St. 1890, c. 421.

The fund created by the old Boston Mutual Life Association for the benefit of its members paying upon the assessment system is still charged with the trust established in connection therewith under the terms of St. 1890, c. 421, § 14, and the directors of the new company may deal with it only in the manner and for the purposes which the directors of the old association might have dealt with it. Its surplus above the necessary minimum, which is required to be kept while any of the old members are still carried on the renewable term basis, may be drawn from the treasury of the Commonwealth and applied to the purposes mentioned in St. 1890, c. 421, § 14, but to no others. If, as was stated in a communication to you by the insurance company, which you have submitted to me, "the policies of the association now in force are continued on the plan of renewable term insurance with increasing yearly cost to the insured," some portion of the surplus might well be drawn and applied to lessening such yearly cost.

The specific fund held by you, as to which you inquire, may not at the present time be withdrawn except in the manner and form and to the extent described in St. 1890, c. 421, § 14, which, though now repealed, established the trust, its terms and uses.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Referendum — Appointment of Assistant Registers of Probate for Middlesex County.

A law is either excluded from, or is subject to, the referendum in its entirety.

A law which in any way deals with the powers of courts is not subject to the referendum.

A law is not excluded from the operation of the referendum for the reason that its operation is restricted to a particular town, city or other political subdivision, unless the operation of the entire act is so restricted.

A law conferring upon the judges of probate for Middlesex County the power to appoint a third and a fourth assistant register for said county relates to the powers of courts, and is not subject to the referendum.

JUNE 30, 1927.

Hon. JAMES C. McCORMICK, *Comptroller*.

DEAR SIR: — You have asked my opinion as to whether St. 1927, c. 198, may be the subject of a referendum petition, in order that you may deter-

mine the time at which the salary of the fourth assistant register of probate for the County of Middlesex, appointed under the statute, commences.

St. 1927, c. 198, reads as follows:—

**“AN ACT TO PROVIDE AN ADDITIONAL ASSISTANT REGISTER OF PROBATE
FOR THE COUNTY OF MIDDLESEX.**

SECTION 1. Section twenty-five of chapter two hundred and seventeen of the General Laws, as amended by section three of chapter one hundred and sixty-four of the acts of nineteen hundred and twenty-three, is hereby further amended by inserting after the word ‘third’ in the second line the words:— and a fourth,— and by striking out, in the fourth line, the word ‘He’ and inserting in place thereof the word:— They,— so as to read as follows:— *Section 25.* The judges of probate for Middlesex county may appoint a third and a fourth assistant register for said county, who shall hold office for three years unless sooner removed by the judges. They shall be subject to the laws relative to assistant registers.

SECTION 2. Section thirty-five of said chapter two hundred and seventeen, as amended by section two of chapter three hundred and eighty of the acts of nineteen hundred and twenty-six, is hereby further amended by striking out the last paragraph and inserting in place thereof the following new paragraph:—Second, third and fourth assistant registers, sixty, fifty-five and fifty per cent, respectively, of the salaries paid their respective registers,— so as to read as follows:— *Section 35.* The salaries of registers and all assistant registers shall be paid by the commonwealth, and, except in Suffolk county, shall be as follows:

Registers, seventy-five per cent of the salaries paid the judges of their respective counties.

Assistant registers, sixty-six and two thirds per cent of the salaries paid their respective registers, except that in a county in which there is more than one judge of probate the salaries of assistant registers shall be seventy-five per cent of the salary of the register.

Second, third and fourth assistant registers, sixty, fifty-five and fifty per cent, respectively, of the salaries paid their respective registers.”

Section 2 of this act makes no change in the law existing at the passage of the act except in so far as it provides for the salaries of fourth assistant registers.

The act was approved April 1, 1927. After the expiration of thirty days from that date the judges of probate for Middlesex County appointed a fourth assistant register of probate for that county, who has since performed the duties of his office.

The question presented is whether or not the fourth assistant register so appointed is legally competent to act as an assistant register prior to the expiration of the ninety-day period which must elapse before a law subject to the referendum becomes effective. If the act is subject to the referendum it does not become effective until after the expiration of ninety days from its passage. If, on the other hand, it is not subject to the referendum it becomes effective after the expiration of thirty days from its passage. If subject to the referendum it does not become effective prior to July 1, 1927, and therefore the appointment may not legally be made until that date. Under the provisions of G. L., c. 215, § 61, which state that “no court shall be held by adjournment or otherwise unless the register, assistant register or a temporary register is present,” it would seem that any session of the Probate Court held for Middlesex County

prior to July 1, 1927, at which no register or assistant register except the fourth assistant register appointed by the judges under this act was present would not have been a proper session of the court, and that its decrees and orders rendered during such session would be void and of no effect if St. 1927, c. 198, is subject to the referendum. It is necessary, therefore, to determine whether the act is subject to, or excluded from, the referendum.

Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2, is as follows:—

“SECTION 2. *Excluded Matters.*—No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.”

The only pertinent clauses of the amendment which might exclude the act from the referendum are, — “no law that relates . . . to the powers, creation or abolition of courts” and “no law . . . the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth.”

It may be well to consider first the question as to whether a part of a law may be subject to the referendum and another part not so subject. The word “law” as used in the amendment connotes an act of the Legislature, approved by the Governor, regarded as an entity. The word has no application to a single part or section of such an act taken by itself. That the word is to be so construed is made clear by an examination of the proceedings of the Constitutional Convention, by which the initiative and referendum provisions were framed. It follows that a particular section of an act may not of itself be the subject of a referendum.

As to the first section of St. 1927, c. 198, it seems that such portion thereof as authorizes the judges to appoint a fourth assistant register clearly deals with “the powers . . . of courts,” and such portion, if it stood alone, would be excluded from the referendum. That part of section 1 which prescribes the tenure and powers of the fourth assistant register does not, in my opinion, deal with powers of courts and therefore, if it stood alone, would not be excluded on that ground. I do not think that matters relating to the tenure, powers and compensation of registers of probate may properly be included in the phrase “powers . . . of courts,” within the meaning of these words as used in the amendment.

The whole of section 1, if it stood alone, would be excluded from the operation of the referendum for the reason that its operation is restricted to a particular political division of the Commonwealth, namely, Middlesex County.

Section 2, in my opinion, if it stood alone, would be subject to the referendum. It re-enacts the earlier provisions of law as to salaries of registers, assistant registers, and second and third assistant registers and adds only the salary of fourth assistant registers. Its effect is not confined to the fourth assistant register of Middlesex County but is of general application to all fourth assistant registers in the entire Commonwealth with the exception of Suffolk County, for which county there is special legisla-

tion on this matter. It is true that there are at present no other fourth assistant registers in the Commonwealth, except in Suffolk, and that therefore the act affects no one at this time but the fourth assistant register provided for therein. On the other hand, the section fixing his salary is general in its terms, and would apply to such other fourth assistant registers as may in the future be appointed in any county in the Commonwealth, except Suffolk. It is impossible, therefore, to construe section 2 as being "restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth."

We have, therefore, section 1, a part of which, if standing alone, would be excluded from the referendum on one ground and all of which, if standing alone, would be excluded on another ground. We have also section 2, which, if standing alone, clearly would be subject to the referendum. In view of the fact that a law in its entirety is either excluded from, or subject to, the referendum, it becomes necessary to determine whether the excluded portion will exclude the entire act from the referendum or whether the included portion will render the whole act subject to the referendum.

No authoritative decision on this question has been called to my attention, and the amendment must be interpreted on broad and general principles. It states that no law that "relates to powers . . . of courts" shall be the subject of a referendum petition. It is not expressly stated whether the law must "relate" entirely to powers of courts or merely in part. In my opinion, if the law deals with powers of courts then it is such a law as is excluded from the referendum. One purpose of the insertion of "SECTION 2. *Excluded Matters*" in the amendment was to preserve laws with reference to the powers of courts immune from the referendum, and the act in question is clearly concerned with the power of the court to appoint a fourth assistant register. The title of the act, as stated above, tends to indicate that this was the intent of the Legislature.

It cannot well be said that the second possible ground of exemption would of itself exclude the act from the referendum. The amendment states that "no law . . . the operation of which is restricted to a particular town, city or other political division . . . shall be the subject of a referendum petition." The words "the operation of which is restricted to" seem to imply that the entire scope of the law must be so restricted. "Restricted" differs from the word "relates" in this respect, in that the word "relates" does not necessarily compel an inference that every part of the act must be concerned with the powers of courts, whereas the words "the operation of which is restricted to" imply that the entire act must be so limited.

My opinion, therefore, is that the act is not subject to the referendum, for the reason that it relates to an excluded matter, namely, the powers of courts.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Motor Vehicles — Registration — Partnership.

Upon dissolution of a partnership by the death of one of the partners and the purchase of all outstanding interests by the surviving partner, the latter may not operate a motor vehicle which was the property of the partnership unless he re-registers it in his own name.

JULY 13, 1927.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR: — You ask my opinion as to whether one Antonio O. Pajer may continue to operate certain motor busses without re-registering them.

I understand the facts to be that for some indefinite period prior to 1927 Pajer and one Harvey H. Collins were co-partners doing business under the firm name and style of Springfield-New London Coach Company, with places of business in New London, Connecticut, and Springfield, Massachusetts. January 1, 1927, these two men registered three motor busses with the Registrar of Motor Vehicles under the name "Springfield-New London Coach Company by Antonio O. Pajer." Since that date Collins has died and Pajer has bought Collins' interest in the firm from Collins' estate and is continuing the business under the firm name as sole owner.

At the time of the original registration of the vehicles by the partnership it was not improper for the application for registration to be made under the partnership name, signed by one only of the partners, the fact that the owners were a co-partnership being made plain in accordance with the customary form of application used by the Registry of Motor Vehicles. See Attorney General's Report, 1926, p. 123. The partnership no longer exists. Death of a partner dissolves the existence of a co-partnership except under unusual terms in the partnership agreement, which I assume did not exist in the instant case and which would be rendered immaterial, as you advise me that the surviving partner has purchased all rights in the partnership which may have existed in the deceased's representatives. *Marlett v. Jackman*, 3 Allen, 287. The fact that the present owner was the member of the former partnership who signed the application for registration by such co-partnership gives no information to the public that he is now the sole owner of the vehicles. Indeed, the application and registration as they now stand furnish an entirely erroneous statement as to the present ownership. One purpose of the statute, G. L., c. 90, was to give persons injured by a motor vehicle redress by enabling them to ascertain easily the name of the owner of such a vehicle. *Fairbanks v. Kemp*, 226 Mass. 75; *Bacon v. Boston Elevated Ry. Co.*, 256 Mass. 30.

G. L., c. 90, § 2, as amended, in its fourth paragraph provides, in part: —

"Upon the transfer of ownership of any motor vehicle or trailer its registration shall expire, and the person in whose name such motor vehicle or trailer is registered shall forthwith return the certificate of registration to the registrar with a written notice containing the date of the transfer of ownership and the name, place of residence and address of the new owner."

The proviso added to the fourth paragraph of section 2 by St. 1924, c. 427, continuing the registration for a period after the death of an owner, even if it were applicable with relation to the death of a member of a co-partnership, is immaterial in the instant case, for the surviving partner, by purchase of all outstanding interests of the deceased partner, is now the sole owner, and there has been such transfer of ownership of the vehicles as has caused the registration to expire, and the present owner, Mr. Pajer, may not operate until he has received a new registration.

Very truly yours,

ARTHUR K. READING, *Attorney General.*

Parent and Child — Adoption — Duty to support Natural Parent.

Adoption of a minor abrogates the latter's duty to pay for the support of its natural father under G. L., c. 273, § 20.

JULY 14, 1927.

DR. GEORGE M. KLINE, *Commissioner of Mental Diseases.*

DEAR SIR:— You request my opinion as to whether a daughter is legally liable for the support of her father, duly committed to a State institution and confined there as an insane person, such daughter having been legally adopted by a maternal uncle when she was a young child. In my opinion, a daughter thus adopted as a child is in no way responsible for the support of her actual parent.

G. L., c. 210, § 6, provides:—

"If the court is satisfied of the identity and relations of the persons, and that the petitioner is of sufficient ability to bring up the child and provide suitable support and education for it, and that the child should be adopted, it shall make a decree, by which, except as regards succession to property, all rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between the child and the petitioner and his kindred, and such rights, duties and legal consequences shall, except as regards marriage, incest or cohabitation, terminate between the child so adopted and his natural parents and kindred or any previous adopting parent; but such decree shall not place the adopting parent or adopted child in any relation to any person, except each other, different from that before existing as regards marriage, or as regards rape, incest or other sexual crime committed by either or both. The court may also decree such change of name as the petitioner may request. If the person so adopted is of full age, he shall not be freed by such decree from the obligations imposed by section six of chapter one hundred and seventeen and section twenty of chapter two hundred and seventy-three."

This section has always been construed as putting an adopted child, for all legal purposes, with certain specified exceptions mentioned in the section, in the place of an actual child with respect to the adoptive parent, and as terminating between the child so adopted and his natural parents and kindred all legal consequences, except those specially mentioned. See *Boutlier v. Malden*, 226 Mass. 479, 484, and cases therein cited.

The only exception under section 6 which could in any way be construed to impose upon a child thus adopted the obligation to support its natural parent is contained in the last sentence of section 6. This exception, however, applies only "if the person so adopted is of full age," and only in that event is the adopted child not freed by the decree of court allowing the adoption from the obligations of G. L., c. 273, § 20. In the case you state the child adopted was not of full age at the time of the adoption, and therefore, the case not coming within the strict terms of the exception, the child is in no way liable for the support of her natural parent.

It is, of course, clear that the liability imposed by G. L., c. 123, § 96, upon certain relatives of inmates of State institutions, including children of such inmates, is not one of the consequences of the relation of child and parent within any of the exceptions contained in G. L., c. 210, § 6, and hence that liability is abrogated by the decree of adoption.

Very truly yours,

ARTHUR K. READING, *Attorney General.*

State Examiners of Plumbers — Revocation of Licenses.

The State Examiners of Plumbers may not revoke or suspend plumbing licenses except as provided in G. L., c. 142, §§ 6 and 7.

G. L., c. 142, § 4, which authorizes the State Examiners of Plumbers to make such rules and regulations as they deem necessary for the proper performance of their duties, does not confer upon them the power to revoke or suspend such licenses.

JULY 18, 1927.

Mr. WILLIAM F. CRAIG, *Director of Registration.*

DEAR SIR:— You have asked my opinion as to whether or not the State Examiners of Plumbers may properly adopt the following rules:—

“1. Any master plumber who the Board finds has loaned, transferred or assigned his license to any other party with the intent that that party to whom such license was loaned could function as a master plumber or work as a journeyman plumber under that license, may have said license suspended for a period of thirty days for the first offense, for a period of three months for a second offense, and in the event of a third offense said license may be revoked permanently.

2. In case the holder of a license or certificate violates any statute, ordinance, by-law, rule or regulation, relative to plumbing, on the request of the inspector of buildings or board of health of the town where such violation is committed, the Board of Examiners of Plumbers may revoke the license of the plumber, in accordance with G. L., c. 142, § 7.”

I am of the opinion that the Examiners have not the power to adopt the first of the above rules. The power to suspend or revoke licenses of this character must be expressly or impliedly given to the particular board by statute. *Lowell v. Archambault*, 189 Mass. 70. Except for sections 6 and 7 there is nothing in the plumbing statute, G. L., c. 142, which can be construed as giving this power to the Examiners, unless it be found in section 4, which provides as follows:—

“The examiners may make such rules as they deem necessary for the proper performance of their duties, which shall take effect when approved by the department of public health.”

The balance of this section deals with the duties of the Examiners with reference to the giving of examinations and the issuing of licenses.

I am of the opinion that the power to make rules and regulations given by this section does not include the power to make rules and regulations concerning the revocation or suspension of licenses after they are issued. This view is strengthened by the fact that section 6 of said chapter 142 provides expressly that the Examiners, after notice and hearing, may revoke the license of a licensee violating any regulation relative to plumbing who has previously been convicted of a like offense. This section restricts the right to revoke to violation of “regulations relative to plumbing,” which words, in my opinion, connote regulations which have to do with the actual physical work of plumbing and have no relation to the general conduct of plumbers. It is to be noted that the Board may not revoke a license under this section unless it also appears that the licensee has been previously convicted of a like offense.

Section 7 of said chapter 142 provides as follows:—

“If in the opinion of such inspector of buildings, if any, otherwise of the board of health, of a town, the holder of a license or certificate violates

any statute, ordinance, by-law, rule or regulation relative to plumbing, the said inspector or board of health of the town where such violation is committed may request the examiners to forbid such holder, for not more than thirty days, to engage in business in such town as a master plumber or to work as a journeyman. After notice and hearing both parties, the examiners may so forbid such holder and shall give notice of their decision to each of the parties interested."

It may be seen, therefore, that the Legislature has expressly provided for revocation under section 6 in certain cases and for a limited suspension under section 7. The right to revoke or suspend under these sections is closely limited and confined to certain enumerated circumstances. It is also to be noted that in many instances the Legislature has specifically given a general power to revoke to boards and departments similar in character to the State Examiners of Plumbers. A notable example of this may be found in G. L., c. 141, § 4, which section gives to the State Examiners of Electricians the right to revoke certificates for any sufficient cause. The absence of such a general power of revocation in chapter 142 and the fact that the chapter specifically provides in sections 6 and 7 for revocation or temporary suspension in certain limited cases, indicate that it was not the intent of the Legislature to confer the right to adopt such a rule as rule number 1 above. I am therefore of the opinion that the State Examiners of Plumbers under existing law have no power to issue rule number 1.

What has been said concerning the first rule covers the second rule submitted in your request. The Examiners must limit their action under section 7 to the words of the section, and may not adopt a rule except in so far as conforms strictly to said section.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Reformatory for Women — Sentence.

A female convicted of a crime punishable by imprisonment in the State Prison may be held in the Reformatory for Women for a period of five years, irrespective of the existence of a lesser alternative sentence.

JULY 18, 1927.

HON. FRANK A. BROOKS, *Chairman, Board of Parole*.

DEAR SIR:— You have asked my opinion as to whether a certain woman committed to the Reformatory for Women can be legally held for a five-year indefinite sentence, or if she may be held for two years only.

You have submitted to me a letter written to your Board, which you state "very plainly sets the case out," and which I assume correctly states all facts necessary to a proper consideration of the subject matter. These facts are as follows:—

"According to the records of the Roxbury Court a woman was committed to the Reformatory for Women on the 9th day of July, 1926. The record does not indicate any term of service and apparently was imposed under the provisions of G. L., c. 272, § 16. The Roxbury Court entertains jurisdiction in accordance with the provisions of G. L., c. 218, § 26, and, having entertained jurisdiction, its powers to impose penalties were circumscribed by the provisions of G. L., c. 218, § 27, to the effect that 'they

(Roxbury Court) may not impose a sentence to a jail or house of correction for a longer term than two years or to the State Prison for any term.' ”

G. L., c. 279, reads, in part, as follows:—

“SECTION 16. A female, convicted of a crime punishable by imprisonment in a jail or house of correction, may be sentenced to the reformatory for women.

SECTION 17. The court or trial justice, imposing a sentence to the reformatory for women, shall not prescribe the limit of the sentence unless it is for more than five years.

SECTION 18. A female sentenced to the reformatory for women for larceny or any felony may be held therein for not more than five years, unless she is sentenced for a longer term, in which case she may be held therein for such longer term; if sentenced to said reformatory for any other offence, she may be held therein for not more than two years.

SECTION 19. The sentence to imprisonment of a female convicted of a felony shall be executed in the reformatory for women; or the court imposing sentence in such a case may impose the sentence in a jail or house of correction provided by law in the case of male prisoners if it does not exceed two and one half years.”

It is plain from the provisions of section 18 that a female sentenced to the Reformatory for Women for a felony may be held for not more than five years, but if she be so sentenced for a misdemeanor other than larceny, she may not be held for more than two years. Accordingly, it becomes necessary to determine whether the sentence in the instant case was for a misdemeanor or a felony.

A felony is defined by G. L., c. 274, § 1, to be “a crime punishable by death or imprisonment in the state prison.”

According to the statement of facts presented to me, this woman was convicted of an offense under G. L., c. 272, § 16, the punishment for which may be by imprisonment in the State Prison. Her offense, then, comes within the class of crimes declared to be felonies by G. L., c. 274, § 1. The fact that the statutes provide that a lesser penalty may be imposed for the offense does not remove it from the class of crimes defined by the Legislature as felonies, because the punishment for the offense may be imprisonment in the State Prison. The fact that jurisdiction of the case was exercised by a district or municipal court judge, who has no authority to commit to State Prison but must fix one of the lesser forms of punishment which are prescribed as an alternative to imprisonment in the State Prison, does not affect the nature of the crime, which falls within the statutory definition of a felony. The judges of the district courts are given by the statute concurrent jurisdiction with the Superior Court over many felonies, with the provision that if they elect to assume such jurisdiction they may not impose the sentence of imprisonment in the State Prison. G. L., c. 218, § 26. Their election to exercise such jurisdiction, rather than merely to hold the defendant for the Grand Jury, does not affect the nature of the defendant's crime and make an offense which is defined by statute as a felony a misdemeanor.

The opinion in *Platt v. Commonwealth*, 256 Mass. 539, is to the effect that a sentence to the Reformatory for Women for a misdemeanor may be for the period of two years, under G. L., c. 279, § 18, even though such period is longer than the punitive term provided for the offense by the statute, and it would seem to be entirely consistent with the proposition

that a sentence to the Reformatory for Women for a felony may be for a longer period than that which a district court or other judge may impose as a punitive term.

It follows from the foregoing that this defendant, who has been convicted of a crime which was punishable by imprisonment in the State Prison, although such sentence was not actually imposed, is nevertheless "a female sentenced to the reformatory for women for a felony," and "may be held therein for a period of not more than five years."

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Department of Public Health — Tests for Water Supply — Trespass — Damage.

Members of the Department of Public Health and its agents may enter upon private land for the purpose of driving wells and making reasonable tests contemplated by the Resolves of 1927, c. 30, without rendering themselves liable for any action of trespass.

If actual damage results, proceedings may lie against the Commonwealth, under G. L., c. 79, § 10.

JULY 19, 1927.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have called my attention to Resolves of 1927, chapter 30, under which your Department is authorized and directed to investigate and determine the best method of supplying with water the municipalities in the valley of the Merrimack River, and especially to make such investigations as your Department may deem necessary, including pumping tests, to determine the practicability of securing an additional water supply in a certain area, described in the resolve, in the town of Chelmsford. You desire my opinion upon the following question:—

"Is the Department authorized to enter upon any private land for the purposes of driving wells and making the tests contemplated by the resolve, the doing of which may include some damage to shrubs, trees and grass, so that the members of the Department and its agents shall not render themselves liable for any action for trespass to any individual landowner upon whose land they may enter?"

Such action as you contemplate is clearly authorized by the said resolve, which reads, in part, as follows:—

"Said department (of public health) shall also make such investigations as it may deem necessary, including pumping tests, to determine the practicability of securing an additional water supply for the city of Lowell and the North Chelmsford fire district . . . from the ground in the neighborhood of said (Merrimack) river on the north side adjacent to the present well fields of said city or from the ground in the area within that portion of the town of Chelmsford which lies between the Boston and Maine railroad and the southerly bank of said river northwest of the point where Stony brook joins said river and within approximately one mile of said junction."

It is true that acts which would constitute trespass unless duly authorized by the Legislature will necessarily be committed by your acting under this resolve, according to the common and the statutory law (par-

ticularly G. L., c. 266, § 113). It is also true that the resolve does not expressly provide that the members of the Department and its agents shall not be liable for trespass, as has been provided in other somewhat similar statutes of this Commonwealth. G. L., c. 48, § 27 (forest wardens); G. L., c. 33, § 136 (militia).

It is my opinion, however, that such acts on your part are justified by the authority given to the Department by the resolve and that this justification is a good defense to any action, civil or criminal, which may be brought against the members of the Department and its agents, while acting thereunder, on account of trespass. A statute such as this resolve clearly grants powers incidental to the carrying out of its provisions.

In the case of *Winslow v. Gifford*, 6 Cush. 327, it was held that there was no trespass where certain commissioners, under authority of a statute, entered upon the lands of the plaintiff and made certain surveys with the view of ascertaining the boundaries of a tract of land devoted to public purposes, no compensation being provided for such apparent trespass. That case has been approved several times in Massachusetts and has been cited at length and with approval by the United States Supreme Court in *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U. S. 160, 167.

Other cases show it to be well settled in this Commonwealth that general rights in property have certain limitations, in that entry upon private property may be made under various circumstances by individuals and by public officers for the protection of the public welfare. When a general survey or exploration is made there is not necessarily an exercise of the right of eminent domain, nor permanent appropriation of property to the exclusive use of another. The entry may be made for a purpose determined by the General Court to be for the public welfare, and is subject only to the limitations as expressed in the case of *Winslow v. Gifford*, *supra*, that it "is reasonably necessary and that it is but a temporary one and accompanied with no unnecessary damage."

My answer to your question, therefore, is in the affirmative as long as the acts which would otherwise constitute trespass are a reasonable carrying out of the purpose of the resolve. I am advised, moreover, that your Department has secured releases, under seal, from the landowner upon whose property most of the tests or acts set forth in the resolve are to be made by you. This fact would seem to render the question upon which you seek my opinion an academic one as to the land of such owner.

It should be added, however, that the acts of the Department contemplated by the resolve are likely to go further than such as would be, if unauthorized, mere trespass, and that there may be actual and substantial damage to the lands entered upon by reason of the making of borings and wells. In my opinion, the Commonwealth, but not the members of the Department, would be liable for such damages, under G. L., c. 79, § 10. The resolve is a proper exercise of the sovereign power of the State to provide for and regulate the water supply of its inhabitants, but private property may not be actually damaged without compensation. While the members of the Department and its agents will not render themselves liable to any individual landowner upon whose land they perform the acts required by the resolve, proceedings by the owner may lie against the Commonwealth by virtue of G. L., c. 79, § 10, for any actual damage that may result.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

High Schools — Towns — Payment for Board of Pupils in Lieu of Transportation.

Towns which do not maintain high schools may be required to make payments toward the board of their school children attending high schools in other towns, irrespective of the financial ability of the children or their parents.

JULY 21, 1927.

DR. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR:— You have asked my opinion upon the two following questions relative to the application of G. L., c. 71, §§ 6 and 7, as amended. Your questions are as follows:—

“1. A boy living in the town of Dana, Massachusetts, which does not maintain a high school, attends the New Salem Academy, a public high school in the adjoining town of New Salem. As he lives more than three miles from this school and there is no public conveyance between his home and the school, it is convenient for him to board at the academy. He pays his board by working at the school.

May the town of Dana, under these circumstances, pay to the parent or guardian of the boy money for board in lieu of transportation, under G. L., c. 71, § 6 and § 7 as amended by St. 1923, c. 363, and be legally reimbursed by the State for the money expended for said board?

2. If a pupil from Dana attends New Salem Academy under conditions similar to those already described, and pays his board at the academy in whole or in part by work done in a grocery store in New Salem, may the town of Dana, under these conditions, pay to the parent or guardian of the boy money for board in lieu of transportation and be legally reimbursed by the State for the money expended for said board?”

G. L., c. 71, § 6, as amended by St. 1921, c. 296, § 1, reads as follows:—

“If a town of less than five hundred families or householders, according to such census, does not maintain a public high school offering four years of instruction, it shall pay the tuition of any pupil who resides therein and obtains from its school committee a certificate to attend a high school of another town included in the list of high schools approved for this purpose by the department. Such a town shall also, through its school committee, provide, when necessary, for the transportation of such a pupil at cost up to forty cents for each day of actual attendance, and it may expend more than said amount. The department shall approve the high schools which may be attended by such pupils, and it may, for this purpose, approve a public high school in an adjoining state. Whenever, in the judgment of the department, it is expedient that such a pupil should board in the town of attendance the town of residence may, through its school committee, pay toward such board, in lieu of transportation, such sum as the said committee may fix.

If the school committee refuses to issue a certificate as aforesaid, application may be made to the department, which, if it finds that the educational needs of the pupil in question are not reasonably provided for, may issue a certificate having the same force and effect as if issued by the said committee. The application shall be filed with the superintendent of schools of the town of residence, and by him transmitted forthwith to the department with a report of the facts relative thereto.”

G. L., c. 71, § 7, as now amended by said St. 1921, c. 296, § 2, and St. 1923, c. 363, reads as follows:—

“If the expenditure per thousand dollars valuation from the proceeds of local taxation for the support of public schools, made by any town of less than five hundred families or householders for the three town fiscal years preceding any school year, averaged more than four and not more than five dollars, the commonwealth shall reimburse the town for one half the amount paid by it during said school year for transportation or board in accordance with the preceding section. If said average was more than five and not more than six dollars, the reimbursement shall be for three fourths of said amount, or if said average was more than six dollars, the reimbursement shall be for the entire sum. Such reimbursement shall not be based on the excess of any amount above forty cents for each day of actual attendance of any pupil. If, however, in order to reach the high school, a pupil must travel three or more miles in some manner other than by steam or electric railroad, or other public conveyance, then the town shall be reimbursed three fourths of the excess, if any, that it expends for such pupil’s transportation or board, or both, above forty cents, but not above eighty cents, for each day of actual attendance. Said excess reimbursement shall be paid only to towns in which said average expenditure per thousand dollars valuation was more than five dollars. All expenditures for which reimbursement is claimed shall be subject to approval by the department.”

It has always been the policy of the Commonwealth to maintain a system of free education available to the children within its jurisdiction, and this general policy, as is obvious from G. L., c. 71, as amended, now includes free high school education.

When a town which, under provisions of law, might ordinarily be required to maintain a high school does not so maintain one, it is called upon to pay the tuition of such of its children as are certified and approved by the proper authorities as fit subjects for high school education at a high school in another town approved by your Department. Moreover, when it is deemed expedient by your Department that such children, or any of them, should board in the town where they are in fact attending high school, the town of residence is to pay toward such board, in lieu of transportation, to the other town such sum as the school committee may fix. Further provision is made for reimbursement to the town of a portion of the money so expended for transportation or board.

There is nothing in the statute which indicates that a distinction is to be made between school children who are able to and do pay for their board in the high school outside their own town and those who are not able to or do not do so. To have so provided would have been to create a discrimination based upon wealth or earning capacity on the part of children, a discrimination entirely repugnant to the spirit of our laws and to the provisions of the particular chapter under consideration. It is not provided in G. L., c. 71, §§ 6 and 7, that the town must necessarily pay the money which it is required to expend for the benefit of a child in lieu of transportation directly to the child or to its parent. It may, and very properly might, make arrangements to pay the sum which it is called upon to disburse towards the child’s board directly to the person to whom it is due. To the amount of such sum so paid by the town of residence, the mode of determining the amount thereof being established by the statute, the child or its parents will be relieved to the extent that the

payments now made by the child, either by money or its equivalent, are released for some other purpose, presumably a purpose connected with the child's welfare. It is not the intent of the statute that towns shall be relieved from the duty to make payments for the benefit of a high school child by reason of the personal labor of the child himself. Provisions are made in the statute for a mode of reimbursing a town in part for the disbursements it may make in this connection.

I answer both of your questions in the affirmative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Director of Fisheries and Game — Deer — Damage.

The Director of Fisheries and Game has no authority to pass upon claims for damage done by wild deer, approved by local authorities prior to June 28, 1927.

JULY 25, 1927.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR: — You have asked my opinion as to whether the Director of Fisheries and Game has jurisdiction to approve or pass upon claims for damage caused by wild deer in the following cases:

1. In cases where the damage was caused prior to June 28, 1927, and where the claim was formally approved by the chairman of the board of selectmen and two disinterested appraisers, as well as by the county commissioners, prior to that date.

2. In cases where the damage was caused prior to June 28, 1927, and where the claim was not approved by the chairman of the board of selectmen and two disinterested appraisers, as well as by the county commissioners, prior to that date.

The date June 28, 1927, is of importance for the reason that St. 1927, c. 194, amending G. L., c. 131, § 67, and amendments thereto, became effective on that date.

G. L., c. 131, § 67, as amended, provided as follows: —

"Whoever suffers loss by the eating, browsing or trampling of his fruit or ornamental trees, vegetables, produce or crops by wild deer or wild moose, if the damage is done in a city may inform the officer of police thereof, who shall be designated to receive such information by the mayor, and if the damage is done in a town may inform the chairman of the selectmen of the town where the damage was done, who shall proceed to the premises and determine whether the damage was inflicted by such deer or moose, and, if so, appraise the amount thereof if it does not exceed twenty dollars. If, in the opinion of the officer or chairman, the amount of said damage exceeds twenty dollars, he shall appoint two disinterested persons, who, with himself, shall appraise, under oath, the amount thereof. The officer or chairman shall return a certificate of the damages found, except in Suffolk county, to the treasurer of the county in which the damage is done, within ten days after such appraisal is made. The treasurer shall thereupon submit the same to the county commissioners, who, within thirty days, shall examine all bills for damages, and if any doubt exists, may summon the appraisers and all parties interested and make such examination as they may think proper. The bills properly approved with the cost of appraisal shall be sent by the county treasurer to the state auditor, and they shall be paid by the com-

monwealth. In Suffolk county the certificate of damages shall be returned to the treasurer of the town where the damage is done, who shall exercise and perform the rights and duties hereby conferred and imposed upon the county commissioners in other counties. The appraisers shall receive from the commonwealth one dollar each for every such examination made by them, and shall receive twenty cents a mile, one way, for their necessary travel."

St. 1927, c. 194, amends this act by providing that the bills, after approval by the county commissioners, shall be sent to the Director, who shall examine the same and, if found by him to be proper, shall endorse his approval thereon and transmit them to the Comptroller, whereupon they shall be paid by the Commonwealth.

In my opinion, the Director has no authority to pass upon the claims in the first case. While undoubtedly St. 1927, c. 194, is retrospective in its operation and applies to pending cases, I do not think that it applies to a case where all the substantial steps in enforcing the remedy have been completed. In the first case all steps had been completed before the new law went into effect, except that the approved bill had not been sent to the State Auditor or to his successor, the Comptroller, and had not been paid by the Commonwealth. No appeal from the finding of the county commissioners was provided for by the law, and at the time it was rendered the finding of the county commissioners was final; nothing remained to be done but the purely ministerial act of sending the bills to the State Auditor and the actual paying of the money by the Commonwealth. Neither of these acts involved any discretionary action on the part of any one. The action was not a pending action at the time the new law went into effect, and I therefore am of the opinion that the Director has no power to act in this case.

In the second case the actions were pending at the time the new law went into effect, and under the familiar rule that remedial and procedural laws are retrospective as to pending cases, I am of the opinion that the provisions of St. 1927, c. 194, apply to such cases, so that the Director must approve such bills before they are paid.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Metropolitan District Commission — Beaver Dam Brook — Construction of Statutes.

St. 1927, c. 301, is so repugnant in its terms to St. 1913, c. 814, that it impliedly repeals the latter, and deprives the Metropolitan District Commission of the authority to deal with Beaver Dam Brook given it by St. 1913, c. 814.

JULY 29, 1927.

HON. DAVIS B. KENISTON, *Chairman, Metropolitan District Commission*.

DEAR SIR: — Your Commission has asked my opinion relative to the effect of St. 1927, c. 301, upon the authority given to your Board, or its predecessor in office, by St. 1913, c. 814.

The statute of 1913 authorized the Metropolitan Water and Sewerage Board to widen, straighten and deepen the channel of Beaver Dam Brook in the towns of Ashland, Framingham, Sherborn and Natick. The Board was authorized to take by eminent domain, or otherwise, lands and water rights in relation to such work for the metropolitan water works, the title

to the property so taken to vest in the Commonwealth. Damages were to be determined by the Board, and in the absence of an agreement relative to such determination by a jury in the Superior Court. The Board was given authority to assess betterments. The expense incurred in carrying out the provisions of the act was to be paid out of the treasury of the Commonwealth and an issue of bonds therefor was authorized, and a third of the expense was to be repaid to the Commonwealth by the town of Framingham and an issue of bonds for such purpose, to be made by the town, was authorized.

St. 1927, c. 301, provides that the town of Framingham may widen, straighten and deepen the channel of Beaver Dam Brook in the towns of Ashland, Framingham and Natick, with other provisions relative to the brook similar to those contained in section 1 of chapter 814 with the exception of any mention of the town of Sherborn in the statute of 1927. I am advised that the part of the town of Sherborn which is in any way affected by the widening of the brook has, since 1913, been annexed to the town of Framingham.

St. 1927, c. 301, authorizes the town of Framingham to perform the same and some additional work in relation to the channel of Beaver Dam Brook as was given to the Board under the earlier act, and authorizes the town to take by eminent domain or purchase the land and water rights, and provides that damages recovered for such takings shall be paid by the town. The town is also given authority to make betterment assessments, and it is provided in this statute (§ 5) that from and after the completion of the work authorized by this act said Beaver Dam Brook shall be maintained, controlled and kept in good condition by the said town of Framingham.

Undoubtedly, as a matter of law, the repeal of a statute or a part thereof by implication is not favored, but a later statute containing provisions plainly repugnant to those of a former statute has been held to repeal the earlier one in so far as the two were repugnant to each other. *New London Northern R.R. Co. v. Boston & Albany R.R. Co.*, 102 Mass. 386, and cases there cited. In the case of *New London Northern R.R. Co. v. Boston & Albany R.R. Co.*, *supra*, powers and duties previously conferred and imposed upon commissioners appointed by the court were by a statute vested in a board of railroad commissioners, and the court held that all provisions of law which authorized commissioners appointed by the court to exercise such powers and perform such duties or the court to appoint such commissioners or to adjudicate upon their report were, in view of the statutory creation of a new commission, impliedly repealed.

The statute of 1927 is repugnant to the statute of 1913. It relates to the same subject matter; it is not affirmative, cumulative or auxiliary, but grants authority to a new board to perform the acts which were formerly authorized to be performed by the Metropolitan Water and Sewerage Board; and it authorizes the new body, the town, which is to go forward with the work, to assess betterments, to make takings and to do all the other necessary acts relative to the completion of precisely the same public improvement which was mentioned in the earlier statute. An attempted exercise of its power under the statute of 1913 by the Metropolitan District Commission, as successor to the Metropolitan Water and Sewerage Board, would bring it into direct collision with the authority vested by the statute of 1927 in the town of Framingham; and while the statute of 1927 does not in terms refer to or directly repeal the

statute of 1913, it must, in my opinion, be said to be so repugnant to, and so obviously intended by the Legislature as a substitute for, the other as impliedly to repeal the provisions of St. 1913, c. 814, and I am of the opinion that the authority to proceed with the public work relative to the channel of Beaver Dam Brook now rests with the town of Framingham and is not within the authority of your Commission, under the statutes as they now stand.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Illegitimate Child — Legitimation — Acknowledgment.

Marriage of the parents of an illegitimate child without an acknowledgment of the parentage of the child by the father is not sufficient to make such child legitimate.

AUG. 29, 1927.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You submit to me the inquiry of the Secretary of State of the United States as to whether, under the laws of Massachusetts, the subsequent marriage of the parents of a child born out of wedlock has the effect of legitimating their child.

G. L., c. 190, § 7, provides as follows:—

“An illegitimate child whose parents have intermarried and whose father has acknowledged him as his child shall be deemed legitimate.”

Acknowledgment by the father is, therefore, requisite in addition to intermarriage to legitimate a child born out of wedlock.

Yours very truly,
ARTHUR K. READING, *Attorney General*.

Drainage District — Assessments — Recording.

The provisions of G. L., c. 80, § 2, that no betterments for improvements shall be assessed unless the order therefor is recorded, do not apply to the assessing in a town within a drainage district organized under G. L., c. 252, as amended, of expenses of an improvement determined under said chapter 252.

SEPT. 1, 1927.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:— You inform me that the Weweantic River Drainage District, having been organized under the provisions of G. L., c. 252, and never having been reorganized under the provisions of St. 1923, c. 348, § 2, is subject to the provisions of G. L., c. 252, as amended by St. 1922, c. 349, and is not subject to the provisions of St. 1923, c. 348, as amended by St. 1926, c. 393, in which form G. L., c. 252, §§ 1–14B, as so amended now appear.

You inform me that the commissioners of the said district have made an award determining the proportion of the total expense of the improvement of certain low lands in said district to be paid by the town of Carver, and that the sum due from such town has been ascertained in accordance with the provisions of G. L., c. 252, § 13; and that neither the award nor a plan of the area expected to receive advantage from the improvement nor an estimate of the amounts to be assessed upon each parcel of land within

such area was recorded, within thirty days from adoption of the award, in the registry of deeds of the district in which the area so improved is situated, as is required under the provisions of G. L., c. 80, §§ 1 and 2, to be done before assessing betterments for an improvement receivable by an area by reason of an order adopted by a board of officers of the Commonwealth stating that betterments are to be assessed for the improvement.

You request my opinion whether the provisions of G. L., c. 80, §§ 1 and 2, relating to assessment of betterments for an improvement consequent to an order of a board of officers of the Commonwealth for such an improvement, stating that betterments are to be assessed, and especially the provision in section 2 that "no betterments shall be assessed for such improvement unless the order . . . (is) recorded," so apply to the assessing by assessors of the town of Carver, under the provisions of G. L., c. 252, § 14, of the divisions of the sum ascertained to be due from the town of Carver under G. L., c. 252, § 13, and especially under the provision therein that "the assessors . . . shall assess the same in the same manner as betterments are assessed under chapter eighty," as to preclude assessing land for divisions of the sum so ascertained, unless the award for such improvement, together with plan and estimate, is first recorded in the registry of deeds of the district within thirty days from its adoption.

G. L., c. 252, § 14, is as follows:—

"The assessors of each such town shall divide the sum ascertained to be due from their town under the preceding section, among the various parcels of land therein which are within the drainage district and are benefited by the improvement in proportion to the special benefit received by each such parcel therefrom and shall assess the same in the same manner as betterments are assessed under chapter eighty. The provisions of said chapter relative to the apportionment, division, reassessment, abatement and collection of assessments for betterments, and to interest, shall apply to assessments made under this section, except that such assessments shall be apportioned in twenty equal annual instalments or in such lesser number as the assessors may determine."

The first sentence sets forth a direction to assessors to perform certain functions, namely, to divide an ascertained sum and to assess the same. The amount which is to be assessed upon each parcel of land is a divisional of an ascertained sum, and the sum which is to be divided is a sum as ascertained in section 13. The functions of division and of assessing relate to a sum definitely described, and ascertained under definite procedure. In so far as the provisions of G. L., c. 80, relate to the function of assessing betterments thereunder, section 14 provides that such provisions shall apply to the function of assessing land for the divisions made by the assessors, pursuant to section 14, of the sum ascertained under section 13.

G. L., c. 80, § 1, as amended by St. 1923, c. 377, §§ 1, 2 and 17, relating to assessing betterments, are as follows:—

"SECTION 1. Whenever a limited and determinable area receives benefit or advantage, other than the general advantage to the community; from a public improvement made by or in accordance with the formal vote or order of a board of officers of the commonwealth or of a county, city, town or district, and such order states that betterments are to be assessed for the improvement, such board shall within six months after the

completion of the improvement determine the value of such benefit or advantage to the land within such area and assess upon each parcel thereof a proportionate share of the cost of such improvement, and shall include in such cost all damages awarded therefor under chapter seventy-nine; but no such assessment shall exceed the amount of such adjudged benefit or advantage. The board shall in the order of assessment designate as the owner of each parcel the person who was liable to assessment therefor on the preceding April first under the provisions of chapter fifty-nine.

SECTION 2. An order under section one which states that betterments are to be assessed for the improvement shall contain a description sufficiently accurate for identification of the area which it is expected will receive benefit or advantage, other than the general advantage to the community, from such improvement, and shall refer to a plan of such area, and shall contain an estimate of the betterments that will be assessed upon each parcel of land within such area; and such order, plan and estimate shall be recorded, within thirty days from the adoption of the order, in the registry of deeds of every county or district in which the benefited area is situated. No betterments shall be assessed for such improvement unless the order, plan and estimate are recorded as herein provided, nor upon any parcel of land not within such area, nor for a greater amount than such estimate.

SECTION 17. Whenever a formal vote or order for the laying out or construction of a public improvement, or for the taking of land therefor, states that betterments are to be assessed, no betterments shall be assessed except under this chapter, and all proceedings relating to such betterments shall be as herein provided, notwithstanding any special act hitherto enacted."

These provisions are directory to a board, by whose order, stating that betterments are to be assessed, an area receives improvement, as to the function of assessing betterments (§ 1) and as to a function relative to such order (§ 2). Though the exercise of the function relative to such order (§ 2) is therein made requisite to the exercise of the function of assessing in the operation of perfecting an assessment, the manner of the exercise of the latter function is clearly distinguishable, namely, to "assess upon each parcel thereof a proportionate share of the cost of such improvement, and shall include in such cost all damages awarded therefor under chapter seventy-nine; but no such assessment shall exceed the amount of such adjudged benefit or advantage."

Examination of these provisions is sufficient for the conclusion that the provisions of section 14 bear instruction to assessors in the function of assessing only and of an amount as ascertained under G. L., c. 252, only, independent of instructions to other officials or of acts or omissions to act pursuant to such instructions, made requisite elsewhere in the full process of accomplishing any assessment.

G. L., c. 252, particularly provides in detail for procedure as to manner and form of the improvement of low land and swamps by drainage thereof (§§ 1-14); for the financing of the same, namely, by payment of certain expenses by certain counties (§§ 7, 8 and 11); for the payment thereof to such counties by certain towns (§ 13); and for the collection by such towns of the amounts so repaid (§ 14). The provisions of section 13 delineate the mode of ascertainment of the amount to be repaid by any

town to any county, namely, determination by an award, the procedure as to which (in making, notice to any town, appeal by any town aggrieved, and the finality thereof) is set forth in detail therein, as follows: —

“The commissioners shall, after due notice and a hearing, determine what proportion of the total expense of the improvement, of the cost of maintenance of drains and ditches and of the payment for works or structures taken or otherwise acquired in connection therewith, except, such as is to be paid by the commonwealth, shall be paid by each town where any of the land improved lies, and shall return their award to the board, which shall, upon acceptance thereof, send a copy thereof to each such town. Any such town aggrieved by such award may, by petition joining all the other such towns as party respondents, appeal to the superior court for the county where the greater part of the land improved lies; provided, that such petition is entered not later than the next return day after the expiration of thirty days from its receipt of said copy. Questions of fact shall, upon motion of either party, be tried by jury in such manner as the court orders. The court may affirm, reverse or alter the award, and the decision of the court shall take effect as an original award. The board shall forthwith send to the county commissioners of the county where the greater part of the land lies a copy of the award as finally determined. The sum so ascertained to be due from any such town shall be paid by the treasurer thereof to said county in not exceeding twenty equal annual instalments to be collected in the same manner as taxes.”

The provisions of section 14, as herein set forth, delineate the method of collecting, in towns, sums ascertained to be due from the same under the provisions of section 13.

G. L., c. 80, as amended by St. 1923, c. 377, particularly relates to betterments from a public improvement when made by vote or order of a board of public officials and when such order states that betterments are to be assessed for the improvement, and delineates the mode of assessment (§§ 1 and 2), collection (§§ 12 and 14), abatement (§§ 5, 6, 7, 8, 9 and 10), apportionment (§§ 13 and 14 [repealed]), division (§ 15) and reassessment (§ 16) of the same. The provisions of sections 1 and 2 relate particularly to assessments, and require that the same shall be made by the board adopting the order for the improvement and assessment; that the order shall designate owners of land liable to assessment (§ 1), and that no betterments shall be assessed unless the order, plan of area benefited and estimate of betterments to be assessed on each parcel have in fact been recorded in the registry of deeds where the benefited area is situated, within thirty days after the adoption of the order (§ 2).

If G. L., c. 80, §§ 1 and 2, in so far as they relate to incorporation, in the order, of a designation of owner of each parcel liable to assessment, of a description sufficiently accurate for identification of areas benefited, of plans of such area and an estimate of benefits, and the recording of such order, plan and estimate, as prerequisites to assessing betterments, apply to the manner and form of making an award and for the ascertainment of sums due under G. L., c. 252, § 13, as prerequisite to assessing sums ascertained through procedure, of which such award is a part, it is obvious that such provisions of G. L., c. 80, §§ 1 and 2, are in addition to the provision of G. L., c. 252, in delineating further procedure for making an award by district commissioners or by a drainage board, and for ascertainment of sums due, assuming that such award is an order of a board of officers for a public improvement, stating that betterments are

to be assessed, to which, when of such character, G. L., c. 80, §§ 1 and 2, are generally applicable, and impose upon said commissioners or drainage board, additional and similar in purport to duties owed solely to towns and to county commissioners, for their information and protection, as recited in G. L., c. 252, § 13, duties to owners of each parcel of land to be assessed within the towns, for whose like information and protection as to betterments, designation of ownership, description of area benefited and recording of order, plan and estimate are ostensibly provided in G. L., c. 80.

G. L., c. 80, § 2, requires that the order shall be recorded within thirty days after the adoption of such order. G. L., c. 252, § 13, provides that after the award is made, the district commissioners shall return the same to the drainage board (now State Reclamation Board, St. 1923, c. 457) for its acceptance; that any town aggrieved by the award, so accepted, may appeal to the court, the decision of which shall take effect as an original award; and that the drainage board shall send to the county commissioners a copy of the award as finally determined. If G. L., c. 80, §§ 1 and 2, in so far as they relate to the recording of an order for improvement and assessment of betterments, within thirty days after its adoption, apply to an award under G. L., c. 252, § 13, they require determination of the date of the adoption of the award, as among the dates of its making, of return to drainage board for acceptance, of acceptance by the board, of receipt of copy by any town from the drainage board, of expiration of period, after receipt, for appeal by a town aggrieved, of decision of court on appeal as an original award, of receipt by county commissioners from the drainage board of copy of award as finally determined, as recited in section 13, in procedure to be had, with respect to such an award, for the ascertainment of the sums to be divided and assessed by the assessors under section 14.

If G. L., c. 80, §§ 1 and 2, in so far as they provide that no betterments shall be assessed for such improvements unless the order, plan and estimate are so recorded, apply, under the provisions of G. L., c. 252, § 14, to the assessing of land in a town for the sum due from such town, then, in the absence of such record within thirty days after adoption of the award, the provision of section 14 that the assessors shall divide the sum due from any town as ascertained under section 13, and shall assess the same, is nullified, and the amount due from any town, though having been determined, ascertained and paid by a county treasurer in strict compliance with the provisions of section 13, cannot be collected because of preclusion for its assessment.

It is evident, therefore, by recitation of but a few involvements, occasioned by construing all the provisions of G. L., c. 80, for perfecting assessment of betterments as an integral part of the procedure for perfecting assessments under G. L., c. 252, that the two chapters are incompatible, except in so far as the provisions of G. L., c. 80, relate to the isolated function of assessing.

Moreover, by recitation in G. L., c. 252, § 14, of the several aspects, relating to betterments, to which the provisions of G. L., c. 80, are expressly made applicable and in which recitation "assessments," as accomplishments had after adherence to the procedure delineated therein, are not enumerated, it becomes more evident that it was the intent of the Legislature to establish the procedure set forth in G. L., c. 252, § 13, as sufficient prerequisite to the operation of assessing by assessors, and that the provisions of G. L., c. 80, are applicable only in so far as they

mannerize such operation; and that as to the manner of accomplishing an assessment to pay a town's share of expense of a drainage improvement other than the operation of assessing, the provisions of G. L., c. 252, are substitute for the provisions of G. L., c. 80.

I therefore answer your interrogatory in the negative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Constitutional Law — Notaries — Justices of the Peace.

Appointments to the offices of notary public and justice of the peace rest in the discretion of the Governor and Council, who may pass upon the qualifications of applicants for such offices.

SEPT. 14, 1927.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — You request my opinion as to the intent of the framers of the Constitution in regard to the appointment of notaries public and justices of the peace in the Commonwealth.

"Was it originally contemplated," you ask, "that appointments should be made indiscriminately, as indicated in the petition herein enclosed?" The petition referred to is that of a salesman of bonded whiskey, who petitions for appointment to the office of notary public for the Commonwealth of Massachusetts.

Mass. Const. Amend. IV provides that notaries shall be appointed by the Governor in the same manner as judicial officers are appointed. Mass. Const. Amend. XXXVII provides that the Governor, with the consent of the Council, may remove justices of the peace and notaries public.

In my opinion, there is nothing in the language used by the framers of the Constitution to indicate that appointments to the offices above mentioned should be made *indiscriminately*.

In the original Constitution of the Commonwealth, justices of the peace were to be nominated and appointed by the Governor, by and with the advice and consent of the Council, being *judicial officers* (*Opinion of the Justices*, 107 Mass. 604) within the meaning of Mass. Const., pt. 2nd, c. II, § I, art. IX, which provides: —

"All judicial officers, the attorney-general, the solicitor-general, all sheriffs, coroners, and registers of probate, shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment."

Notaries public, on the other hand, were to be elected by the Legislature. Mass. Const., pt. 2nd, c. II, § IV, art. I, was as follows: —

"The secretary, treasurer and receiver-general, and the commissary-general, notaries public, and naval officers, shall be chosen annually, by joint ballot of the senators and representatives in one room. . . ."

But, as has already been stated, article IV of the amendments brought notaries also within the appointing power of the Governor and Council: —

"Notaries public shall be appointed by the governor in the same manner as judicial officers are appointed, and shall hold their offices during seven years, unless sooner removed by the governor with the consent of the council, upon the address of both houses of the legislature."

The mere fact that the offices of notaries public and justices of the peace are appointive offices indicates that the Governor and Council are to use their *discretion* in the matter of the nomination and appointment of these officers. This discretion, of course, must not be *arbitrarily* exercised, but the Governor can refuse to appoint for any valid reason.

The Governor and Council, using their discretionary power, might determine, after inquiring into the personal qualifications of applicants or into the reasons for which they seek appointment, that such applicants are not proper persons to receive commissions, or that the reasons which they give for desiring such appointments are not sufficient to justify appointment, or that the public welfare does not require an increase in the number of such officers.

Former Attorney General Benton, in an opinion to Your Excellency and the Honorable Council, dated January 20, 1925 (Attorney General's Report, 1925, p. 67), with which opinion I concur, states: —

"It is my opinion that, except for limitations of the type mentioned in the preceding paragraph, all questions relating to the number of justices of the peace and notaries public which it may be thought desirable to have, or relating to the personal qualifications for appointment to these offices, or relating to the reasons for which such officers once appointed should be removed, are for the determination of the Governor and Council, in the exercise of their sound discretion."

Very truly yours,

ARTHUR K. READING, *Attorney General*.

County Commissioners — Trustees of County Tuberculosis Hospital — Compensation.

County commissioners may not award to themselves or to trustees of a tuberculosis hospital salary or compensation for services.

OCT. 3, 1927.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR: — You request my opinion as to whether, under the provisions of G. L., c. 34, § 5, as amended by St. 1927, c. 327, relating to schedules of salaries of county commissioners, and of G. L., c. 111, and amendments thereof, in those sections relating to county tuberculosis hospitals, an item in certain county accounts for compensation to county commissioners for attendance at meetings of the trustees of the tuberculosis hospital maintained by the county of the said commissioners, and an item for salary voted by the trustees of a county tuberculosis hospital to the county commissioners of the same county for services as trustees, are items which the Director of Accounts, under the provisions of G. L., c. 35, § 44, *et seq.*, and amendments thereof, relating to supervision of county accounts, may certify as correct.

G. L., c. 111, § 78, *et seq.*, and amendments thereof, provide for the erection, care, maintenance and repair of county tuberculosis hospitals. Section 87 provides that the "county commissioners shall be trustees of the hospitals erected."

G. L., c. 34, § 5, is as follows: —

"To establish the salaries of county commissioners, the counties, except Suffolk and Nantucket, are divided into eight classes, based upon popula-

tion, according to the following schedule, and said salaries, in full for all services performed by said commissioners, except as otherwise provided, shall be as follows:— . . .”

A schedule is then set forth, which schedule was amended by St. 1927, c. 327.

It is therefore specifically provided that the salary scheduled to any given class shall be “in full for all services performed by said commissioners, except as otherwise provided,” and that performance of service of trusteeship of a county tuberculosis hospital is imposed upon the county commissioners of such county.

As to the first item, compensation for services of county commissioners for attendance as county commissioners at meetings of themselves as trustees, the service of attendance is a service represented by the county commissioners to have been performed in their capacity as county commissioners; and it follows, therefore, that such service is included in those services, for “all” of which, under the provisions of G. L., c. 34, § 5, salary is established in full, unless payment of compensation for such service shall be elsewhere provided by statute. I do not find such a statute.

As to the second item, salary voted by county commissioners to themselves in their capacity as trustees of a county hospital, for services rendered by them as such trustees while at the same time receiving a salary for their office as county commissioners, by virtue of which they are trustees, the service of trusteeship is a service “performed” by the commissioners pursuant to the provisions of G. L., c. 111, § 87, whether or not performed by them in their capacity as county commissioners in their capacity as such or as trustees, for which, as one of “all services performed by said commissioners,” under the provisions of G. L., c. 34, § 5, salary is established in full, unless payment of salary for such service is elsewhere provided. If the service of trusteeship is performed by them as county commissioners, by reason of incumbency in such office, it is a service in their capacity as county commissioners included in those services for all of which the salary, established by G. L., c. 34, § 5, as amended, is in full. If the service of trusteeship is performed by them in their capacity as trustees, apart and distinct from their capacity as county commissioners, enablement of payment by the trustees of salary for such service must be found in some provisions pertaining thereto in statutes relating to such trustees. I do not find any such provision.

It follows, therefore, that there is no authorization for the payment of compensation to county commissioners for attendance of themselves, as county commissioners, at meetings of trustees of county tuberculosis hospitals, nor for salary to them, as county commissioners, as trustees of such hospitals, other than the salary to such county commissioners established for all services performed by county commissioners, nor for payment of a salary to any trustees of county tuberculosis hospitals; and, in my opinion, neither item is proper for certification by the Director of Accounts.

Yours very truly,
ARTHUR K. READING, *Attorney General.*

Public Schools — Textbooks — Transportation of Pupils.

Public funds may not be expended to provide free textbooks or free transportation for pupils attending private schools.

Nov. 2, 1927.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR:— You have requested my opinion upon the two following questions of law:—

“1. Whether the town of Ashburnham, under the ‘anti-aid’ amendment, can furnish textbooks out of public funds to pupils attending a private school.

“2. Can the town, from public funds, pay the transportation of pupils to a private school?”

You have set forth the facts relative to the situation in Ashburnham, to which you direct my attention, as follows:

“The town of Ashburnham is exempted by the Department from maintaining a high school because high school opportunities are made available to the pupils of the town at Cushing Academy in Ashburnham. The tuition of these pupils is paid from a private fund which has been raised by the citizens of the town. The town itself has been supplying these pupils with textbooks. The question of transporting pupils to Cushing Academy has never been raised, but a member of the school committee states that should it occur the transportation would be paid by the town out of public funds.”

It is apparent from the foregoing facts and from an inspection of a written contract between the school committee of Ashburnham and the trustees of Cushing Academy, which you have submitted to me, that Cushing Academy is an entirely private school. It is completely under private management. Public officials exercise no control whatsoever over it. No question exists as to its status in this respect, such as was considered with relation to the Punchard School in an opinion rendered to you on August 6, 1924 (Attorney General's Report, 1924, p. 114). The fact that the availability of Cushing Academy as a place where Ashburnham children of high school age might receive training may have been a large or controlling factor in leading you, in the exercise of your discretion, to exempt the town from maintaining a high school, under the authority given you by G. L., c. 71, § 4, does not change the status of the academy from that of a private to a public school. The expenditure of public funds for the purchase of school books for pupils who receive their education in institutions other than those public schools embraced in our general public school system is not authorized by the statutes (G. L., c. 71, §§ 48 and 49), and would constitute an expenditure of money for a purpose which cannot be termed public, in the absence of a specific legislative determination to that effect.

The same considerations are applicable to the payment of public funds for the transportation of Ashburnham children to the private school, Cushing Academy, and I am of the opinion that the town cannot expend public moneys to buy textbooks for, or to transport, pupils attending the academy, under the facts as you have set them forth.

Very truly yours,

ARTHUR K. READING, *Attorney General.*

Motor Vehicles — Steam Road Roller — Storing of Compressed Air.

A steam road roller capable of being propelled by its own power is a motor vehicle within the provisions of G. L., c. 146, § 34.

Nov. 3, 1927.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR:— You have requested my opinion as to whether, under G. L., c. 146, § 34, a steam road roller is a motor vehicle.

G. L., c. 146, § 34, provides:—

“No person shall install or use, or cause to be installed or used, any tank or other receptacle, except when attached to locomotives, street or railway cars, vessels or motor vehicles, for the storing of compressed air at any pressure exceeding fifty pounds per square inch, for use in operating pneumatic machinery, unless the owner or user thereof shall hold a certificate of inspection, issued by the division.”

G. L., c. 90, § 1, provides:—

“The following words used in this chapter shall have the following meanings, unless a different meaning is clearly apparent from the language or context, or unless such construction is inconsistent with the manifest intention of the legislature:

‘Motor vehicles,’ automobiles, motor cycles and all other vehicles propelled by power other than muscular power, except railroad and railway cars and motor vehicles running only upon rails or tracks, ambulances, fire engines and apparatus, police patrol wagons and other vehicles used by the police department of any city or town or park board solely for the official business of such department or board, road rollers and street sprinklers.”

In commenting upon G. L., c. 90, the justices of the Supreme Judicial Court have said, in *Opinion of the Justices*, 250 Mass. 591, 601:—

“The dominant aim of the statute is to regulate the use of motor vehicles upon highways. That is a proper field for the exercise of the police power. The enactment of G. L., c. 90, in its main features is an exercise of the police power.”

It is evident, therefore, that G. L., c. 90, has a limited application. Further, it is to be noted that section 1 of said chapter begins, “the following words used in this chapter shall have the following meanings,” and that consequently the definitions, including that of the term “motor vehicles,” have an application limited to the purposes of that chapter.

The first law enacted in this Commonwealth to regulate the operation of automobiles and motor vehicles on ways is found in St. 1902, c. 315. Section 4 of that chapter is as follows:—

“The term ‘motor vehicle’ in this act shall include all vehicles propelled by any power other than muscular power, excepting railroad and railway cars and motor vehicles running only upon rails or tracks.”

It is to be noted that in that section the definition of the term “motor vehicle” was limited to “this act” and that the Legislature recognized that there existed motor vehicles other than those sought to be regulated by the act of 1902.

This chapter was subsequently repealed in 1903 by St. 1903, c. 473, § 15. In that act automobiles and motor cycles were the only motor vehicles the use of which was regulated, yet the Legislature evidently considered steam road rollers to be motor vehicles as such. In that chapter the Legislature enacted as follows:—

“The terms ‘automobile’ and ‘motor cycle’ as used in this act shall include all vehicles propelled by power other than muscular power, excepting railroad and railway cars and motor vehicles running only upon rails or tracks, and steam road rollers.”

Later on, by St. 1909, c. 534, the prior motor vehicle laws were repealed. In section 1 of that chapter “motor vehicle” is defined, with the exception of two words — “shall include” after the words “motor vehicle” — in the identical language found in the definition of the same words in G. L., c. 90, § 1.

It is evident, therefore, that the term “motor vehicle” as used in G. L., c. 90, § 1, is limited in its application to the sections embodied in that chapter, and that in order to determine whether or not a steam road roller is a motor vehicle under G. L., c. 146, § 34, it is necessary to consider what the term “motor vehicle” means, without regard to the provisions of G. L., c. 90.

The word “motor” is defined by the Century Dictionary as follows:—

“That which imparts motion; a source or originator of mechanical power; a moving power, as water, steam, etc. In *mach.* a prime mover; a contrivance for developing and applying mechanically some natural force, as heat, pressure, weight, the tide, or the wind; a machine which transforms the energy of water, steam, or electricity into mechanical energy; as an electric motor.”

The word “vehicle” is defined by the Century Dictionary as follows:—

“Any carriage moving on land, either on wheels or on runners; a conveyance. That which is used as an instrument of conveyance, transmission or communication.”

The words “motor vehicle,” as found in the Encyclopedia Americana, 1905, are defined as follows:—

“Denoting a vehicle moved by inanimate power of any description, generated or stored within it, and intended for the transportation of either goods or persons on common highways. As an adjective the word denotes broadly some relation to mechanically driven vehicles.”

Definitions of the terms “motor” and “vehicle” in other dictionaries commonly accepted as standards coincide with the definitions quoted above. Judicial definitions of the term “motor vehicle” in its broader sense are almost entirely lacking.

It is my opinion that a steam road roller, that is, a road roller operated by steam and capable of being propelled by its own power, is a motor vehicle within the terms of G. L., c. 146, § 34.

Very truly yours,

ARTHUR K. READING, *Attorney General.*

Insurance — Fraternal Benefit Society — Distribution of Surplus.

A distribution of the surplus of a fraternal benefit society to its members is not an equitable distribution if it is made upon a basis of a *per capita* division or of a percentage of present annual assessments alone.

Nov. 3, 1927.

Hon. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR:— You have asked my opinion relative to a proposed distribution of surplus to be made by a fraternal benefit society to its members.

You have advised me that the report of the society which has been adopted by vote of its officers having, I assume, the power of directors, relative to such distribution, is as follows:—

“In the valuation of our condition as of December 31, 1926, \$1,400,000 was set aside for contingencies and \$600,000 for dividend purposes. After setting aside these two sums, our valuation shows a percentage of 105 plus and the executive committee recommends that a dividend be paid of $8\frac{1}{3}$ per cent of the annual assessment of each member, to all members in good standing June 30, 1927, who have completed two full years membership on December 31, 1926, with the exception of members on the Table of Regular Rates under 65 years, the dividend to be paid by checks through the collectors of subordinate councils, and on list of members supplied from the office of the supreme secretary.”

You have informed me that the \$1,400,000 reserve of this society, referred to in the foregoing order, from the statutory surplus of which the proposed distribution is to be paid, has been built up by the payments of beneficiaries upon their assessments made to provide for their prospective benefits under the rules of the organization, with the exception of those members under sixty-five years, specifically referred to in said order. You also have advised me that the amounts which have been paid in by respective beneficiaries differ greatly. Accordingly, the proportionate interests in the reserve funds of the society, including the surplus, which the various members have built up for themselves individually, differ greatly among such members in like manner as their respective payments have differed.

It is obvious that under the plan adopted for distribution one who has been a member for only a short period, whose payments would necessarily have been much less than those of a member of longer standing paying at the same rate, would receive the same amount of repayment from the surplus as would the latter member, although the latter's contribution to such surplus, and his consequent interest therein, would be far the larger.

It is immaterial whether the fund from which the dividend be paid is said to be derived from a reserve, a contingency, a surplus reserve or an emergency fund, as each is built up by the payments of the members, which are not alike for all at any given period. It is immaterial that the sum to be repaid to each member equals the amount of a periodical contribution. The repayment purports to be a payment of a portion of the surplus directly to the members and not a reduction of the periodical contributions of its members. The number or amount of such contributions themselves is not, in fact, lessened or reduced by the vote of the officers, though a member might, if he so chose, use the funds received in the future payment of a contribution. Moreover, the same principle of equitable

apportionment is applicable to a distribution by either the method of direct payment or the reduction of contributions. It is likewise immaterial that the amount of the respective repayments is stated in terms of a percentage of the annual assessment.

G. L., c. 176, § 17, as amended by St. 1926, c. 206, to the terms of which this proposed mode of distribution must conform, reads as follows:—

“Whenever the actual assets of a society exceed its liabilities, including in liabilities the net value of its outstanding contracts computed on the basis specified in the preceding section, by an amount equal to five per cent of said net value, such society may make an equitable distribution of any surplus in excess of said five per cent by a reduction of the periodical contributions of its members, or may pay back to its several members an equitable portion of such surplus in such manner as may be determined by vote of the officers of the society having the powers of directors.”

Prior to the passage of St. 1926, c. 206, the only statutory manner of equitable distribution of the specified amount of surplus was by a reduction of the periodical contributions. A second manner, direct payment to beneficiaries, such as this society is following, is now authorized by said chapter 206. The intention of the statute as to either form of distribution is plain. It must be made equitably; that is, without discrimination among the several members, in accordance with the equitable as well as legal rights which such members severally have in the fund which is to be the subject of division. “Equitable distribution” and “equitable portion,” as used in the statute, denote, respectively, a distribution made in accordance with the foregoing principles and a portion received by means of such a distribution. The word “equitable” as used in the instant statute does not describe the total sum which is to be distributed in its relation to other moneys of the society.

The reserves and surplus of the society have been built up by the contributions of the members, and as to such surplus and reserve each member has an interest in such part as is represented by the proportion which the member's contributions to such surplus and reserve fairly bear to the total amount thereof. In other words, a member by his payments is continually building up a part of the reserve of the whole society, which part may fairly be described as the reserve on his particular certificate, and in any fair division of such reserve, or a surplus part of it, the portion thereof which can be allocated to his particular certificate should be returned to him. As such individual portions of the reserve so built up by various members through their own contributions will naturally differ widely in amount with variations in length of membership or rates of payment, any method of dividing up the total reserve or surplus, or any part of either, which ignores these variations in the amount of the particular reserves built up by the individuals and attempts a division *per capita* or by a percentage of present annual assessments is obviously unfair, regardless of the equitable rights of the several members in the whole fund, and cannot be termed either an equitable distribution nor be said to pay to the members equitable portions. An assessment based upon a percentage of the annual assessment of each member, while varying in amount with the size of the respective assessments of the members, does not necessarily reflect in the same proportions the variations which exist in the contributions to the fund to be distributed, which the members have respectively made.

Apart from G. L., c. 176, § 17, as amended, it has been held in this

Commonwealth that in a distribution of a reserve fund justice requires that it be carried out by payments to certificate holders in proportion to the amounts paid in to such fund by each respectively. *Fogg v. Order of the Golden Lion*, 159 Mass. 9.

Because amounts of payments to beneficiaries are to be equal it does not follow that they will be just or equitable. Indeed, the very fact that they are equal is what may make them inequitable. The scheme under which this society is about to make payments, totally disregarding, as it does, the varying proportions in which the beneficiaries have contributed to the fund which is to be returned in part to those who created it, is plainly inequitable.

I am not unmindful of the difference which exists between the character of the relation of members of a fraternal beneficiary society to the society itself and that of an assured with an insurance company, but I am of the opinion that the specific language of G. L., c. 176, § 17, as amended, clearly indicates an intent on the part of the Legislature to recognize and protect, to the extent of his contributions, an interest of the individual member in the accumulated funds of such a society when a distribution of surplus permitted by the statute is made. The decisions in *Reynolds v. Supreme Council, Royal Arcanum*, 192 Mass. 150, and *Royal Arcanum v. Green*, 237 U. S. 531, are not inconsistent with the opinions which I have expressed.

Although the statute authorizes the officers of the society who have the powers of directors to determine the manner in which the equitable distribution is to be paid, they are not authorized to make any distribution other than an equitable one. While their determination in regard to the manner of carrying out the distribution (whether by direct payments or by a system of credits, for example) is within their authority, and while their determination in this respect may be binding upon the members of the society, yet they have no authority whatsoever to establish an inequitable scheme for distribution, and their determination, by adoption or otherwise, of the propriety of a given plan of distribution as being equitable is not binding upon the members of the society nor upon the Commissioner of Insurance, and if it be not an equitable plan the courts will grant relief against it. Such relief would probably be granted upon the suit of an aggrieved member of the society without the necessity for the intervention of the Commissioner of Insurance. The Commissioner has ample powers under the statutes to invoke the aid of the courts to prevent the carrying out of a proposed inequitable scheme of distribution if, in his judgment, consideration of the public good requires him so to act in any given case, for the protection of beneficiaries or for other good cause.

The answers to the questions which you have propounded in your letter are, I think, fully indicated in the foregoing considerations and do not require to be set forth seriatim. In order that there may be no possibility of misunderstanding the effect of the opinions which I have expressed herein, I answer your fourth question, in view of the facts before me, categorically in the negative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Inspector of Animals — City of Lowell — Approval of Appointment.

The appointment of an inspector of animals for the city of Lowell under St. 1921, c. 383, §§ 20-23, is subject to the approval of the Director of Animal Industry.

Nov. 3, 1927.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You have requested my opinion relative to an interpretation of the provisions of St. 1921, c. 383, §§ 20 and 22, which you suggest are in conflict with G. L., c. 129, §§ 15 and 16, concerning the appointment of an inspector of animals for the city of Lowell.

I am of the opinion that there is not such repugnancy between the statute of 1921 and G. L., c. 129, §§ 15, 16, 17 and 18, as works an implied repeal of all of such sections or renders them entirely inapplicable to the city of Lowell.

The statute of 1921 is special in its nature and limited to the city of Lowell, but is cumulative or auxiliary to the above provisions of the General Laws as they affect the appointment of inspectors of animals under the said sections, rather than contrary and opposed to them, in the main. St. 1921, c. 383, § 20, provides that in the city of Lowell there shall be certain administrative officers, among whom shall be an inspector of animals, and by section 22 it is provided that the inspector of animals, among others of such officers, shall be nominated by the mayor, subject to confirmation by a majority vote of all the members of the city council, for the term of two years, the first term to begin the first Monday of January, 1922. I am advised in the communication which you forwarded that such nominations to the office of inspector of animals have been duly made at regular intervals of two years since January 1, 1922, and that the present incumbent of the office of inspector of animals for the city of Lowell was so appointed in January, 1926.

While it is true that the precise mode and manner by which the mayor of Lowell is to nominate an inspector of animals differ in detail from the general provision relative to other cities (G. L., c. 129, § 15), both as to date and as to the length of the term of the office, and confirmation by the city council of such nomination, yet such differences as exist do not appear to be material variations from the procedure outlined in G. L., c. 129, § 15. In any event, the mayor's act with relation to the inspector is treated as a nomination in the newer statute as in the older, and such nomination is spoken of as confirmed by the city council; yet it would seem that even after the council has acted upon the mayor's nomination there has not yet been an appointment, and G. L., c. 129, provides that the appointment is subject to the approval of the Director of Animal Industry. Because the Legislature has changed the mode of nominating the officer it does not follow that the statute shows a legislative intent to remove the final approval from the Commonwealth's own official. St. 1921, c. 383, does not create a new office of inspector of animals. It merely provides for his appointment, with a possible enlargement of his duties, but the inspector is still subject to the orders and directions of the Director of Animal Industry (G. L., c. 129, § 18), and other duties to be presumed under G. L., c. 129, rest upon him. His work appears to be an integral part of an orderly scheme laid out by the Commonwealth, under the control of the Director. It is hardly to be supposed, without the use of explicit words indicating such an intention, that the Legislature intended

to make inapplicable to this official the existing requirement of approval by the Director of Animal Industry, under whom his work is largely to be carried on and to whom his duties require him to be responsible as well as to the city. It cannot well be said that the enactment of the statute of 1921, silent as to repeal of any general laws, was intended by the Legislature to make inapplicable to the inspector of animals in Lowell the provisions of G. L., c. 129, §§ 16, 17, 18, 19 and 24, or the vital provisions of section 15 for the approval of his nomination by the Director, the latter requirement being in no sense inconsistent with the powers of nomination and confirmation thereof given by the statute of 1921 to the mayor and council.

In *Brooks v. Fitchburg & Leominster St. Ry. Co.*, 200 Mass. 8, it was stated by Rugg, J.:

"The principle of interpretation is well established, that statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both, unless there be some positive repugnancy between them."

And see, also, III Op. Atty. Gen. 296; 593.

Accordingly, I am of the opinion that the statute of 1921 has not repealed or altered, as far as the city of Lowell is concerned, the provisions of G. L., c. 129, § 15, except in so far as the manner and date of choosing the inspector of animals and the time of reporting the choice is necessarily varied, and that the other provisions of section 15 apply; that the name of the city appointee to the office of inspector of animals should be made known to you by the mayor of Lowell before the first of April in the year in which he is nominated, with the address and occupation of such inspector; that his nomination does not become effective as an appointment until approved by the Director of Animal Industry; and that if more than one inspector is nominated and appointed one must be a registered veterinary surgeon.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Director of Accounts — County Accounts — Expenditures.

Postdating a voucher for the purpose of confirming an account of a county treasurer in its representation as an item of expenditure for a current year renders such account so incorrect that the Director of Accounts may refuse to certify it under G. L., c. 35, § 44, as amended.

A county treasurer's account which contains an item of expenditure in excess of \$800, not made in compliance with G. L., c. 34, § 17, as amended, may not properly be certified by the Director of Accounts.

Nov. 4, 1927.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR: — You request my opinion as to whether, under the provisions of G. L., c. 35, § 44, the Director of Accounts may rightly decline to certify, and may rightly notify the Attorney General of, an account in certain county accounts for allowance of payment, out of appropriations for the current year, of expenditures actually incurred in a preceding year for requirements of said year, though the voucher accompanying such account confirms and sustains on its face the representation of the account, that the indebtedness is one incurred in and for the current year, and corresponds in every detail of its items with detail of the items of the account, and states such details sufficiently.

G. L., c. 35, § 44, as amended by St. 1921, c. 486, § 2, provides, in part, as follows:—

“The director of accounts . . . shall . . . examine the books and accounts of each county treasurer and all original vouchers . . . , and if the same are correct, and if the accounts are accompanied by sufficient vouchers stating in detail the items thereof, and if such vouchers confirm and sustain the same, . . . he shall so certify on the treasurer’s cash book. . . . If such accounts are incorrect or not accompanied by sufficient vouchers, the director shall, unless the irregularity is promptly rectified, notify in writing the . . . attorney general.”

In my opinion, the word “correct” in the foregoing provisions, descriptive of the character of the books, accounts and vouchers, as to which the Director is authorized to certify, is not restricted to a description of such books, accounts and vouchers as that of being correct in the sense of sufficient itemization in each and of complete accuracy in correspondence of one with another as to such itemization. Postdating a voucher for the purpose of confirming and sustaining an account in its representation as an item of expenditure incurred in and for the current year, which in fact is an expenditure for the requirements of a preceding year, is contrary to the general purposes of the statutes regulating county finances with respect to their purposed regulation for orderly and accurate allocation of expenditure, and such accounts appearing in books, accounts and vouchers, though correct in the sense that they are in accurate correspondence with and in confirmation and sustinment of one another, are not “correct” in the sense that they are accurate and true accounts of the facts which they purport to represent.

You are advised, therefore, that the Director of Accounts may rightly decline to certify such an account as “correct” unless such irregularity is rectified.

You also request my opinion as to whether, under the provisions of G. L., c. 34, § 17, as amended by St. 1922, c. 383, requiring the advertising of certain contracts by the county commissioners for the purchase of supplies in excess of \$800, and under the provisions of G. L., c. 35, § 44, as amended by St. 1921, c. 486, § 2, authorizing the Director of Accounts to certify accounts “if in case of all payments in excess of eight hundred dollars section seventeen of chapter thirty-four has been complied with,” an item for the allowance of payment of a bill of \$1,160 for printing of booklets entitled “Fees, Forms and Rules,” contracted for by a register of probate without having been advertised, is a proper item for certification by the Director of Accounts.

G. L., c. 34, § 17, as amended by St. 1922, c. 383, is, in part, as follows:—

“All contracts exceeding eight hundred dollars in amount made by the (county) commissioners for building, altering, furnishing or repairing public buildings, or for the construction or repair of public works, or for the purchase of supplies, . . . shall be made after notice inviting bids therefor has been posted . . . and has been advertised . . . No contract made in violation of this section shall be valid against the county, and no payment thereunder shall be made.”

The booklet is entitled “Fees, Forms and Rules,” and pertains to probate court practice. My attention has not been directed to any statutory provision authorizing incurrence by a register of probate of any indebtedness through contract for labor or materials chargeable to a county.

The provisions of G. L., c. 34, relating to the general powers of county commissioners, of G. L., c. 35, relating to county finances, of G. L., c. 215, §§ 30-56, relating to probate courts and to duties of county commissioners with respect to such courts, and of G. L., c. 217, relating to the powers and duties of registers of probate, indicate that indebtedness of a county for and in behalf of the probate court for the county, through contracts, shall be incurred by or on approval of the county commissioners.

Under the provisions of G. L., c. 34, § 17, a county indebtedness in excess of \$800, if arising by reason of a contract by the county commissioners for the purchase of supplies, may not be paid unless such contract is advertised. Though all the other types of contract enumerated in the statute, to which its provisions are applicable, relate to public buildings and public works of the county, with respect to construction, alteration, furnishing and repair thereof, in my opinion the word "supplies" is not thereby restricted to a designation of a contract only for supplies for alteration, furnishing and repair of public buildings, but comprehends all supplies which county commissioners are authorized to provide as incidental to the orderly transaction of probate court proceedings, of which a printed publication for information of the public as to rules, fees and forms of such court may be one.

G. L., c. 35, § 44, provides, in part, as follows:—

"The director of accounts . . . shall examine the . . . accounts of each county treasurer, . . . and if in case of all payments in excess of eight hundred dollars section seventeen of chapter thirty-four has been complied with, he shall so certify on the treasurer's cash book."

These provisions are applicable to all payments in excess of \$800 appearing on the books of a county treasurer, and require that as to every payment in excess of \$800 the provisions of G. L., c. 34, § 17, must be complied with as a condition precedent to certification thereof by the Director of Accounts.

As the account about which you inquire is for allowance of a payment in excess of \$800 and a payment for supplies for a county, furnished under the terms of a contract, and as the register of probate was without authority to make such a contract, apart from any action of the county commissioners thereon, and as the provisions of G. L., c. 34, § 17, were not complied with, in that the contract for such supplies, if interpretable as a contract of the commissioners, was not advertised by the county commissioners, you are advised that said account is not a proper one for certification by the Director of Accounts.

Yours very truly,

ARTHUR K. READING, *Attorney General.*

Department of Public Health — Inspection of Milk — Interstate Commerce.

An entry into a railroad car for the purpose of taking samples of milk therein may not be made by an inspector of the Department of Public Health if such car is in the control of a carrier who has operated it for the purpose of an interstate shipment of the milk, even if such car be at or near the consignee's unloading platform.

Nov. 10, 1927.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR:— You have asked my opinion as to "the rights of the inspectors" of the Department of Public Health "to enter milk cars on

railroads in this State and take samples of milk consigned to persons engaged in the milk business in this State."

My answer to your question is that your inspectors may enter milk cars on railroads for the purpose of taking samples of milk only when the milk is not being carried as a subject of interstate commerce.

G. L., c. 94, § 35, authorizes an entry, for the purpose of taking samples, into vehicles used for the conveyance of milk, but in the last sentence of said section it is specifically provided that "this section shall not apply to milk in the course of interstate commerce." The phrase "in the course of interstate commerce," as used in the instant statute, indicates a period covering at least the time between the consignment of the commodity to a carrier for interstate shipment and its delivery at the point of destination to the consignee. The time when the delivery to the consignee is made is to be determined in any given instance by a consideration of all the facts in relation thereto. As a general proposition, milk is "in the course of interstate commerce," within the meaning of the statute, when it is in a railroad car of the interstate carrier, over which such carrier still properly retains control through its servants, even though the car be at or near the consignee's establishment or his unloading platform. It is possible that there may be such a delivery of the loaded car to the consignee at his private platform, with such a complete abandonment and surrender of the control thereof by the carrier, as will constitute a termination of the course of interstate commerce, but until there has been such an abandonment of control of the car it cannot be said that final delivery to the consignee, which would break the course of interstate commerce with relation to the milk, has taken place until the commodity has at least been unloaded.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Board of Dental Examiners — Practice of Dentistry — Registration — Married Woman.

Only dentists practicing within the Commonwealth are required to pay an annual license.

The power of the Board of Dental Examiners to revoke, cancel or suspend a certificate of registration is limited by G. L., c. 112, § 61, as amended.

A woman dentist who marries must obtain a certificate in her married name.

Nov. 16, 1927.

Mr. W. F. CRAIG, *Director of Registration*:

DEAR SIR:— You have asked my opinion upon the following questions:—

"1. Would St. 1927, c. 147, require dentists who are registered in Massachusetts but practicing dentistry in another State to register annually in Massachusetts and pay a fee, in order to maintain their standing as legally authorized practitioners of dentistry in Massachusetts? Should dentists who are registered in Massachusetts but practicing dentistry in the army or navy and regularly enlisted in the United States service, be required to register annually with and pay a fee to the Massachusetts Board of Dental Examiners in order to maintain their standing as legally authorized practitioners of dentistry of Massachusetts?"

2. What action, if any, should the Board of Dental Examiners take with dentists who are convicted of a misdemeanor by the courts and pay the penalty of their crime? Has the Board the power to penalize them further by suspension or revocation of their licenses to practice dentistry?

3. Is it necessary for duly registered women dentists of Massachusetts who marry to have new certificates engrossed in their married name in order legally to practice dentistry in Massachusetts?"

1. St. 1927, c. 147, amending G. L., c. 112, § 44, is as follows: —

"Every registered dentist when he begins practice, either by himself or associated with or in the employ of another, shall forthwith notify the board of his office address or addresses, and every registered dentist practicing as aforesaid shall annually, before April first, pay to the board a license fee of two dollars. Every registered dentist shall also promptly notify the board of any change in his office address or addresses and shall furnish such other information as the board may require. The board may suspend the authority of any registered dentist to practice dentistry for failure to comply with any of the foregoing requirements. The board shall publish annually complete lists of the names and office addresses of all dentists registered and practicing in the commonwealth, arranged alphabetically by name and also by the towns where their offices are situated. Every registered dentist shall exhibit his full name in plain readable letters in each office or room where his business is transacted."

This act requires that every registered dentist who is practicing by himself, or who is associated with or in the employ of another, shall annually pay to the Board a license fee of two dollars. I am of the opinion that this provision applies only to such dentists as are practicing within this Commonwealth. The act further provides that the Board shall publish annually a list of all registered dentists who are practicing in the Commonwealth, which provision indicates that it was the intention of the Legislature to limit the application of this section to such dentists. The duty to pay a license fee under this act is predicated upon actual practicing of dentistry, differing in this respect from certain other license fees which are due and payable regardless of whether the licensee actually is performing the work required to be licensed. I therefore answer the first part of your first question in the negative.

With reference to those registered dentists who are in the United States service practicing dentistry in the army or navy, I advise you that they are not required to pay the annual license fee unless they are engaged in private practice in this Commonwealth apart from their official duties in the army or navy.

2. With reference to your second question, the law in question is found in G. L., c. 112, § 61, as amended by St. 1921, c. 478, which is as follows: —

"Except as otherwise provided by law, each board of registration in the division of registration of the department of civil service and registration, after a hearing, may, by a majority vote of the whole board, suspend, revoke or cancel any certificate, registration, license or authority issued by it, if it appears to the board that the holder of such certificate, registration, license or authority, is insane, or is guilty of deceit, malpractice, gross misconduct in the practise of his profession, or of any offence against the laws of the commonwealth relating thereto. Any person whose certificate, registration, license or authority is suspended or revoked hereunder shall also be liable to such other punishment as

may be provided by law. The said boards may make such rules and regulations as they deem proper for the filing of charges and the conduct of hearings."

The above section applies to the Board of Dental Examiners, and clearly sets forth its duties and powers. Assuming that a case arises in which the Board, under the above statute, has the power to revoke, cancel or suspend, the exercise of this power in the particular case is a matter for the judgment and discretion of the Board. The Board may not suspend, revoke or cancel a certificate of registration for the reason that it appears to the Board that the holder thereof is guilty of an offense against the laws of the United States relating to the practice of his profession. It is confined solely to the reasons set forth in the act above cited. With reference to the particular cases mentioned in your letter, the Board may not act by reason of the violation of the Federal laws, but if it appears to the Board that either of the persons mentioned is guilty of deceit, malpractice or gross misconduct in the practice of his profession, it may suspend, revoke or cancel the certificate.

Under the act the Board clearly has the power to revoke, suspend or cancel if it appears to it that the holder of a certificate is guilty of an offense against the laws of the Commonwealth relating to the practice of his profession, but here also the exercise of this power in any given case lies within the sound discretion of the Board.

It is also to be noted that under the authority of St. 1927, c. 147, the Board may suspend the authority of any registered dentist to practice dentistry for failure to comply with certain provisions of that act.

3. The statutes applicable to your third question are as follows:—

G. L., c. 112, § 44, as amended, states, in part:—

"Every registered dentist shall also promptly notify the board of any change in his office address or addresses and shall furnish such other information as the board may require."

G. L., c. 112, § 45, provides:—

"In proof of this right the certificate or a duplicate shall be kept in his office in plain view of his patients, and, on application, shall be shown to any member or agent of the board."

G. L., c. 112, § 49, provides:—

"No person shall conduct a dental office under any name other than that of the dentist actually owning the practice, or a corporate name containing the name of such dentist."

G. L., c. 112, § 52, provides a penalty for any violation of the provisions of sections 43 to 53, inclusive, of said chapter for which no other penalty is provided.

The statutes above cited indicate clearly that the correct name of the dentist shall be exhibited in each office or room where his business is transacted, and that he shall keep in his office in plain view his certificate, or a duplicate, and shall show such certificate or duplicate to the Board on application. This necessarily implies that the certificate shall bear the correct legal name of the dentist, and it follows that a married woman who does not have a new certificate bearing her married name is violating section 45, for the reason that she has not a proper certificate in plain view of her patients and which she can show to the proper authorities.

Further, it is to be noted that a married woman violates section 44, as amended, unless she exhibits her correct name in her offices; she also violates section 49 if she conducts a dental office under any name other than her correct name. I therefore answer your third question in the affirmative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Civil Service — Agent of Soldiers' and Sailors' Relief of Fall River — Officer.

The agent of soldiers' and sailors' relief of Fall River is not the head of a "principal department" nor an "officer" within the meaning of G. L., c. 31, § 5, as amended.

Nov. 25, 1927.

Hon. PATRICK J. McMAHON, *Acting Commissioner of Civil Service*.

DEAR SIR:— You request my opinion as to whether the agent of soldiers' and sailors' relief of Fall River is the head of a principal department within the meaning of G. L., c. 31, § 5, as amended by St. 1923, c. 130.

The following facts appear as to the position: The duties of the agent are not fixed by charter or ordinance and there is no department of soldiers' and sailors' relief in the list of departments and officers created by the charter and ordinances of the city of Fall River. The affairs of the soldiers' and sailors' relief are administered by a committee of the board of aldermen in that city, to whom the agent reports his activities. The committee in turn reports to the full board of aldermen. The duties of the agent are to investigate and report upon cases within the field of soldiers' and sailors' relief. The agent deals with no officer of the city government except the chairman of the committee of the board of aldermen referred to above, and has himself no authority to disburse cash relief, which is paid by the city treasurer only on the order of the board of aldermen. He has authority to give orders for fuel, groceries and other necessities, subject to later ratification by the board of aldermen, which ratification has always been given. The only written instructions given to the agent in the performance of his duties are those contained in pamphlets issued by the Division of State Aid and Pensions. The agent, as a matter of practice, receives no instructions directly from the mayor of the city, either orally or in writing. An assistant to the agent has been appointed, who deals only with the agent, but who, because of the division of work between the agent and assistant, receives no directions or orders from the agent.

In view of the fact that there is no department of soldiers' and sailors' relief provided for in the charter or ordinances of the city of Fall River, it cannot be said that the agent of soldiers' and sailors' relief is the head of a department of the city. *A fortiori* it cannot be said that he is the head of a principal department within the meaning of the provisions of G. L., c. 31, § 5, as amended by St. 1923, c. 130, which reads as follows:—

"No rule made by the board shall apply to the selection or appointment of any of the following:

Judicial officers; officers elected by the people or, except as otherwise expressly provided in this chapter, by a city council; officers whose ap-

pointment is subject to confirmation by the executive council, or by the city council of any city; officers whose appointment is subject to the approval of the governor and council; officers elected by either branch of the general court and the appointees of such officers; heads of principal departments of the commonwealth or of a city except as otherwise provided by the preceding section; directors of divisions authorized by law in the departments of the commonwealth; employees of the state treasurer appointed under section five of chapter ten, employees of the commissioner of banks, and of the treasurer and collector of taxes of any city; two employees of the city clerk of any city; public school teachers; secretaries and confidential stenographers of the governor, or of the mayor of any city; clerical employees in the registries of probate of all the counties; police and fire commissioners and chief marshals or chiefs of police and of fire departments, except as provided in section forty-nine; and such others as are by law exempt from the operation of this chapter."

This section of the statute has been construed recently by the Supreme Judicial Court in *Robertson v. Commissioner of Civil Service*, Mass. Adv. Sh. (1927) p. 963. The language of that case, at page 965, makes it abundantly certain that only the positions of heads of departments which are clearly designated as principal departments by the charter and possibly by the ordinances of a city can be considered heads of principal departments within the meaning of the statute. The nature of the duties of the agent also strengthens the view that the incumbent of the position cannot be described as the head of a principal department.

I must therefore advise you that the position of agent of soldiers' and sailors' relief is not that of the head of a principal department. I am also of the opinion, upon the authority of the *Robertson* case above cited, that the incumbent of the position, in view of the nature of the duties of the position, is not an "officer" within the meaning of G. L., c. 31, § 5, as amended.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

INDEX TO OPINIONS.

	PAGE
Accounts, Director of; certification of expenditures by a county	156
Banking; co-operative banks; loans; shareholders	97
Trust companies; assessments	114
Beaver Dam Brook; Metropolitan District Commission; construction of statutes	139
Boston Elevated Railway Company; trustees; term of office	90
Broad Canal; repairs; Metropolitan District Commission	64
Civil service; laborer; retention in employment after conviction of sale of intoxicating liquor	36
Officer or head of a principal department; agent of soldiers' and sailors' relief of Fall River	162
Constitutional law; interstate commerce; quarantine on plants	69
Justices of the peace	146
Notaries public	146
Pardoning power of the Governor; insane person	122
Respite	77
County accounts; certification of expenditures by Director of Accounts	156
County commissioners; trustees of county tuberculosis hospital; compensation	147
Dental Examiners, Board of; examinations; graduates of dental colleges	80
Practice of dentistry; annual registration; married woman	159
Registration; legal age; revocation of license	91
Drainage district; assessments; recording	141
Eminent domain; removal of buildings from land taken; procedure	38
Right of access to land taken for park purposes; abutting owners	54
Firemen's relief; allowance to families of deceased firemen	105
Fisheries and Game, Director of; claims for damage done by wild deer	138
Hours of labor; Sunday employment in a paper mill	92
Illegitimate child; adoption; Commission on Probation	44
Legitimation; acknowledgment	141
Inspector of animals; city of Lowell; approval of appointment by Director of Animal Industry	155
Inspectors of slaughtering; registered veterinary surgeon; inspectors of animals	93
Insurance; adjusters of fire losses; solicitation of business	104
Deposit with the Treasurer and Receiver General; trust fund	124
Fraternal benefit society; distribution of surplus	152
Mutual liability company; by-laws; issuance of policies	47
Interstate commerce; inspection of milk	158
Justices of the peace; appointment; qualifications	146
Laborer in employ of the Commonwealth; retention in employment after conviction of sale of intoxicating liquor	36
Licenses; boxing matches and exhibitions	78
Master plumber; examination	102
Storage of gasoline; authority of State Fire Marshal to entertain appeal from decision of the board of license commissioners of Quincy	82
Structures in tidewater; Acushnet River	94
Land of the Commonwealth	56
Massachusetts Agricultural College; expenditure of funds from the Federal government	39
Master plumber; license; examination	102
Metropolitan District Commission; Charles River Basin; private canal; repairs	64

	PAGE
Motor vehicles; locomotives; steam shovel	89
Registration; partnership	128
Private charitable hospital	46
Steam road roller; storing of compressed air	150
Notaries public; appointment; qualifications	146
Parent and child; adoption; duty to support natural parent	130
Parole of prisoners; terms and conditions	49
Plumbers, State Examiners of; revocation of licenses	131
Powers of courts; referendum; excluded matters; appointment of assistant registers of probate	125
Public Health, Department of; inspection of milk; interstate commerce	158
Quarantine; typhoid carrier	51
Tests for water supply; trespass; damage	134
Reclamation districts; assessments; towns	75
Correction of error in assessment roll; State Reclamation Board	43
Referendum; excluded matters; powers of courts; appointment of assistant registers of probate	125
Reformatory for Women; sentence	132
Registers of probate; payment to Treasurer and Receiver General of fees collected	86
Secretary of the Commonwealth; ballot; question for voters	81
Schools; denial by town of request for transportation of school children; appeal to Department of Education	107
Payment for board of pupils in lieu of transportation	136
Special classes for children of retarded mental development	112
Textbooks and transportation for pupils attending private schools	149
Soldier; dishonorable discharge subsequent to the close of the World War	63
State Aid and Pensions, Commissioner of; soldiers' relief; widow; conflict of laws	85
State Boxing Commission; licenses; boxing matches and exhibitions	78
State employees; income tax assessors	109
Mechanics' and tradesmen's pay; permanent employees	62
State Fire Marshal; jurisdiction; storage of gasoline	82
State Highway; abandonment; title to land abandoned	34
Alteration; "cut-off" line	74
State Retirement Association; income tax assessors; State employees	109
Taxation; bank taxes; rate of taxation	120
Excise tax; corporate excess	72
Taxable gain; voting trust; stockholders	117
Teachers' Retirement Association; retirement fund; beneficiaries	73
Teacher of music; term of service in public schools	118
Tidewater, structures in; Acushnet River; licenses	94
Land of the Commonwealth; compensation for rights; licenses	56
Treasurer and Receiver General; collection of fees paid to registers of probate	86

RULES OF PRACTICE

IN INTERSTATE RENDITION.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:—

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(b) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to

the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1928



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1928

ATTORNEY GENERAL'S REPORT, NOV. 30, 1928

ERRATA

Page 9:

5th line from top of page,—figures 24 should be omitted.

3d ¶, 2d line,—\$1000 should read \$3000.

3d ¶, 3d line,—c. 256 should read c. 257.

3d ¶, 3d line,—St. 1924, c. 57, § 1,—should be included within the parentheses.

Page 10: 4th ¶, 2d line,—1921 should read 1922.

Page 14: 3d ¶, 9th line,—c. 185 should read c. 125.

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1928



The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 16, 1929.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1928.

Very respectfully,

JOSEPH E. WARNER,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL, State House.

Attorney General.

JOSEPH E. WARNER.¹

(ARTHUR K. READING.²)

Assistants.

FRANKLIN DELANO PUTNAM.

JOSEPH E. WARNER.³

ROGER CLAPP.

CHARLES F. LOVEJOY.

SAMUEL H. LEWIS.⁴

RALPH W. STEARNS.⁴

EMMA FALL SCHOFIELD.

GERALD J. CALLAHAN.

JAMES S. EASTHAM.

R. AMMI CUTTER.

VINCENT J. ZEO.⁵

EDWARD T. SIMONEAU.⁶

STEPHEN D. BACIGALUPO.⁶

GEORGE B. LOURIE.⁶

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

¹ Chosen by Legislature to fill vacancy June 13, 1928.

² Resigned June 6, 1928.

³ Sworn in as Attorney General June 14, 1928.

⁴ Resigned July 14, 1928.

⁵ Resigned July 21, 1928.

⁶ Appointed August 8, 1928.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1928	\$104,000 00
Appropriation for small claims	5,000 00
Publication of opinions of the Attorneys General	5,000 00
Supplemental appropriation	17,000 00

\$131,000 00

Expenditures.

For salary of Attorney General	\$7,822 21
For law library	590 38
For salaries of assistants	45,704 04
For clerks	10,528 50
For office stenographers	7,913 89
For telephone operator	1,228 00
For legal and special services	20,307 67
For office expenses and travel	5,034 39
For court expenses	2,136 88
For small claims	2,502 24
Publication of opinions	3,921 15

Total expenditures \$107,689 35

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 16, 1929.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my report.

The cases requiring the attention of this Department during the year ending November 30, 1928, to the number of 8,450 are tabulated below:

Corporate franchise tax cases	544	
Extradition and interstate rendition	298	
Grade crossings, petitions for abolition of	55	
Land Court petitions	101	
Land-damage cases arising from the taking of land:		
Department of Public Works	64	
Metropolitan District Commission	62	
Department of Mental Diseases	8	
Department of Conservation	1	
Department of Public Health	3	
Department of Correction	2	
Miscellaneous cases	957	
Petitions for instructions under inheritance tax laws	55	
Public charitable trusts	241	
Settlement cases for support of persons in State hospitals	57	
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	5,960	
Indictments for murder:		
Disposed of	30	
Now pending	12	42

CAPITAL CASES.

Bristol County. — In charge of District Attorney William C. Crossley:

Disposed of — Napoleon Pelletier and Elmer K. Pierce.

Pending — Henri LeBrun.

Essex County. — In charge of District Attorney William G. Clark:

Disposed of — James Kamanis and Vincent Laurette.

Pending — George Metaxatos and George Elmer Harrison Taylor.

Hampden County. — In charge of District Attorney Charles R. Clason:

Disposed of — Morris Levine.

Hampshire County. — In charge of District Attorney Charles Fairhurst:

Disposed of — Joseph Parent.

Middlesex County. — In charge of District Attorney Robert T. Bushnell.

Disposed of — Abraham M. Ali, Demosthenes Antonopoulos,
Paulo Baressi, Joseph Foster Buckley, Jerry Gedzium, Cos-
tantino Girardo, Herbert J. Gleason, Clarence R. Hogan,
Louis LaCedra, and Pierre Veilleux.

Pending — Frederick Hinman Knowlton, Jr.

Norfolk County. — In charge of District Attorney Winfield M. Wilbar:

Disposed of — Carmine F. Corbi, Stephen Hoppe, John Tartar,
Clement Teti, and Guiseppi Truglie.

Suffolk County. — In charge of District Attorney William J. Foley:

Disposed of — Alesandro Diotalevi, Joseph Greco, Whitfield
Lovell, William F. O'Donnell, Raoul S. Roberio, and Michael
Rocco.

Pending — Gangi Cero, Mary E. Fitzgibbons, Harry Lamb, Walter
Perry,¹ Antonio Selvitella, Charles Trippi, and Ung Hong
Yeu.

Worcester County. — In charge of District Attorney Charles B. Rugg:

Disposed of — Nathan Desatnick, Charles Graves, and Louis
Pasakinski.

Pending — John Kroll.¹

¹ Committed to State hospital.

I. THE ADMINISTRATION OF CRIMINAL JUSTICE SUPERVISED BY THE ATTORNEY GENERAL.

The entire burden of the suppression of crime may not be laid upon the judicial machinery of the Commonwealth. Suppression of crime has a multitude of angles, and the district attorney's office is immediately concerned with but a single one of them, namely, prosecution after commission.

The prevention of crime concerns itself with research as to the causes of crime, the bases of supply, the foment of the criminal class; the effect of heredity, environment, poverty, education, religious training, and, last but not least, the attitude of the community toward crime and the criminal. These are sociological fields.

Detection and apprehension of crime primarily lie with the police arm. The betterment and development of crime detection, through adoption of scientific methods, and of all apprehension service, through co-operation, lies with the police forces. In this respect the State and Metropolitan Police commendably exemplify progressive and constructive systematization. Efficiency of local municipal departments presumes a certain degree of sovereign unification, which local pride can ill afford to overlook, as the common need is that of a commonwealth.

Correction of crime and of the criminal is a penal problem. Schools of thought reach various conclusions as to modes of its accomplishment. One group contends that incarceration effects no reform; does not serve as a deterrent; that it is a barbaric survival of revenge, and, engendering an "anti-social" attitude, hardens the very offender. Another group contends that, without incarceration, there is little stigma; that mere money penalty ill suffices. Still another group contends that the criminal is merely mentally diseased and should be treated, and, possibly, restored to health through mental hospitalization. Still another group contends that inflexible severity yields the only suitable remedy as a stern and forbidding spectre against the commission of all crime. Another asserts that the greater the severity the less the likelihood of conviction by a jury. Still another group contends that there should be a Procrustean standardization of penal punishment applicable irrespective of condition or circumstance. In juxtaposition to this latter group still another contends that power of individualization by the court for tempering justice with mercy should be paramount and absolute.

I cite this diversity of opinion on the part of that element of the

public studiously inclined to offer a solution of this one aspect of crime suppression alone, while vociferous call is addressed to prosecuting officers to stamp out crime. It is apparent that results may not be obtained through casual or spasmodic opinions or isolated cases. Time alone, enabling legislation chastened by the wisdom of the most profound public sentiment, based upon intensive and comprehensive study of all phases, may effect cures harmonious to the body politic.

The present obstacle to speedy prosecution is the congestion of cases listed for trial. The Judicial Council, after mature deliberation, has submitted certain findings well worthy of consideration. In some of these recommendations I concur, to wit:

1. For the avoidance of delay in the execution of sentences in capital cases, by the saving of exceptions at hearings on motions for new trial and repeated recourse to the Supreme Judicial Court; the recommendation for the broadening of the functions of the Supreme Judicial Court on appeals so that it may pass upon the whole case, order new trial if interest of justice requires, and stay execution of any imposed sentence of death pending final determination of any judicial question. (3d Rep., p. 77.)

2. For the relief of congestion of jury trial cases of persons under indictment for crime, the recommendation for voluntary waiving by the accused of jury trial in other than capital cases. (1st Rep., p. 21.)

3. For the relief of congestion of criminal cases in the district courts, the recommendation for the elimination of court appearances of offenders in certain petty motor vehicle offenses. (4th Rep., p. 37.)

Recommendations of District Attorneys.

The recommendations of district attorneys, in which I concur, are as follows:

1. That duration of the provisions of St. 1923, c. 469, as amended by St. 1928, c. 353, for disposition of certain criminal cases by judges of district courts sitting in the Superior Court be extended to December 31, 1930.

2. That the cases, in the trial and disposition of which district court judges sitting in the Superior Court have powers and duties of the judges of the Superior Court, include all cases within the criminal jurisdiction of the district courts. St. 1923, c. 469, § 1, as amended by St. 1924, c. 485, § 1, restricts the jurisdiction of district court judges sitting in the Superior Court to "any misdemeanors except conspiracy or libel;" whereas G. L., c. 218, § 26, defining the original jurisdiction of the district court judges, includes "felonies punishable in the state

prison for not more than five years." It seems inconsistent to preclude a judge of the district court sitting in the Superior Court from jurisdiction of cases over which he has power to make final disposition in his own court concurrent with the Superior Court. As it is now, prosecutions for violation of G. L., c. 272, §§ 7, 14, 24, or proceedings for forfeiture, may not be had by district attorneys before district court judges sitting in the Superior Court.

3. That district court judges sitting in the Superior Court have power of the Superior Court judges in all cases of forfeiture.

District court judges sitting in the Superior Court now have power to decree forfeitures of the value of the property not exceeding \$1,000 (G. L., c. 256, §§ 3, 7; c. 218, § 19). There seems to be no good reason to preclude district court judges from hearing and disposing of all forfeitures, for the reason that such courts, hearing the violation of the law whereby property was seized, could make decisions appropriately as to the forfeitures regardless of the value.

4. That in recovery on recognizance district attorneys may sue and bid in real estate for the county.

5. That St. 1928, c. 333, relative to commitment of defective delinquents and drug addicts, be amended. This act, amending G. L., c. 123, § 113, as amended by St. 1921, c. 270, and St. 1922, c. 535, § 7, provides for application by a district attorney for commitment as a defective delinquent of a defendant committable to State prison, reformatory, etc., for any offense "not punishable by death or imprisonment for life." There are many offenses punishable by life imprisonment other than murder in the second degree. The district attorneys believe that the benefits of this chapter, if not extended to all offenses punishable by life imprisonment, should be extended to offenses other than murder in the second degree.

6. Abolishing the crime of accessory before the fact; that G. L., c. 274, §§ 2 and 3, be repealed, and that there be substituted therefor a short section making accessories before the fact triable and punishable as principal felons.

7. That the penalty for larceny be increased. The maximum penalty today for larceny of any sums in excess of \$100, whether \$101 or \$1,001, is five years in State Prison. There should be a heavier penalty for larceny of larger sums.

8. That in bail cases, where real estate is surety, a certificate be recorded in the registry of deeds creating a lien on the same.

9. That G. L., c. 12, be amended, enabling district attorneys to secure advance moneys for travel and expenses outside of the

State. Expedition in securing evidence and return of fugitives would thereby be facilitated.

10. That, in criminal cases, if no agreement is reached by a jury before nine o'clock in the evening, the court may permit suspension of deliberations and provide suitable accommodations for the jury for the night.

By reason of doubt as to jurisdiction in automobile cases, trial justices hold offenders for the grand jury, thus necessitating indictment and the loss of time of a district attorney for more important cases. Consideration of clarification of their jurisdiction by specific inclusion of automobile offenses is suggested.

A professional bondsman is defined in G. L., c. 276, § 61B (inserted by St. 1921, c. 465, § 2, amended by St. 1926, c. 340, § 1), as "any person becoming bail or surety in a criminal case after having become bail or surety in criminal cases on more than three separate occasions in any twelve months' period." Surety companies are excepted. A probation officer in the Superior Court or district court may come within this description. The appointment of probation officers as sureties for bail is of aid to the courts, as well as to the community, for control of persons pending trial and disposition. I recommend that probation officers be also excepted.

II. ADMINISTRATION OF CIVIL BUSINESS CONDUCTED BY THE ATTORNEY GENERAL.

Cases of Interest wherein the Attorney General appears for the Commonwealth.

A. CASES PENDING NOVEMBER 30, 1928.

(a) INTERSTATE CONTROVERSY.

Connecticut v. Massachusetts.

St. 1926, c. 375, and St. 1927, c. 321, authorized the diversion of a portion of the waters of the Swift and Ware rivers from the watershed of the Connecticut River for the purpose of providing a water supply for the Metropolitan District, and authorized the Metropolitan District Water Supply Commission, created thereby, to expend a sum not to exceed \$65,000,000.

The supply of good water for the city of Boston and surrounding communities is not adequate, and unless it is augmented a very serious and acute shortage will result in the near future. The effect of the diversion is to abstract from the Connecticut River watershed a small quantity of water which otherwise would flow into that river through our own Commonwealth and thence into Connecticut.

The State of Connecticut, alleging that the flow of the river will be so diminished by the diversion as to cause injury to that State and to the citizens thereof, instituted suit against this Commonwealth in the Supreme Court of the United States, seeking to enjoin the diversion. An answer was filed by this Commonwealth and the case is now pending in court.

Bentley W. Warren, Esq., was appointed Special Assistant Attorney General to conduct the case for the Commonwealth of Massachusetts, and is being assisted by two of the regular Assistant Attorneys General. The issues of law and of fact are complicated and detailed. It is sufficient, however, to state that the interests of this Commonwealth in this case are of the greatest consequence and are being carefully and fully protected.

(b) RATE CASES.

1. *Electric Light Rates.*

Rates for electric lighting as fixed by the Department of Public Utilities have been attacked as confiscatory. Sherman L. Whipple, Esq., was appointed a Special Assistant Attorney General to conduct the trial of these cases in support of the rates so fixed.

In the first of the cases, brought by the Worcester Electric Light Company, the evidence presented before a special master has been closed, and the case awaits the filing of his report.

In the second case, brought by the Cambridge Electric Light Company, hearings before a master are now in progress.

2. *Automobile Compulsory Insurance Rate Cases.*

Owing to the resignation of the Commissioner of Insurance on September 1, 1928, litigation resulted as to what, if any, rates for such insurance were to apply for the year 1929. Various proceedings were brought to try out this question and were argued on behalf of the Acting Commissioner of Insurance by this Department before the Full Bench of the Supreme Judicial Court. The decision of the court resulted in a set of rates being promulgated in November by the then Acting Commissioner. Various petitions for review of these rates as they have been established are now pending in the Supreme Judicial Court.

(c) BILLBOARD CASES.

The billboard litigation is a consolidation of various bills in equity brought by the General Outdoor Advertising Company, Inc., and nineteen other outdoor advertising companies in Massachusetts against the

Commissioners of Public Works. The case involving the Chevrolet sign on Beacon Hill was added to the billboard cases in 1927. These cases are being heard before a master, and the complainants' case has been practically completed. The record is assuming large proportions, there being to date 4,724 pages of transcript of evidence, with over 1,300 exhibits.

(d) TAX CASES.

There are now pending in the Supreme Judicial Court two important questions affecting taxation:

(1) Whether a receipt in full given by the Commissioner of Corporations and Taxation prevents the Commissioner from later making an additional assessment where the net estate of a Massachusetts decedent is increased, due to a rebate of a Federal estate tax previously allowed as a deduction by the Commissioner in computing the Massachusetts inheritance tax; and

(2) The constitutionality of the Massachusetts succession tax in its application to a trust *inter vivos*, executed before the enactment of the taxing statute, where the trust is to take effect in possession or enjoyment after death.

B. CASES DECIDED DURING THE YEAR.

1. IN THE SUPREME COURT OF THE UNITED STATES.

(a) *Tax Cases.*

During the past year the Supreme Court of the United States has on three occasions considered questions argued by this Department involving the constitutionality of tax statutes of this Commonwealth or of the application of those statutes in particular instances.

In *Saltonstall v. Saltonstall*, decided February 20, 1928, the Supreme Court affirmed the decision of the Supreme Judicial Court of Massachusetts reported in 256 Mass. 519, wherein it was held that the tax authorized by the Massachusetts legacy tax statute is an excise tax upon the privilege enjoyed by the beneficiary of succeeding to the possession and enjoyment of property, and that the tax could be imposed upon an interest accruing to beneficiaries after the enactment of the tax statute upon an interest created by a revocable trust indenture executed prior to the passage of the tax statute.

Long v. Rockwood, decided May 14, 1928, affirmed the decision of the Supreme Judicial Court in the case of *Rockwood v. Commissioner of Corporations*, 257 Mass. 572. In that case the Commissioner of Corporations and Taxation had taxed income in the nature of patent

royalties received by the complainant, a resident of the Commonwealth. The complainant paid the tax and successfully sued to recover it, contending that income received in the form of royalties for the use of patents issued to him by the United States was not taxable inasmuch as it was income from a Federal instrumentality. Four justices dissented.

National Leather Co. v. Massachusetts, decided May 28, 1928, upheld an excise tax assessed, under the provisions of G. L., c. 63, upon a foreign corporation for the privilege of carrying on business in Massachusetts, and held that the Commissioner of Corporations and Taxation properly included, in computing the "corporate excess employed within the Commonwealth" certain shares owned by the taxpayer corporation in other foreign corporations also doing business in Massachusetts. As a result of this favorable decision the validity of a very large number of taxes under the present corporation excise statute has been assured.

2. IN THE SUPREME JUDICIAL COURT.

(a) *Tax Cases.*

There have also been several important tax decisions rendered by the Supreme Judicial Court. The provisions of our income tax law with respect to the taxation of certain dividends in liquidation of foreign corporations were construed favorably to the contentions of the Commonwealth in *Boston Safe Deposit & Trust Co. v. Commissioner of Corporations and Taxation*, 262 Mass. 1.

In *Whipple v. Commissioner of Corporations and Taxation*, it was held that, upon the facts set forth in that case, losses incurred in the operation of a farm, conducted in a manner found by the trial court to be businesslike, might be deducted from business income under the Massachusetts income tax statute (G. L., c. 62, §§ 5, 6).

The case of *Macallen Co. v. Commonwealth* upheld the validity of the net income measure of the corporate excise imposed under G. L., c. 63, § 32 and § 30 (as amended by St. 1925, c. 353, § 1A). Under that act income received by domestic corporations from Federal government bonds is included as a portion of the gross income of such corporations for the purpose of computing net income within the meaning of the act. This holding that the 1925 amendment of our corporation excise statute is constitutional will, if upheld by the Supreme Court of the United States, result in continuing the more equitable distribution of the burden of the corporation excise intended when that amendment was passed. An appeal has been taken by the taxpayer to the

Supreme Court of the United States, which will probably be argued some time in the spring.

The validity of the minimum excise tax upon domestic business corporations whose profits are derived principally from the manufacture, ownership, or use of real estate or tangible personal property, was upheld by the Supreme Judicial Court in *Essex Theatres Co. v. Commonwealth*.

(b) *The "Padlock" Case.*

Under the provisions of St. 1928, c. 125, equity proceedings, seeking to close certain premises by permanent injunction, were initiated in the Superior Court for Middlesex County. The district attorney for the Northern District, Mr. Bushnell, with commendable energy, proceeded to take advantage of the provisions of this new act shortly after it became effective, but, before the hearing could be had, the owner of the premises, which the district attorney sought to close, filed a petition for a writ of prohibition, seeking to prevent the Justices of the Superior Court from hearing the petitions on the ground that St. 1928, c. 185, was unconstitutional. The Department appeared for the Justices. On dismissal of the petition, the owner of the premises took the case to the Full Bench of the Supreme Judicial Court upon a bill of exceptions. The exceptions were overruled, the court holding that the statute was in all respects constitutional. *Reale v. Judges of the Superior Court*, Mass. Adv. Sh. (1928) 1917.

A decision upholding the constitutionality of the Padlock Law so soon after its passage is exceedingly helpful. It makes the application of the law easier and tends to prevent frivolous appeals on constitutional grounds.

At page 1921, however, Mr. Justice Pierce uses the following language:

One part of a building may be used in such manner as to make it a nuisance without affecting the legal character of the other part. *Commonwealth v. Donovan*, 16 Gray, 18. A legal variance would result if an indictment charged the keeping of a certain building for the illegal sale and illegal keeping of intoxicating liquor, if the proof was that one of several tenants in the same building occupied and kept that tenement for that purpose. *Commonwealth v. McCaughey*, 9 Gray, 296. And a like rule is applicable to proceedings under said § 16A.

From this and other language of the court, it is arguable that section 16A authorizes a judge sitting in equity to "padlock" only such portions of a building as may be shown to be used for the sale of intoxicating liquor, if the evidence does not go to the extent of proving either (a) that the whole building was used and occupied by the person main-

taining the nuisance, or (b) that the whole building constituted a nuisance because all of it was used for the sale of intoxicating liquor; and that, consequently, though one portion of the building be padlocked, the keeper of the nuisance may at once proceed to use another portion of the building for illegal purposes. Without passing on the question whether such a narrow construction of section 16A would be taken by a court, the act might appropriately be amended in order that no doubt may exist as to power of the court.

III. DEPARTMENTAL SERVICES.

1. Settlement of Small Claims against the Commonwealth.

Since the period covered by my predecessor's last annual report 28 claims have been presented against the Commonwealth under St. 1924, c. 395.

18 were approved, with a total expenditure of \$2,045.

3 were referred to the Legislature under the terms of the statute.

4 were rejected.

2 were withdrawn by the claimants.

1 is still pending.

Sixty per cent of these claims was for damages occasioned by the operation of State automobiles.

2. Petitions for Abolition of Grade Crossings.

The State, the city or town, and the railroad company are jointly interested in the abolition of the grade crossing, — menace to life and limb and thief of time. The burden of expense is borne only in part by the railroad and by the locality, 10 to 30 per cent coming from the State.

Today an abolition is a local problem, and its success is dependent upon local zeal irrespective of the part it plays in the general scheme, either from the standpoint of traffic or the burden of general taxation. Plans, both old and new, are being projected, now that the effect of war conditions upon finance of the railroads — primary cause for deferring action — is diminishing. Of the \$5,000,000 authorized to be expended by the Commonwealth for the abolition of grade crossings under the provisions of St. 1906, c. 463, § 42, approximately only \$435,000 is unapplied and available for projects already initiated or proposed. The broad provisions for comprehensive survey by the Department of Public Works for State highway construction worked successfully.

It might be well to have each proposition of abolition submitted to the Department of Public Works as well as to the Department of Public Utilities for its report or approval, so that it may square with a general scheme of development for the general benefit.

3. Interstate Rendition and Extradition.

After the Governor of this Commonwealth has granted the request of a Governor of another State for the rendition of an alleged fugitive from justice, and has issued a warrant calling for such rendition, it occasionally happens that, solely for the purpose of delaying the trial of the criminal prosecution for which the fugitive is wanted in another State, a petition for a writ of habeas corpus is filed by the alleged fugitive in the Supreme Judicial Court raising issues of fact and law which have already been carefully considered by the Governor or by this Department under the authority of G. L., c. 276, § 12. A hearing upon such a writ may be had with reasonable promptness before a single justice of the Supreme Judicial Court. If, however, the case is taken to the Full Court upon report or for review in some other manner, a very considerable time may elapse before the Full Court renders its opinion. Inasmuch as a Federal question is frequently involved in such cases, resort may be had, even after the opinion of the Full Court, either to the Supreme Court of the United States by appeal, or by the filing of another writ of habeas corpus in the Federal District Court. It thus may happen that an undue time may pass between the arrest of the fugitive and his rendition to a sister State seeking to prosecute him for some serious offense within that jurisdiction. In my opinion, provision should be made by amendment of G. L., c. 276, § 14, and by amendment of the pertinent sections of G. L., c. 248, so that review of the decision of the single justice as to whether or not a writ of habeas corpus should be granted should be given by the Full Court more expeditiously than is possible at present. One method of expediting such hearings before the Full Court would permit argument of report or exceptions upon typed record in manner similar to that now provided for capital cases and other felonies by St. 1925, c. 279, and St. 1926, c. 329. In any event, provision should be made for the advancement of such cases upon the docket of the Full Court on the same basis as criminal appeals. The Supreme Judicial Court, in the absence of such provision in the statutes, has on at least one occasion made an order advancing such a case as a matter of discretion.

Presumably a fugitive will receive a fair trial before a properly con-

stituted judicial body in the demanding State, and that trial, in the interest of justice, should not be delayed unduly by dilatory proceedings in the courts of this Commonwealth.

I suggest that this matter be referred to the Judicial Council for consideration and recommendation.

4. Matters Concerning Public Administration.

During the past year the Department has kept in close touch with public administrators handling estates throughout the Commonwealth, in which estates this Department might, either on its own account or on behalf of the Treasurer and Receiver General, have an interest by way of possible escheat of the assets of the estate, or otherwise.

These administrators are frequently placed in the position of passing upon claims against the estate made by persons who have referred the estate for administration to the public administrator. Perhaps a system of rotation could be worked out, involving reference by the court of estates to administrators, assuring all administrators in a county of an equal share and relieving them from embarrassment in passing on claims presented against an estate by the very person giving them the case. The situation is one difficult to reach directly by legislation. Regulation may be effected through extension of rule-making powers of the Probate Court.

There is some evidence of a growing practice by attorneys, other than public administrators, of conducting searches for heirs in large estates in which administration has already been taken out by public administrators. Upon the discovery of heirs, or alleged heirs, the attorney conducting this search then petitions, in his own name or in the name of some nominee, for administration in behalf of the alleged heirs. Under the present statute (G. L., c. 194, § 7) no notice need be given to the public administrator who has already been appointed, to the Treasurer and Receiver General, or to the Attorney General, all of whom are certainly persons interested, for one reason or another, in the administration of the estate.

I recommend that notice of petitions by alleged heirs to the public administrator concerned and to the Treasurer and Receiver General be required, and that it be made discretionary with the Probate Court to permit the public administrator already handling the estate to continue to do so if such continuance of service would best meet the public interest and the welfare of the estate.

The alleged heirs in such instances are almost invariably persons of small means, frequently residing abroad and ignorant of our laws.

Upon giving some Massachusetts attorney a power of attorney to handle the administration for them, they usually are not aware of the fact that taking the administration out of the hands of the public administrator will result in financial loss to them. Usually there is no gain to the public or to the alleged heir in having the estate removed from the hands of the public administrator. The gentlemen now occupying the positions of public administrators throughout the Commonwealth are fitted to handle these estates to the advantage of all concerned, and may well be permitted, subject to judicial discretion, to complete the administration of estates in which they have been appointed as fiduciaries where the interest of the state and of the public will be thereby served. Moreover, the authenticity of some such claims of heirship is exceedingly doubtful. I suggest a provision calling for investigation by the public administrator of all claims in which the probate court may find there is reasonable cause to believe that the claimant is not in fact an heir of the decedent. To prevent fraudulent claims of heirship by non-residents in cases where public administration has not been taken out prior to the bringing of a petition in behalf of the alleged heirs, provision should be made for notice in writing to the Treasurer and Receiver General of the pendency of all petitions for administration brought by an alleged widow, surviving husband or next of kin not resident within the Commonwealth.

5. Supervision of Charitable Trusts.

This has involved the examination of all petitions in Massachusetts courts relative to the application of the *cy-pres* doctrine to charitable bequests; of all petitions by charities for permission to sell property subject to a trust; to dissolve and transfer assets to another corporation upon the same charitable purposes; examination of accounts of trustees; rendition of assistance to the court in the matter of appointment of new trustees for charitable purposes; participation in litigation affecting any bequests to Massachusetts charities.

6. Proceedings in the Nature of Quo Warranto.

Of the many petitions the one affecting the greatest number of persons was that brought at the relation of the Acting Commissioner of Insurance under the provisions of G. L., c. 175, § 6, as amended, against the Car Owners Mutual Liability Insurance Company, as to which the Acting Commissioner was satisfied that its condition was one of insolvency. The matter was promptly heard in the Supreme Judicial Court,

and after a report by a master a permanent injunction was issued restraining the company from doing business, and receivers were appointed to settle its affairs and to protect the interests of its 40,000 policy holders and of its numerous creditors.

7. Appearance in Industrial Accident Cases and Approval of Contracts and Titles.

The Department has represented the Commonwealth at 21 hearings before the Industrial Accident Board and at 8 conferences in cases arising under the Workmen's Compensation Act (G. L., c. 152), providing for compensation to laborers, workmen and mechanics, as well as foremen, subforemen and inspectors, employed by the Commonwealth, who receive personal injuries arising out of and in the course of their employment.

The Department also prepared or passed upon 461 contracts as to form; and 25 leases, 3 easements and 115 deeds as to legal form and title.

Of proceedings against the Commonwealth under the provisions of G. L., c. 258, there are pending 15 in contract.

8. Special Reports to the Legislature.

AS TO RELEASE BY THE COMMONWEALTH OF RESTRICTIONS ON NEWBURY STREET, BOSTON.

Of several reports rendered by the Department, that most immediately affecting the Commonwealth relates to the advisability of a release by the Commonwealth of its interest in certain restrictions, which restrictions might tend to prevent the widening by the city of Boston of Newbury Street. A public hearing was held thereon, and after due consideration, this Department recommended that no steps be taken by the Commonwealth at this time to release its interests in such restrictions. The Back Bay district, as laid out by the Commonwealth of Massachusetts in about 1850, was originally intended as a highly desirable residential district, and any move at this time on the part of the Commonwealth which would in any way detract from the desirability of that district for such purposes is deemed unwise and ill-timed.

9. Opinions of the Attorney General.

Opinions which may be of interest are annexed to the Report.

10. Federal Relations.

The Act of Congress of March 28, 1928, declared that "the people of all the zones," established by the Radio Act of 1927, "are entitled to equality of radio broadcasting service," and directed the Federal Radio Commission to make "a fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within each zone, according to population." The Attorney General appeared before the Commission at Washington in opposition to an assignment of reduced wave length to station WNAC, which assignment, by reason of practical loss of service of such station through reduction, appeared to be discriminatory to the people and to the State. The Attorney General co-operated with the Attorney General of New York in opposition to an assignment of curtailed operating time to station WGY in New York State, serving the people of our western counties.

IV. GENERAL OBSERVATIONS.

1. Authority of the Attorney General to Settle Cases.

I recommend that legislation be enacted empowering the Attorney General to settle all cases actually entered in court upon whatever terms may seem to him most advantageous to the Commonwealth. Considerable doubt exists at present as to the extent of his authority in this respect.

2. Fixation of Definite Time for Enforcing Claims for Labor and Materials on Public Works Constructed by the Commonwealth and by Counties, Cities and Towns, and Harmonization of Law relating to Claims for Labor and Materials on Public Works Constructed by Counties, Cities and Towns, with that of the Commonwealth.

In order to prevent the tying up of money of the contractor held by the Commonwealth, and because of the inability of the Commonwealth to close its accounts as a result of non-enforcement of claims filed by claimants, and in order to prevent similar consequences to counties, cities and towns from non-enforcement of claims against contracts, I recommend an amendment to G. L., c. 30, § 39, as amended by St. 1922, c. 416 (relating to the filing of claims against contracts for public works being constructed or repaired by the Commonwealth), and an amendment to G. L., c. 149, § 29 (relating to the filing of claims against public works contracts of counties, cities and towns), so that a definite time (six months) may be stipulated within which the claimants must bring a petition in equity to enforce their claims or intervene in a peti-

tion already filed. G. L., c. 30, § 39, also provides that claimants shall file claims within sixty days after "the completion of the work," whereas G. L., c. 149, § 29, provides that claimants shall file their claims within sixty days after "*the last day the claimant ceases to perform labor or to furnish labor and materials.*" I recommend that G. L., c. 30, § 39, be further so amended. St. 1922, c. 416, provided that claims may be filed for "*materials employed*" in the construction or repairing of public works as well as for "*materials used.*" There was, however, no similar amendment of G. L., c. 149, § 29, relating to claims filed under county, city or town contracts. I recommend, therefore, such an amendment.

3. Clarification and Unification of all Proceedings relating to Children and Domestic Relations.

As it is now, the district court, municipal court, superior civil court, superior criminal court and probate court may make findings and decrees relating to the same matters. A case of a neglected child is civil; the complaint against its parents, however, is criminal; and the adjudications, on appeal, may be contrary.

A woman deserted by her husband, needing separation or support for herself and her children, now alternates between the criminal courts and the probate court. I stress the urgency for unification of all domestic relation proceedings under a single jurisdiction.

I concur in the recommendation of the Judicial Council that private conversations between husband and wife in cases of domestic relations be admitted. (2d Rep., p. 116.)

Revision of statutes relating to or affecting the welfare and protection of children should be made. Provisions for social investigation of all petitions for adoption; for jurisdiction and supervision by the Department of Public Welfare of all illegitimate children for the establishment of paternity and obtainment of security for support; and supervision of certain others to sixteen years of age, might well be considered.

For the preparation of subsequent legislation, I recommend the appointment of a commission which shall make a thorough study of all these matters.

4. Clarification of Laws relating to Plumbing.

The provision of G. L., c. 142, dealing with the supervision of plumbing, give rise to controversy. They do not have general application throughout the entire Commonwealth. A new examination is manda-

tory on failure to apply for renewal of license on or before May 1. There is uncertainty as to the right of a corporation and partnership legally to engage in the plumbing business. The practice with respect to granting permits to master and journeymen plumbers in cities and towns is not uniform. I recommend study by such commission or board as the General Court may designate for report and recommendations.

5. Recording Automobile Conditional Sales to Avoid Futile Litigation.

I recommend that legislation be enacted requiring that conditional sales of motor vehicles be recorded with the registrar of motor vehicles. It is impossible at the present time to ascertain whether or not a motor vehicle is held on a conditional sale, and great inconvenience and considerable litigation result from disputes with reference to ownership, sales, attachments and liens. The expense in the handling of such recording would be small and could be amply covered by requiring a small recording fee. The result would be that any person interested could find in one central office information which would minimize to a very considerable degree unnecessary loss and litigation.

6. Penalty for Killing Fowl by Poison.

G. L., c. 131, § 58, as amended by St. 1923, c. 99, § 3, and St. 1925, c. 334, penalizes the killing, by poisoning, of a "quadruped" only. Thus the owners of hens, geese and ducks are not protected. I recommend extension of these provisions to include fowl as well as quadrupeds.

7. Date of Meeting of Presidential Electors.

The Congress of the United States, by the act of May 29, 1928, c. 859, § 1, 45 Stat., provided that —

The electors of president and vice-president of each state shall meet and give their votes on the first Wednesday in January next following their appointment at such place in each state as the legislature of such state shall direct.

This statute is inconsistent with G. L., c. 54, § 148, which provides that —

The persons chosen as presidential electors shall meet at the state house on the Saturday preceding the second Monday in January succeeding their election.

While the manner of choosing, electing or appointing electors of President and Vice-President is left for the several States to prescribe,

yet the Congress of the United States has ample power to prescribe the day on which those electors shall in their several States meet and vote.

Therefore, I recommend that our State statute be made to conform to the Act of Congress by striking out in the first sentence of G. L., c. 54, § 148, the words "Saturday preceding the second Monday" and inserting in place thereof the words "first Wednesday."

8. Literary and Dramatic Censorship.

There has been adverse criticism throughout the country of the methods in Massachusetts of censoring literary and dramatic productions. The effective control of such productions rests either in those local authorities who license theatrical productions, or in such public-spirited citizens as may seek to curb the sale of books which offend them, by criminal prosecution of book sellers.

The pertinent statutes *with respect to theatrical productions* are G. L., c. 140, § 181, § 182, as amended by St. 1926, c. 299, § 2, § 182A, §§ 183A-C, §§ 185A-G, dealing generally with the licensing of theatrical performances by the local authorities; G. L., c. 143, §§ 35-38, and § 52, dealing with the inspection and regulation of buildings used for theatrical entertainments (pertinent here because revocation of licenses to use buildings as theatres has been used as a method of preventing theatrical exhibitions which the local authorities have not desired to prevent by the direct means provided under chapter 140); and G. L., c. 272, § 32, making it a criminal offense to participate in, or aid in, the production of an obscene or offensive theatrical performance or exhibition.

With respect to books, — G. L., c. 272, § 28, making the sale, printing or distribution of matter containing obscene, indecent, or impure language a criminal offense, is the controlling statute. At the last session of the General Court three bills were introduced looking to the amendment of the last-named section. (See 1928 House Documents Nos. 59, 577 and 680.) All of these bills were referred to the Committee on Legal Affairs, which reported "leave to withdraw" (House Journal (1928) 522), which report was accepted (House Journal (1928) 534, 541).

Regulation of the sale of objectionable books is, therefore, left to the criminal law and to the preventive effect of threat of prosecution; regulation of dramatic production, to the action of local authorities principally. A theatrical producer or a publisher has no way of discovering in advance whether performance or book will meet any local standard of propriety. A book seller must either remove a questionable

book from his shelves or deliberately make a sale, for which he knows he will be prosecuted, in the hope of an acquittal. Even acquittal of the particular sale prosecuted is no assurance of acquittal on a prosecution for subsequent sale heard by a different judge or in a different court. On the other hand, books and plays, in fact equally or more questionable, may be sold, or produced, failing disapproval or notice of action of subordinate local authorities, through inadvertence, lack of appreciation, or otherwise. It is obvious that this system leaves a matter which seriously affects the whole community to private enterprise and haphazard and spasmodic public prosecution, resulting in the inconsistency of contemporaneous suppression in one locality and sanction in another. There are many groups interested in any new legislation on these subjects, which affect the press, publishers, librarians, authors, theatrical producers, the clergy, persons engaged in education, labor and the legal profession, among others. An unpaid commission representing all of these groups, the duty of which would be to study the situation and report to the Legislature, might well frame a sound and satisfactory scheme for a more rational censorship.

9. Procedural Changes.

I concur in the recommendation of the Judicial Council for revision of the form of the writ and summons that its content may be as intelligible to the layman as to the lawyer (2d Rep., pp. 37, 112), and for the elimination of the fiction of the chip attachment (2d Rep., pp. 43, 113).

To facilitate determination of cases by avoidance of delay of counsel as to agreement on condensed narrative of transcript of evidence, I concur in the recommendations enabling recitation of evidence in bills of exceptions in question and answer form (2d Rep., p. 35).

To relieve congestion in the Superior Court, I concur in its recommendation of increase in the jurisdiction and limits of the district courts in civil cases (1st Rep., p. 47), and that cases growing out of the same accident, when brought in different counties, may be transferred to be tried together (4th Rep., p. 43).

10. Automobile Litigation.

The administrative problem affecting the Superior Court jury trials is the congestion of civil and criminal cases. Congestion in the civil jury list seems to arise from automobile cases clogging the list, to the prejudice of other causes. The automobile and its laws are account-

able for the inevitably increasing class of such causes. Relief must be had either by the use of other agencies for determination of this class of causes or by shifting other burdens from the Superior Court and discouraging needless litigation. Much can be done in supplemental relief by the State, or cities and towns, through traffic commissions and public improvements, and by organizations genuinely engaged in the promotion of the public safety, for the prevention of accidents.

The valuable analysis of the Judicial Council suggests various possible forms of relief.

11. Alleged Fraudulent Practices of Attorneys and Physicians in Automobile Compulsory Insurance Cases.

Early in 1928 the then Commissioner of Insurance stated publicly that he was informed that fraud in automobile compulsory insurance claims existed which necessarily had a very serious relation to the cost of liability rates. It was eminently proper that the law officer of the Commonwealth should examine the premises which would support so grave a charge, and to that end I conferred with the Commissioner before and since his resignation, and also with such parties as I had reason to believe might have special knowledge of the alleged fraudulent practices. A very determined effort was made on my part to secure evidence upon which the above public statements were based. But not only was no evidence submitted by or subsequently obtainable from the aforesaid Commissioner, but even the "leads" suggested were of no immediate value. Anxious as I was to correct such abuses if they existed, I was presented with only the flimsiest of hearsay to support the statements made by him.

Yet this same vague allegation has focused the attention of this Department upon the possibility of irregularity. The investigation is not completed, and must of necessity take a considerable time. If violation of the law is disclosed, prosecution will follow. But indictment or complaint will not be made until there is dependable evidence. The investigation involves an examination into all the facts of hundreds of accident cases. It has, however, proceeded sufficiently far to make it apparent to me that there is no occasion to initiate or to attempt to initiate any general inquiry into the conduct of the bar of this Commonwealth, such as was conducted in New York and in other cities. I am of the opinion that disciplinary action toward such attorneys as may be disclosed to have committed fraudulent practices can be initiated in the courts in the customary manner rather than through a wholesale investigation of the bar. It would be a great aid to the

investigation which I am making if additional power were given to the Department of the Attorney General, as requested in the following paragraph.

12. Power of the Attorney General Relative to Investigations.

The obligation is generally attributed to the Department of the Attorney General to conduct investigation of matters concerning the public peace, public safety and the public welfare, if at any time it appears to him that the laws are being violated. At present, however, he has no power in any independent inquiry to summon witnesses and to examine them under oath. He should have that power, subject to the same provisions, respecting the obligation of a witness to testify and the right of a witness to refuse to testify, which govern the giving of testimony in the courts of the Commonwealth. Obviously, no exhaustive investigation designed to remedy any arising or existing evils can be conducted by the Attorney General unless he has such power. I recommend enabling legislation.

13. Unprofessional Practices by Attorneys.

There are approximately 7,000 attorneys in Massachusetts. The profession has gained popularity as a calling during the past generation, about 400 becoming eligible thereto annually. Virtually the principal qualification is the passing of the examination established by the Board of Bar Examiners. It is doubtful if any other standard is workable. In the large membership of the bar, not unlike other professions, or even trades, there is an irresponsible element. While, to be sure, this element is but a fraction of the whole, it appears to be increasing. The fraud and misconduct of this minority gravely reflects upon the general reputation of the whole bar, and indirectly lessens the public respect for the judicial system. Necessary house cleaning should be the concern of the various organizations of the bar throughout the State. If work of this nature is not commenced, and pushed to conclusion, and decent amelioration supplied, it is not unlikely that that portion of the public which has been defrauded and imposed upon may demand and obtain some drastic relief not wholly just to the great reputable majority. For the present it seems better to leave the voluntary cure of the malignant ulcers with the various bar associations.

14. Qualifications for Admission to the Bar.

The ground of complaint against the unscrupulous minority of the Massachusetts bar does not come from any cultural deficiencies, but

from basic unmorality. Until this basic lack of morality is supplied, no requirement of qualification by culture will afford a guarantee of rectitude. Education, however exalted, does not fulfill its mission unless it inculcates an unadulterated respect for the fundamental law and government of our country. Ill equipped, indeed, is that student, though he be rich with degrees, who leaves his alma mater poor from lack of respect for the Constitution which, under his oath as a member of the bar, he must swear to honor and uphold. (G. L., c. 221, § 38.) The inculcation of old-fashioned ethics, from early childhood on, will do a great deal to endow the bar of the future with that high regard in which the profession was held by the generation passing away.

15. Disbarment of Attorneys.

There has been widespread public dissatisfaction with the present procedure of disbarment of attorneys. The present law provides that an attorney may be removed by the Supreme Judicial or the Superior Court, and that whenever a petition is filed for the removal of an attorney the proceedings thereafter shall be conducted by an attorney to be designated by the court. Under the present system proceedings are usually commenced by the various bar associations. While theoretically any private citizen may commence such proceedings, action by any other than a regularly constituted body is impracticable. A private citizen himself has not the knowledge, the time, nor the inclination to commence disbarment proceedings. Individual attorneys will not commence such proceedings at the instigation of a private individual because of their natural disinclination to proceed against another attorney, and also because of the existence of a certain professional code and spirit which deters one lawyer from proceeding against another.

The present method of proceedings instituted by bar associations has proven inefficient and ineffectual. Very few proceedings are commenced, and actions which are commenced drag indefinitely.

A change is vitally necessary. Various methods have from time to time been suggested, — reference to the Attorney General; establishment of bar counsel in each county. Neither agency meets the situation. I suggest that a paid commission of three or more attorneys be appointed by the Governor for a term of years, who shall not be permitted to engage in the practice of the law, with duties and powers of investigation and prosecution of cases of "deceit, malpractice or other gross misconduct."

16. Limitation upon Practice in Criminal Cases by Special Justices.

I urge attention to the recommendation, made in former years, that special justices of municipal and district courts be prohibited from practising in their own courts in criminal cases whether as prosecuting officers or as defendants' attorneys. The justice and the clerk or assistant clerk of a court are now prohibited from engagement in any criminal action pending in or previously examined or tried in the court. Special justices as well should be prohibited.

The appearance of special justices as counsel for complainant or defendant in criminal actions pending before their courts arouses in the public mind a certain element of distrust, in that close association of the judges may influence decisions. However unfounded, the practice is detrimental to the confidence of the people in an impartial judicial system.

17. Treatment of Drug Addiction.

A problem that little comes to the attention of the public at large is that relating to the unfortunate drug addict. Today, if he seeks cure, his sole avenue of relief through the agency of this State is a commitment which puts him in the light of a criminal, as many of these unfortunates are without the means to avail themselves of private sanitarium treatment. I suggest, in the cause of humanity, that some legal avenue be opened which will grant them institutional relief apart from criminal process. If by these means it is possible to restore to normal health these unfortunates, the contribution that this element makes to crime is bound to be diminished.

18. Regulation of "Overnight Camps."

"Overnight" camps are springing up all over the State. Aside from regulation for public health by provision for their inspection, and for disposition of waste matter, regulation by licenses to owners, requiring records of lodgers, would afford information for identification of persons. G. L., c. 40, § 21, cl. 1st (enabling towns to enact by-laws relative to the conduct of such business), if availed of by all towns, might be sufficient, but general legislation applicable to all camps may well be considered.

19. Regulation of the Sale of Securities.

By Resolves of 1928, c. 29, the Board of Bank Incorporation and the Department of Public Utilities, acting jointly, were directed to investigate a number of proposals for amendment to the laws regulating the sale of securities. The members of the two departments

under date of December 5, 1928, filed a report, with drafts of suggested legislation attached thereto. The recommendations contained in the report if adopted would cause no radical changes in the substantive law governing the sale of securities, but would unquestionably so organize the Department of Public Utilities that it would be enabled to enforce existing law much more effectively. I believe that the recommendation of the two Boards that a Securities Division be established in the Department of Public Utilities should be adopted. Only by constant supervision and by vigilant inspection can the activities of fraudulent stock dealers and salesmen be curbed. Without a well-trained group of energetic investigators, inspectors and accountants under a director of real executive ability, sound business sense and experience, successful work in checking the losses to the public caused by unscrupulous promoters and stock salesmen may not be expected.

The present Sale of Securities Act, I believe, has never been given a fair test in its present form, for the proper means to enforce it energetically have hitherto never been (and are not now) at the disposal of the Department of Public Utilities. It may well be that the present unhealthy situation with respect to the sale of securities is based on too little and ineffective enforcement rather than on too little legislation.

The suggestion in the Report of the Attorney General for the year ending November 30, 1927 (at pp. 17-21, 29-31), with respect to reforms in the enforcement of the law governing the sale of securities, that the enforcement of these laws be concentrated in the Department of the Attorney General, was rejected by the 1928 General Court, and was not referred for consideration to the recess commission consisting of the Department of Public Utilities and the Board of Bank Incorporation. The Department of the Attorney General has under the present law no duties and virtually no powers with respect to infringements of the Sale of Securities Act, except in cases referred to the Attorney General by the Department of Public Utilities, or in cases where a crime has been committed, which latter group of cases is primarily within the scope of the duties of the several district attorneys. I support the recommendation of the recess commission principally because it has some tendency to centralize the duty of enforcement of these important laws, although I am still inclined to believe that the recommendation will eventually prove to be less satisfactory than the plan of placing the responsibility for the enforcement of these laws in this Department, following the practice adopted in New York most successfully.

Many complaints of losses are received from subscribers to so-called "tipster sheets" or "investment services." The Sale of Securities Act should in explicit language make the sales and distribution of investment services and information subject to the supervision of the Department of Public Utilities. Certainly persons issuing or distributing such services or "tipster sheets" should be required to register as brokers under G. L., c. 110A, and the Department of Public Utilities should have power to revoke the registration of such persons for cause.

CONCLUSION.

The foregoing report does not, and, indeed, cannot, cover in detail all the multifold and various activities of this Department which seldom come to the public attention, save such as may be featured in the press and so become of popular interest. Service in all the courts of the Commonwealth and in the Federal courts, rendition of advice to the executive and legislative branches of government and to the departments and their subordinate divisions is routine, but, nevertheless, often attended with major consequences to every man, woman and child in the Commonwealth.

Respectfully submitted,

JOSEPH E. WARNER,

Attorney General.

OPINIONS.

Board of Examiners of Plumbers — Licenses — Rules.¹

If the holder of a license as a master plumber does not renew it on or before May 1st in any year, a renewal thereof may not issue subsequently.

The approval of rules of the Board by the Department of Public Health is essential to their validity, but the rules may be revised without such approval, upon petition of a local board of health.

A master plumber's license may not be loaned to another by the person to whom it is issued.

A duly licensed journeyman plumber may engage in the plumbing business if he does not employ other journeyman plumbers to assist him.

A corporation may not have as one of its employees, for the purpose of enabling it to receive plumbing permits, a master plumber.

FEB. 17, 1927.

MR. WILLIAM F. CRAIG, *Director of Registration.*

DEAR SIR: — 1. You have asked my opinion as to whether it is illegal for the Board of Examiners of Plumbers to issue a renewal license on May 2nd, and if so, whether another examination is required.

G. L., c. 142, § 6, provides: —

"Licenses shall be issued for one year and may be renewed annually on or before May first upon payment of the required fee."

A license under the above chapter is a permit to engage in the plumbing business only during the term of the license (which must be for one year) and renewals thereof. There is no authority permitting an extension of the original license except in so far as the statute states that it may be renewed annually on or before May 1st upon payment of the required fee. If the holder of the license does not renew it on or before that date, it is my opinion that the Board may not issue a renewal thereof subsequent to that date.

I am further of the opinion that if a person holding a license under this chapter and the amendments thereto does not procure a renewal thereof on or before May 1st, he must be treated as a new applicant and submit to the same requirements and examinations as a person who has never had a license.

2. In the third question of your letter you ask whether or not St. 1909, c. 536, § 2, has been repealed, whereby it is not necessary to have the approval of the State Board of Health (now the Department of Public Health) of such rules as are made by the Examiners under the authority of that section.

This section has been repealed by G. L., c. 282. G. L., c. 142, § 4, however, provides: —

"The examiners may make such rules as they deem necessary for the proper performance of their duties, which shall take effect when approved by the department of public health."

In my opinion, therefore, the approval by the Department of Public Health is necessary to the validity of any rule made by the Examiners.

¹ This opinion was unintentionally omitted from the report for the year 1927, and by reason of its importance is printed in this report.

3. In the sixth question of your letter you ask whether or not a master plumber's license can be loaned to another to conduct a plumbing business, and if not, how this practice can be stopped.

A master plumber's license is a permit issued by the State Examiners of Plumbers authorizing the licensee to engage in the business of a master plumber. Such license is issued only to applicants who successfully pass an examination as prescribed by G. L., c. 142, § 4. Public safety and health require that only such persons as are competent to perform the work secure a license, and obviously it can be exercised only by those persons who meet the standard and requirements of the Examiners. It is the clear intent of the Legislature that such a permit or license shall be used and exercised only by the licensee, and shall not be loaned or in any way transferred to another person. Unless this were so, the very evils and perils which the Legislature sought to avert by subjecting the applicant to an examination before granting him a license would still persist. I am of the opinion, therefore, that a master plumber's license may not be loaned to another to conduct a plumbing business.

As to how this practice, if it is prevalent, can be stopped, I respectfully suggest that this is a matter for your department to regulate and control. It seems to have the character and aspect of an administrative problem rather than of a legal problem, and I do not believe that it is within the scope of this Department to make recommendations or suggestions of this character.

4. In the seventh question of your letter you ask whether or not a journeyman plumber may engage in the business of plumbing and advertise as such.

I am of the opinion that a duly licensed journeyman plumber may engage in the business of plumbing to the extent that he has the right to work for himself and to take contracts for, or to do by his own labor, plumbing on buildings, but under the statutes he has no right to employ other journeyman plumbers to assist him in doing such work. *Commonwealth v. McCarthy*, 225 Mass. 192. I am of the opinion that he may lawfully advertise to the same extent that he may perform.

5. In the eighth question of your letter you ask whether a corporation or company can employ a master plumber to enable it to receive plumbing permits.

R. L., c. 103, §§ 1 and 2, provided for the issuance of such a license to a corporation, and stated that a license issued to the manager of a corporation was sufficient compliance with that chapter. R. L., c. 103, §§ 1 and 2, are expressly repealed by G. L., c. 282. The present law, G. L., c. 142, makes no provision for a license to a corporation except in so far as the word "person" applies to corporations as well as to individuals. That part of R. L., c. 103, which provides that a license issued to a manager of a corporation satisfies the requirements of the chapter is also omitted from G. L., c. 142. These omissions are significant in that the present act not only fails to provide for the issuing of a license to a corporation but also fails to indicate what member of the corporation shall take the examination and receive the license.

There is, therefore, no method under the present law whereby a corporation may engage in the plumbing business, and it follows, in my opinion, that a corporation may not have as one of its employees a master plumber for the purpose of enabling it to receive plumbing permits.

6. In the twelfth question of your letter you ask whether your Board can change or amend plumbing rules made under the provisions of St.

1909, c. 536, § 5, and if so, whether they must be approved by any one.

St. 1909, c. 536, § 5, was repealed by G. L., c. 282. G. L., c. 142, § 8, provides:—

“Upon petition of the board of health of any town which has not prescribed regulations relative to plumbing under section thirteen or corresponding provisions of earlier laws, the examiners shall formulate rules relative to the construction, alteration, repair and inspection of all plumbing work within such town, which rules, when approved by the department of public health and accepted by the said board of health and published once a week for three consecutive weeks in some newspaper published in said town, shall have the force of law. Such rules may be revised by the examiners upon the petition of the board of health.”

Under this section it is clear that the Examiners may revise the rules described therein, and it is my opinion that the approval of the Department of Public Health is not necessary to such revision. The approval of the Department of Public Health is necessary to such rules as are formulated by the Examiners, but as to such rules as are revised no approval is necessary.

It may be difficult in some cases to determine whether a purported revision is in fact a revision of an existing rule or a formulating of a new rule, but each case as it arises must be governed and determined by the particular circumstances surrounding it.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Change of Name — Birth Records — Town Clerk.

A record of birth may not be amended by a town clerk so as to insert in place of the person's name, as originally recorded, a new name which he has become entitled to use by virtue of a decree of a Probate Court.

DEC. 22, 1927.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You have asked my opinion as to whether a record of birth, which was correctly recorded some time ago, may be amended or changed so as to insert therein the person's new name, which was properly changed by a decree of the Probate Court. The pertinent provisions of law are as follows:—

G. L., c. 46, § 5, provides:—

“When necessary to supply deficiencies in the birth records, he (the town clerk) may enter therein any written information obtained by him but he shall not change facts already recorded except as provided in section thirteen or except to correct errors in copying from notices, reports or certificates on file in his office.”

G. L., c. 46, § 13, as amended by St. 1925, c. 281, § 2, provides:

“If the record relating to a birth, marriage or death does not contain all the required facts, or if it is claimed that the facts are not correctly stated therein, the town clerk shall receive an affidavit containing the facts required for record, if made by a person required by law to furnish the information for the original record, or, at the discretion of the town

clerk, by credible persons having knowledge of the case. . . . He shall file any affidavit submitted under this section and record it in a separate book kept therefor, with the name and residence of the deponent and the date of the original record, and shall thereupon draw a line through any incorrect statement, or statements, sought to be amended in the original record, without erasing them, shall enter upon the original record the facts required to correct, amend or supplement the same and forthwith, if a copy of the record has been sent to the state secretary, shall forward to the state secretary a certified copy of the corrected, amended or supplemented record upon blanks to be provided by him, and the state secretary shall thereupon correct, amend or supplement the record in his office."

Section 5, quoted above, specifically states that the town clerk shall not change facts already recorded. This statement is modified by providing for two exceptions; one of these is not pertinent to the present case and the other provides for a change only in accordance with section 13. As section 13 is an exception to the general rule, it must be construed strictly.

Section 13 provided only for such amendments or changes as were necessary to render the facts recorded therein correct at the time of the recording, and, in my opinion, did not contemplate that subsequent events, such as a change of name, should be entered into the record by way of correction or amendment. This section was amended by St. 1925, c. 281, § 2, by providing for the amendment of the record in cases where illegitimate children were subsequently legitimized so that the record would read as if the person had been born to its parents in lawful wedlock. No provision was made as to amending the record in cases where the name as recorded was subsequently changed. The law governing this question, therefore, stands as it did prior to this amendment, and it is my opinion that the change of name may not be entered upon the record. In this connection I call your attention to an opinion rendered to you on September 25, 1922, by former Attorney General J. Weston Allen (VI Op. Atty. Gen. 619).

Very truly yours,

ARTHUR K. READING, *Attorney General.*

Probate Courts — Petitions for Administration de Bonis non with the Will annexed — Fees.

Upon a petition for administration *de bonis non* with the will annexed no entry fee should be required if a fee has already been paid upon an original petition or if an original petition was entered prior to the effective date of St. 1926, c. 363.

DEC. 29, 1927.

HON. WILLIAM S. YOUNGMAN, *Treasurer and Receiver General.*

DEAR SIR: — You have asked my opinion whether a fee is collectible by registers of probate under St. 1926, c. 363, § 2, (1) upon a petition for administration *de bonis non* with the will annexed in a case where a fee has already been paid at the entry of the petition for the probate of the will, and (2) upon a petition for administration *de bonis non* in an estate where the original petition for administration was filed before the said statute was passed, so that this subsequent petition is incidental to a proceeding upon which no fee was required to be paid.

In my opinion, no fee should be charged upon either of these petitions. It is of no consequence that the original petition in an estate was filed before the said statute was passed. The purpose of the statute was to charge a fee upon certain kinds of petitions filed after the effective date of the statute. There is no retroactive provision as to petitions filed before the statute was passed.

The relevant portion of G. L., c. 262, § 40, as amended by St. 1926, c. 363, § 2, is as follows:—

“The fees of registers of probate and insolvency, payable in advance by the petitioner or libellant, shall be as follows:—

For the entry of a petition for the probate of a will, for administration on the estate of a person deceased intestate, . . . and, except when the petition is certified by the register or assistant register to be incidental to proceedings already pending in the same county, for the entry of a petition for the appointment of a special administrator, conservator, trustee, receiver of the estate of an absentee, or of a guardian . . . three dollars.”

A petition for administration *de bonis non* with the will annexed is clearly not within the provisions of this statute. It is plain that a petition for administration *de bonis non* with the will annexed is not a petition for the probate of a will, but presupposes a prior and successful petition for probate. It is equally clear that it is not a petition for administration on the estate of a person deceased intestate, but presupposes the existence of a valid will. The first petition regarding which you ask my opinion is therefore not subject to a fee, because it is not within the words of the statute.

The answer to your second inquiry is more difficult. A petition for administration *de bonis non* is clearly within the literal wording of the statute, to wit, “for administration on the estate of a person deceased intestate.” It is my opinion, however, that the fee in question was intended to be charged only upon original petitions for probate and original petitions for administration. The intent of the statute, as shown by its exclusion of a petition for administration *de bonis non* with the will annexed, and by its exception when the petition in certain proceedings is certified by the register to be incidental to proceedings already pending in the same county, seems pretty clearly to be to exclude all except original petitions, on an analogy to entry fees in our other courts.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

District Attorney for the Northern District — Special Assistants.

A justice of the Superior Court may not appoint a special assistant district attorney for the Northern District if there be an assistant district attorney in office.

JAN. 25, 1928.

HON. ROBERT T. BUSHNELL, *District Attorney for the Northern District.*

DEAR SIR:— You request my opinion upon the following question: “Can a justice of the Superior Court, upon the request of the District Attorney for the Northern District, appoint a special assistant district attorney under the provisions of G. L., c. 12, § 18, when there are regular assistants in office?”

G. L., c. 12, § 18, reads as follows:—

“If there is no assistant district attorney, the court may allow a reasonable sum, payable from the county treasury, for the services of a clerk to aid the district attorney; and in the northern, eastern, middle and southeastern districts, the court may appoint, for the sitting at which the appointment is made, a competent person to act as an assistant to the district attorney and his compensation, not exceeding six hundred dollars in one year, shall be paid from the county treasury.”

In the recent case of *Commonwealth v. Sacco*, 255 Mass. 369, 444, the court held that there can be no appointment of a special assistant district attorney if there be in office an assistant district attorney who has been duly appointed.

The restriction applies only in the case of appointments in the Northern, Eastern, Middle and Southeastern districts.

I therefore answer your question in the negative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Board of Retirement — Death of Employee — Widow's Pension.

If the Board of Retirement finds as a fact that work performed by an employee of the Commonwealth was done in the performance of his duties, and that such work contributed to his death, it may award a pension to his widow.

FEB. 3, 1928.

Board of Retirement.

GENTLEMEN:— You have asked my opinion as to two questions in reference to certain facts which are briefly summarized herein:—

An employee of the Metropolitan Sewerage Division, who was suffering from organic valvular disease of the heart, was engaged in carrying a heavy pipe, with the aid of another man, from one room at the East Boston Pumping Station to the basement thereof. Immediately after reaching the basement he dropped to the floor and shortly thereafter died, the death certificate giving as the cause of his death organic valvular heart disease. Nothing unusual occurred while the employee was engaged in this work, nor was there anything requiring extra exertion on his part.

Your questions are as follows:—

“1. Would it be proper and according to the facts in this case to rule that there were no ‘injuries’ according to paragraph (9) or (10) but that death resulted from a pre-existing ordinary disability of heart disease?”

2. Has our Board the legal authority to find that the acceleration of a pre-existing disability of heart disease, without any accidental force being present, but nevertheless causing death in the course of employment, is sufficient ‘injuries’ for the compensation to be awarded to the widow under paragraph (10) of section 2?”

As the answer to each question deals directly with the answer to the other, both are considered together.

The pertinent law is contained in G. L., c. 32, § 2, par. (10), as amended by St. 1921, c. 487, § 5, and is as follows:—

“If any member is found by the board to have died from injuries received while in the discharge of his duty, and leaves a widow, or if no

widow any child or children under the age of sixteen, a pension equal to the retirement allowance to which such member would have been entitled under paragraph (9) had he been permanently incapacitated shall be paid to such widow so long as she remains unmarried, or for the benefit of such child or children so long as he or any one of them continues under the age of sixteen. A person receiving a pension under this paragraph shall not receive from the commonwealth any other sum by way of annuity, pension or compensation."

Paragraph (9), referred to herein, does not affect the action of the Board in this case except in so far as the amount of the pension is concerned, and it follows that the provisions of paragraph (9), to the effect that the injuries must be sustained through no fault of the employee, are not applicable in death cases under paragraph (10).

The mere fact that the employee had been suffering from heart trouble for some time prior to his death does not of itself take his case out of the provisions of the act. Even if he was so suffering, his widow is entitled to the pension if his death was accelerated or hastened by the work done. Under decisions of the Supreme Judicial Court in somewhat similar cases it has been decided that lifting and other physical effort which causes death to a person afflicted with heart trouble may be an "injury" if it in any way is a contributing cause of the death, and even though it would not have caused death except for the defective heart condition. *Brightman's Case*, 220 Mass. 17; *Fisher's Case*, 220 Mass. 581. Nor, in my opinion, is it of importance that the work in which the employee was engaged was not unusual or of the type requiring extra exertion. If the work was done in the performance of his duties and if it contributed to his death, the Board may well find that the employee died from injuries received while in the discharge of his duty. Whether or not the work done by the employee in this case was a contributing cause of death is a fact to be found by the Board, and if the Board finds that it was such a cause, the widow is entitled to the pension. This, in my opinion, is the whole crux of the case, and it is the duty of the Board, upon all the evidence, to ascertain this fact.

Specifically referring to your first question, I repeat that you can find that there were no injuries, within the meaning of the act, only if upon all the evidence the work done did not contribute to the employee's death, and this is a question of fact which must be determined by the Board.

Assuming the facts stated in your second question to be true, I answer it in the affirmative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Constitutional Law — Municipalities — Shellfish.

Municipalities may be authorized by the Legislature to establish plants for the purifying of shellfish taken therein.

House Committee on Bills in the Third Reading.

FEB. 7, 1928.

GENTLEMEN: — You have asked my opinion as to the constitutionality of House Bill No. 945, which is as follows: —

"A city or town may establish and maintain a plant for the purpose of purifying shellfish taken in such city or town. Such plant shall be

established and maintained under the direction of the mayor or board of selectmen or a person designated by said mayor or board. Said mayor or board shall also establish fees sufficient to cover the cost of maintaining and operating the plant, which shall be collected for service rendered thereby."

It is true that ordinarily cities and towns may not engage in a private business, even though such business would be of advantage to its inhabitants. The present act, however, to my mind, obviously contemplates a public purpose, as it is closely connected with the important public purpose of protecting the health of the public. It is a well-known fact that shellfish may constitute a serious menace to the health and well-being of a community, and any reasonable measure contemplated to check or eliminate this menace is consistent with the power of the Legislature. I therefore advise you that, in my opinion, the law, if enacted, will be constitutional.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Municipalities — Employees — Vacations.

Action by a city council, under Gen. St. 1915, c. 60, is a prerequisite to the right of a municipal laborer to receive a vacation by virtue of said statute.

A municipal laborer is entitled to a vacation, under the provisions of St. 1914, c. 217, and St. 1927, c. 131, only while he is upon the pay roll.

FEB. 8, 1928.

Hon. E. LEROY SWEETSER, *Commissioner of Labor and Industries*.

DEAR SIR: — You have asked my opinion upon the following questions:

"1. In the case of a city or town which accepted St. 1914, c. 217, is a laborer who is otherwise qualified as required by statute, entitled to a vacation if the city council has taken no action under Gen. St. 1915, c. 60?

2. Is a laborer who worked thirty-two weeks in the aggregate during the preceding calendar year, and who is discharged at some period in the ensuing year before he has received his vacation, entitled to a vacation?

3. Is a laborer who has worked thirty-two weeks in the aggregate in the course of a calendar year, and who is discharged on the last day of that year, entitled to a vacation in the ensuing year?

4. The act provides that the Department of Labor and Industries shall have all the necessary powers to enforce this statute. Since no penalty is provided for violations of the statute and no prosecution can be instituted against the person violating the statute, what other powers has the Department of Labor and Industries to enforce this law?"

1. In answer to your first question, I am of the opinion that a laborer who is employed by a city and who is otherwise qualified is not entitled to a vacation under this chapter unless the city council has taken the action described therein. St. 1914, c. 217, provided as follows: —

"SECTION 1. All persons classified as laborers, or doing the work of laborers, and regularly employed by cities or towns for more than one year, shall be granted a vacation of not less than two weeks during each year of their employment, without loss of pay.

SECTION 2. This act shall be submitted to the voters of each of the cities and towns of the commonwealth at the next annual state election for their acceptance or rejection, and shall take effect in any city or town upon its acceptance by a majority of the voters voting thereon in the affirmative."

This statute was affected by Gen. St. 1915, c. 60, which provided as follows:—

"Any city in which a majority of the voters at the last state election voted to accept the provisions of chapter two hundred and seventeen of the acts of the year nineteen hundred and fourteen may by vote of the city council, approved by the mayor, or by vote of the commission in any city under a commission form of government, require the heads of the executive departments to grant a vacation of two weeks without loss of pay to any person regularly employed by such city who is classified as a common laborer, skilled laborer, mechanic or craftsman in the labor service, as classified by the civil service commission, under regulations established by said commission for cities to which the labor rules adopted by the civil service commission are or may become applicable. If such vacations are authorized, they shall be granted by the heads of the executive departments, and shall begin at such times as in the opinion of the heads of the executive departments will cause the least interference with the performance of the regular work of the city."

There were several other acts, between this latter act and the effective date of the General Laws, affecting this question. The General Laws repealed all of these acts but one, and that one was in substance reenacted by the General Laws. Several changes, not affecting the answer to your first question, were made subsequently, culminating in St. 1927, c. 131, which provides as follows:—

"In any town which accepted chapter two hundred and seventeen of the acts of nineteen hundred and fourteen, all persons classified as laborers, or doing the work of laborers, regularly employed by such town, shall be granted a vacation of not less than two weeks during each year of their employment, without loss of pay. In any city which accepted said chapter the city council may determine that a vacation of two weeks without loss of pay shall be granted to every person regularly employed by such city as a common laborer, skilled laborer, mechanic or craftsman. If such vacations are authorized, they shall be granted by the heads of the executive departments of the city at such times as in their opinion will cause the least interference with the performance of the regular work of the city. A person shall be deemed to be regularly employed, within the meaning of this section, if he has actually worked for the city or town for thirty-two weeks in the aggregate during the preceding calendar year. The department of labor and industries shall enforce this section, and shall have all necessary powers therefor."

Under this act it follows that in cities the city council must act before a laborer is entitled to any vacation. This has been the law at all times since the effective date of Gen. St. 1915, c. 60. In towns no action by the selectmen or any other body ever has been or is now necessary. A laborer employed by a town is entitled to his vacation, if otherwise qualified, without any action on the part of the selectmen.

2. As to your second question, I am of the opinion that a laborer who

worked thirty-two weeks in the aggregate in the preceding calendar year, and who is discharged at some period in the ensuing year before he has received his vacation, is not entitled to a vacation. The word "vacation" implies a period of rest between periods of employment, and may not properly be used in reference to a period of rest after employment ceases. It contemplates that a person should be employed at the time it commences. The act states that a person shall be deemed to be regularly employed, within the meaning of the section, if he has actually worked for the city or town for thirty-two weeks in the aggregate during the preceding calendar year. This, however, does not mean that a person qualifies for a vacation even though he is not at the time in the employ of the city or town. The definition purports to define the word "regularly" only, leaving the word "employed" to its ordinary common-sense meaning. Any other construction of the act would be unreasonable and not in accord with the intent of the Legislature.

The above is obviously true with reference to a town which has accepted the provisions of St. 1914, c. 217. St. 1927, c. 131, states that in such a town laborers shall be granted a vacation "during each year of their employment." These words tend to indicate that the person must be employed at the time the vacation is to commence. It is further to be noted that in both cities and towns the vacation is to be given "without loss of pay." These words also imply that the person to whom the vacation is given is on the pay roll at the time the vacation commences. If this were not so, the money paid would be in the nature of a bonus or gift rather than pay.

If a man is discharged arbitrarily, for the sole purpose of depriving him of a vacation, it may well be that the above statement of the law would not be applicable, and I express no opinion as to the law covering such a case.

3. What has been said in reference to the second question applies also to your third question.

4. No penalty is provided for violation of St. 1927, c. 131. The duties prescribed by the act fall upon officers of cities and towns, and in most cases these men will conform to the law even though no penalty is prescribed. In my opinion, a petition for mandamus could be successfully maintained by the person entitled to the vacation, in the event that his rights under this chapter were denied or abridged. Under the principle laid down in *Attorney General v. Apportionment Commissioners*, 224 Mass. 598, it is possible that the Attorney General might institute a petition for mandamus to vindicate the public right, on the theory that rights conferred by this act benefit not only the laborer but also indirectly inure to the benefit of the public at large.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Sewer — Massachusetts Reformatory — Apportionment of Expense.

St. 1913, c. 138, as amended, requires the Commonwealth to pay a part of the expense of the Concord sewerage system, with which the Massachusetts Reformatory is authorized to connect its sewers.

Hon. SANFORD BATES, *Commissioner of Correction*.

FEB. 10, 1928.

DEAR SIR:— You request my opinion on the following questions relative to the expense of construction of the main sewer line from Concord to Concord Junction:—

"1. Is the statute of 1895 still in effect?

2. To what extent was it modified by the law of 1906 authorizing an alternative sewerage system at the Massachusetts Reformatory?

3. Was the 1895 law revived by the trivial amendments passed in 1913?

4. To what extent is the Commonwealth obligated under the law, as it now stands, to contribute to the expense of this improvement, the Commonwealth's share of which, it is stated, will be in the vicinity of \$50,000?"

I assume, although you do not so state in your letter, that the main sewer line in question was constructed by the town of Concord under the authority of St. 1895, c. 151. This act authorized but did not require the town of Concord to construct and maintain a sewerage system, provided the act was accepted by vote of the town within three years. I am advised that it was so accepted.

The act further provided that whenever the said system should be established the sewers of the Massachusetts Reformatory and other property of the Commonwealth in Concord should be connected with the main sewer line of the town.

The statute in question, not having been definitely limited in time by its terms or expressly repealed by any subsequent act of the Legislature, has been effective and in force since its passage. I accordingly answer your first question in the affirmative.

Resolves of 1906, c. 49, merely authorized the expenditure of a certain sum in order to provide additional means for the disposal of sewage at the Massachusetts Reformatory. It makes no specific reference to St. 1895, c. 151, and is not inconsistent with it. It therefore does not, either specifically or by implication, modify the latter statute, although the results achieved by works established under it may be a factor to be considered in ascertaining the extent of any obligation on the part of the Commonwealth to compensate the town of Concord for the use of the latter's sewage disposal facilities.

St. 1913, c. 138, amending St. 1895, c. 151, § 8, indicates the intent of the Legislature to treat the earlier act as still in force at that time. The slight verbal changes made by the amendment of the earlier statute do not alter its manifest purpose. Under the law the Commonwealth is obligated to pay for the privileges conferred and benefits received such part or percentage of the construction cost and operating expense of the Concord sewerage system established under St. 1913, c. 138, as amended, as may be agreed upon with the said town, and, in the event of failure to reach an agreement, such compensation is to be determined by three commissioners to be appointed by the Supreme Judicial Court.

Yours very truly,

ARTHUR K. READING, *Attorney General*.

Motor Vehicles — Registration — Non-Residents.

A person living in another State, who works regularly as an employee in a factory within the Commonwealth for a period of more than thirty days in the year, is not a non-resident, as that term is defined in G. L., c. 90, § 1.

FEB. 10, 1928.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR: — You have asked my opinion relative to the meaning of a clause of G. L., c. 90, § 1, in the following language: —

"Under the provisions of G. L., c. 90, § 1, a 'non-resident' is defined as 'any resident of any state or country who has no regular place of abode or business in the commonwealth for a period of more than thirty days in the year.' Along the border of our State many residents of other States own automobiles properly registered in the States in which they live, which they operate every day or practically every day into the State of Massachusetts to places where they are employed. For instance, many of them come from Rhode Island to their place of employment in the jewelry factories in Attleboro.

In such cases is the factory where the resident of the other State works a place of business within the definition above quoted in G. L., c. 90, § 1?"

I am of the opinion that if a person living in another State works regularly as an employee in a factory within the Commonwealth for a period of more than thirty days in the year he is not a "non-resident" within the terms of the definition set forth in said section 1.

Whether or not in any given instance such employment is regular and in excess of the prescribed period is primarily a question of fact, for the determination of your Department or some division or officer thereof.

The word "business" and the phrase "place of business," when used in statutory enactments, may have, respectively, more than one meaning, depending largely upon the context and the purpose and design of the statutes wherein they occur, as the latter throw light upon the legislative intent in employing the words. In its general or broadest sense the word "business" denotes the employment or occupation in which a person is engaged to procure a living, and that irrespective of whether such person be in the service of another or not. *Goddard v. Chaffee*, 2 Allen, 395. Such general meaning should be given to the word as used in the phrase "place of business" unless the context or the design of the statute wherein it occurs indicates that the word is to be interpreted in a more restricted sense, so as to exclude "trade or calling" or "place of employment," as embraced within the use of the word "business" or "place of business," respectively. *Hanley v. Eastern S.S. Corp.*, 221 Mass. 125 (and cases there cited); *Collector of Taxes v. New England Trust Co.*, 221 Mass. 384.

One of the purposes or designs of the instant statute, in regard to the registration of motor vehicles and the licensing of operators thereof, appears to be to require such registration and licensing of all vehicles and operators, respectively, as will render their regulation and identification easy of accomplishment by registration and licensing through the officials of this Commonwealth. Certain exceptions to the strict requirements of the general law in this respect are afforded to owners of vehicles registered or persons licensed in other States, obviously upon the theory that such vehicles and such persons will not be upon the roads of the Commonwealth to the same extent as cars owned by residents or operators who are residents. A person who has a regular place of business in the Commonwealth, in the sense that he has a place where he carries on a trade for hire, is not likely to use the roads of Massachusetts less than one who has a place for the transaction of a business which is something other than a trade or calling. The intent or design of G. L., c. 90, furnishes no ground for asserting that the phrase "place of business," in the clause under consideration, was intended by the Legislature to be interpreted in its narrow sense, so as to exclude places wherein a trade, employment

or calling was regularly practiced by an individual, thereby permitting such individual to be deemed a "non-resident" and within the exceptions to the general design of the law.

Those persons who are to have the benefit of the exceptions from the general law in this respect are entitled "non-residents," and the meaning of "non-residents," for the purpose of the statute, is carefully defined. The definition should be construed so as to give effect to the general design of the statute, which is Massachusetts registration and licensing for cars and operators. By the terms of the definition, owners and operators who come regularly into this State are, by reason of their presumably frequent use of our roads, excluded from the class of "non-resident." Presumable frequency of the use of our roads appears to be the test as to those residents of other States who may avail themselves of the privilege of exception from the general law as to local registration and license. The form of business which a person regularly carries on at a place within the Commonwealth would seem to bear no relation to the frequency of his use of our roads. There appears to be no good reason for differentiating in this respect between a class of persons whose regular business, carried on at a definite place in the Commonwealth, is a trade or calling and those whose business, carried on likewise at such a definite place, is of another type. Both classes may, and probably will, use our roads to the same extent in coming to and returning from their work to a place of abode outside Massachusetts. I do not think that the Legislature, in making this definition, intended to place in one class the man who labors at a bench or in a counting room and in another the man who works in his own executive office, and to make exceptions to the general law applicable to one and not to the other.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Department of Public Health — Water Supply — Hearing.

The Department of Public Health has no authority to reopen a hearing held under G. L., c. 40, § 41, after it has given its approval to a proposed taking for water supply thereunder.

FEB. 14, 1928.

DR. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have asked my opinion as to whether the Department of Public Health has authority to reopen a hearing held under the provisions of G. L., c. 40, § 41, after it has given its approval, subsequent to such hearing, to the purchase or taking of land by a city for a source of water supply; and whether or not, if it has such authority, it must grant such a rehearing.

In regard to the particular matter before you, as to which your question is propounded, you advise me that the owner of land involved in the proposed taking was notified of the hearing and that a period of three months was given him, upon his request for delay, in which to appear and state his objections, which he did not do; that the hearing was duly held and notice of approval of the purchase or taking formally conveyed to the interested city, which thereafter did in fact take land in accordance with such approval; that subsequent to such taking the said owner filed with you a petition for a rehearing.

I am not aware of any provision of the statutes which specifically authorizes a rehearing of the matters brought before your Department under G. L., c. 40, § 41; and after its approval has been acted upon by a municipality and a taking made in reliance thereon, it has not, in my opinion, authority to rehear such matters.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

County Accounts — Deputy Sheriff — Fees.

Fees of a deputy sheriff who is a salaried chief of police may be allowed for services outside the town in which he serves as such chief.

FEB. 15, 1928.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:— You request my opinion as to whether, under the provisions of G. L., c. 262, § 50, as amended by St. 1922, c. 377, § 1, forbidding extra payments for "official services performed in any criminal case" to "a deputy sheriff, city marshal or other police officer who receives a salary," an item in certain county accounts for allowance of payment of fees to a deputy sheriff, not the recipient of a salary or allowance in payment for services therefor, who is a salaried chief of police of a town, for serving criminal process in and for towns which maintain no regular police department, for violations of law therein, is proper for approval by the Director of Accounts.

G. L., c. 262, § 50, provides, in part, as follows:—

"No . . . deputy sheriff, . . . city marshal or other police officer who receives a salary or an allowance by the day or hour from the commonwealth or from a county, city or town, shall, except as otherwise hereinafter provided, be paid any fee or extra compensation for official services performed by him in any criminal case; . . . or for testifying as a witness in a criminal case during the time for which he receives such salary or allowance; . . . but his expenses, necessarily and actually incurred, and actually disbursed by him . . . shall . . . be paid . . . in a criminal case tried in a district court . . . by the town where the crime was committed."

The statute first recites *seriatim* the officials, by title, to whom its provisions, purposing prevention of receipt by salaried officers of double compensation for the same working time, and prohibition of their interest in fees, are applicable. Incumbency of office, receipt of salary or allowance and performance of an official service in any criminal case, by any one of the officials recited, are the circumstances by which the provisions operate, in any given case, to preclude extra payment for "official services." Though the "official services" include any and all services in any criminal case incident to the services required of any one of the officers, they relate to those services, performed by any one of the officials recited, which are incident and peculiar to the services required of such official in the capacity for which he receives a salary or a daily or hourly allowance.

In my opinion, the receipt of a salary for official services as a chief of police of a town, by a person who is also a deputy sheriff, does not, under the circumstances you recite, preclude payment of fees to such person

for official services as a deputy sheriff in serving criminal process in and for other towns for violations of law therein, and you are therefore advised that the item as to which you inquire is a proper one for approval by the Director of Accounts.

Yours very truly,
ARTHUR K. READING, *Attorney General*.

County Treasurer — County Tuberculosis Hospital Treasurer — Salary.

A county treasurer serving as treasurer of a county tuberculosis hospital may receive compensation for the work of both offices, in the absence of a statute making the duties of the latter position part of those of the former.

FEB. 17, 1928.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR: — You request my opinion whether a county treasurer, in the event he serves as treasurer of a county tuberculosis hospital by appointment of the county commissioners, may receive compensation for such service in addition to his salary as county treasurer.

G. L., c. 35, § 4, establishes the basis of salaries payable to treasurers of certain counties "in full for all services performed by them."

The services, obviously, are those required to be performed by an encumbent as part of or incident to duties as a treasurer of a county, as prescribed by statute.

G. L., c. 111, § 81, as amended by St. 1924, c. 500, § 2, provides for the erection of hospitals in counties by county commissioners for hospital care of certain persons in certain municipalities in the counties. Sections 83 and 85 provide for apportionment and collection of amount for erection and maintenance of the same from the municipalities served.

Such municipalities comprise districts as entities separate from the counties. A hospital so erected for such service to municipalities is therefore a county district hospital. The treasurer of such a hospital is therefore not an employee of the county, as such. *Peck's Case*, 250 Mass. 261, 268.

G. L., c. 111, § 87, authorizes appointment by the county commissioners of officers and employees necessary for the proper conduct of said hospitals.

In the absence of any statute requiring treasurership of a county district tuberculosis hospital as part of the duties of a county treasurer, as such, in any particular county, the services of the former are not included in the services of a county treasurer, for the performance of all of which G. L., c. 35, § 4, prescribes a salary in full, and, in the event that the county commissioners appoint a county treasurer to serve as treasurer of such a hospital, he may, in my opinion, receive compensation therefor in addition to his salary as county treasurer.

Yours very truly,
ARTHUR K. READING, *Attorney General*.

Insurance — Title Insurance Company — Commissioner of Insurance.

The Commissioner of Insurance, in reviewing the articles of a proposed title insurance company, may consider with relation thereto the purposes of the corporation in the light of G. L., c. 175, § 47, cl. 11th.

FEB. 23, 1928.

Hon. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR: — You have requested my opinion upon several questions relative to the incorporation of a title insurance company, and have set forth the statement of the purposes for which such company is formed, as contained in its articles of organization submitted to you for your approval.

Your questions are as follows: —

“1. May the Commissioner in reviewing said articles consider the purposes contained in the second to fifth paragraphs above quoted?

2. May the Commissioner under said section 49 lawfully approve the purposes set forth in the second, third, fourth or fifth paragraphs above quoted?

3. Do the provisions of said section 49 restrict the purposes to be set forth in the articles of a domestic insurance company to those contained in one or more of the several clauses of section 47 of said chapter, and may the Commissioner lawfully refuse to approve articles containing any purposes other than those set forth in said section 47 as aforesaid?

4. May a domestic insurance company formed to transact business under said clause eleventh exercise all of the powers specified in the said second to fifth paragraphs, and if not, what powers of those so specified may it exercise?”

1. I answer your first question in the affirmative.

A distinction is to be drawn between the purposes and the powers of a corporation. G. L., c. 175, § 47, cl. 11th, sets forth the only lawful purposes for which a corporation of the character indicated by the instant articles of organization may be organized. A corporation organized for such purposes has by implication of law certain powers necessary or convenient to enable it to carry out such purposes. Paragraphs two to five of the articles of organization submitted to you do not purport to set forth any other purposes than those to which such a corporation is limited by the stated statutory clause. Such paragraphs merely purport to define the powers which the corporation may exercise in effectuating such purposes. The incorporators may not by the inclusion, in such defined powers, of powers not necessary or convenient to the carrying out of its designated purposes, but calculated, if exercised, to add to such purposes, evade the limitations of clause 11th and create an organization virtually having purposes additional to those allowed by the statute. The Commissioner is therefore bound to examine all the paragraphs of the articles of organization, with a view to determining whether the powers of the corporation, as therein set forth, are in excess of those which may properly be exercised by a company which may be formed only to effectuate the limited purposes designated in said clause 11th.

Moreover, G. L., c. 175, § 49, as amended, provides: —

“The company shall be formed in the manner described in and be subject to section nine of chapter one hundred and fifty-five, and sec-

tions six and eight to twelve, inclusive, of chapter one hundred and fifty-six . . .

. . . the articles of organization . . . shall, with the records and by-laws of the company, be submitted to the commissioner" (of insurance) "instead of to the commissioner of corporations and taxation, and he shall have the powers and perform the duties relative thereto specified in section eleven of said chapter one hundred and fifty-six."

G. L., c. 156, § 6, to which the formation of the corporation is to be subject, provides that the agreement of association shall state, among other matters, —

"(h) Any other lawful provisions for the conduct and regulation of the business of the corporation, for its voluntary dissolution, or for limiting, defining or regulating the powers of the corporation, or of its directors or stockholders, or of any class of stockholders."

Under this statutory provision the incorporators have a right in their articles of organization to set forth provisions which define the powers of the corporation. This they have done in paragraphs two to five, as set forth in your communication.

The duties and powers with relation to the articles of organization which are vested in the Commissioner of Corporations and Taxation by G. L., c. 156, § 11, and which by virtue of G. L., c. 175, § 49, the Commissioner of Insurance is to exercise with relation to the corporation now under consideration, are as follows: —

"The articles of organization, the agreement of association, and the record of the first meeting of the incorporators, including the by-laws, shall be submitted to the commissioner, who shall examine them and who may require such amendment thereof or such additional information as he deems necessary. If he finds that the provisions of law relative to the organization of the corporation have been complied with, he shall endorse his approval on the articles. Thereupon, the articles shall, upon payment of the fee provided by section fifty-three, be filed in the office of the state secretary, who shall cause them and the endorsement thereon to be recorded."

Since the incorporators may set forth in their articles of organization such definitions of the powers of the corporation as they may deem best to provide for specifically, it becomes the duty of the Commissioner of Insurance, exercising similar powers to those given to the Commissioner of Corporations and Taxation in other instances, to examine the articles to determine whether such provisions by way of definition are lawful.

2. I answer your second question in the affirmative with relation to the provisions as to the powers of the corporation. No purposes additional to those set forth in the first paragraph of the articles, as quoted in your letter, appear in the following paragraphs of the articles. I do not perceive any powers defined in such latter paragraphs which are either not incidental to or unconnected with the carrying out of the purposes of the corporation, which purposes are set forth in the articles in the language of clause 11th of section 47 of the statute. The powers set forth are so defined with relation to applicable statutory enactments that it cannot be said that the provisions of law relative to the organization of the corporation have not been complied with.

3. I answer both inquiries contained in your third question, as written, in the affirmative.

Section 49 is to be read in connection with section 47, and as complementary and not in opposition thereto. See VII Op. Atty. Gen. 532, 536.

4. I answer your fourth question to the effect that, with relation to the specific case to which you have directed my attention, all the powers as they are defined in the particular articles of organization laid before me may be exercised by this corporation to which they pertain, when its formation has been duly completed.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Insurance — Mutual Liability Insurance Company — Dividends.

A mutual liability insurance company may agree to pay, and may disburse, to policyholders whose policies have expired a share in the profits, such as may be fairly allocated to them for the time during which their policies were in force.

FEB. 27, 1928.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR: — You have advised me to the effect that a domestic mutual insurance company doing business under G. L., c. 175, § 47, cl. 6th, as amended, issuing "motor vehicle liability policies" solely, and subject to the provisions of G. L., c. 175, § 80, as amended —

"proposes to issue to persons insured by it during the year 1927, a certificate entitled 'Participating Dividend Warrant' which reads: —

'(Name of Company.)

No. —

This is to certify that John Doe, a policyholder or member for the year 1927, and continuously thereafter, of the Insurance Company, will be entitled upon surrender of this certificate (when called for surrender by the Board of Directors of such Company) to such dividend, if any, as may be declared by the Board of Directors but in no event to be in excess of 20% of the insurance premium paid by such policyholder or member in the year 1927 — the same to be payable out of the profits or earnings of such Company declared on business written during such policy year.

This certificate is transferable only at the home office of the Company in such manner and at such times as shall be determined by the Board of Directors.'

The purpose of this certificate is to meet competition in that this company has not declared a dividend to persons insured by it during 1927."

You have asked my opinion upon the following questions relative to the foregoing facts: —

"1. May a mutual company lawfully issue a certificate in the form above set forth?

2. Do the words 'may by vote fix and determine the percentages of dividend . . . to be paid on expiring policies,' occurring in said section 80, permit a company to declare and pay dividends on policies which have expired in contradistinction to policies which have not expired, at the time the declaration is made, or more specifically, may a company,

v.g., lawfully declare and pay, in 1930, a dividend in respect to a policy which expired on December 31, 1927?"

1. I answer your first question in the affirmative. It has been the policy of this Commonwealth, as evidenced by a long line of enactments, to provide for the payment to holders of policies in mutual insurance companies of such share in the profits of those companies as might fairly be allocated to them for the time in which their policies were in force. It is made clear by the language of the statutes that they are not to be deprived of such benefits by the expiration of their policies. Doubtless, in the absence of such enactments, it might have been said that only such persons as continued to hold effective policies in a mutual company could be entitled to participate in its benefits or be liable for any part of its losses. *Zinn v. Germantown etc. Ins. Co.*, 132 Wis. 86. Liability to assessment for loss for a designated period after policy lapsing has been placed upon those insured in mutual companies by a series of statutes, now embodied in G. L., c. 175, § 83.

G. L., c. 175, § 80, provides that the directors may fix the percentages of dividends "from time to time." Even if it be assumed that the duty of the directors requires them to make such fixation during each calendar year, the fact that they have not done so in regard to any particular year does not deprive the policyholder of the right which is given by the statute to participate in any dividend which may be declared as of the year in which his policy expired. A declaration of a deferred dividend applicable to a preceding year, deferred perhaps because impossible of ascertainment at an earlier date, or for any other reason, is not specifically forbidden by the statute, and I perceive nothing inherently illegal in it.

The certificate or "warrant" to which you have called my attention does not appear to me to create any liability upon the insurance company which did not previously exist. It seems to be a mere declaration that the company will fulfill its obligation to the holder of a 1927 policy with relation to any portion of a dividend for such year, when and if the same be properly fixed and determined, which might rightly be allocated to him.

I note that the certificate refers to the policyholder of 1927 as one "continuously thereafter" a policyholder or member of the company. It is obvious that if a dividend for 1927 be declared at a later period, all persons whose policies expired in that year would be equally entitled to their proportion of the benefit thereof, irrespective of whether or not they continued to be members of the company, by virtue of the provisions of said section 80. As the so-called warrant does not, as I have said, give rise to new obligations on the part of the company as to policyholders of 1927, the delivery of the warrant, even with this particular clause therein, to continuing members only does not give to the latter any special favor or advantage in the dividends or any other valuable consideration not open to non-continuing policyholders, and for that reason cannot be said to be in violation of G. L., c. 175, §§ 181-185.

2. I assume that the dividend which you refer to in your second question is one which might properly have been declared in 1927 if it had been possible at that time to make the necessary computations, and upon that assumption I answer your second question in the affirmative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Insurance — Fraternal Benefit Society — Death Fund.

Money applicable only to death fund purposes may not lawfully be diverted to the payment of expenses.

FEB. 27, 1928.

HON. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR: — You have laid before me the following facts: —

“A certain fraternal society is licensed to transact business in this Commonwealth under the provisions of G. L., c. 176.

During the year 1926, its board of directors allocated to the expense fund of the society the sum of \$100,000 out of the interest and dividends paid to the society on all of the stocks and bonds owned by it. This sum was, therefore, apparently taken from the accretions of the death fund of the society.

The society contends that it has a right to use any portion of the accretions to its death fund in excess of three and one-half per cent, the rate of interest assumption on its reserve, because its by-laws so provide.”

You have asked my opinion upon the two following questions as they relate to the foregoing facts: —

“1. Did the transfer of the said fund of \$100,000 constitute a violation of G. L., c. 176, § 14?

2. May a society lawfully provide in its by-laws that the accretions to its death fund in excess of the interest assumption on its reserve may be used for expenses?”

G. L., c. 176, § 14, with relation to a fraternal benefit society, provides: —

“Every provision of the by-laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purposes of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses.”

The legislative intent as expressed in this section is plain. It is to the effect that none of the accretions which have in fact actually enured to the mortuary or disability funds shall be used for expenses. It is immaterial that the society by its by-laws may have established some other rule as to the accretions. It is immaterial that the society may have provided for using more than a designated percentage of the accretions for expenses. “Net accretions” to the fund, as those words are used in the instant statute, do not mean such sums as the society may itself determine to leave in its death fund from the profits thereof. It is immaterial whether the sums which the society has determined to leave in its death fund are, in the judgment of the society or in fact, sufficient to secure its actuarial solvency or to provide an adequate reserve. The Legislature has determined that all such sums must be left in the death fund. No other measure of the necessary size of the death fund can be substituted for that adopted by the Legislature, namely, the payments of the members plus the actual or net accretions.

If it be of importance to consider the meaning of the words “net accretions” as distinguished from gross accretions, the same is made clear in that part of the opinion of the Supreme Judicial Court in *Catholic Order of Foresters v. Commissioner of Insurance*, 256 Mass. 502, wherein certain

peculiar expenditures from the gross receipts of the death fund were held to be properly chargeable as against such fund itself, "as in effect a payment of death claims" rather than payable as expenses, within the ordinary use of that word, from the expense fund. In such case the difference between the total of accretions and the authorized payment would clearly be net accretions, within the meaning of the statute.

The words "net accretions" do not mean that portion of the total accretions of the mortuary fund which the society has itself under a by-law permitted to be added to the fund. This society, by means of its by-laws, has attempted by a colorable division of the money paid by the members for mortuary purposes into different funds to divert to the payment of expenses sums applicable only to death fund uses, in much the same manner as did the plaintiff in the case of *Catholic Order of Foresters v. Commissioner of Insurance*, *supra*, — a practice held there improper by the court.

I answer your first question in the affirmative and your second in the negative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Constitutional Law — Contracts between Certain Employers and Employees.

A proposed statute prohibiting the making of contracts for the purchase of stock, between employers and employees engaged in hand labor or machine operation, would not, if enacted, be constitutional.

FEB. 29, 1928.

HON. J. BRADFORD DAVIS, *Senate Chairman, Committee on Labor and Industries.*

DEAR SIR:—Your committee has asked my opinion as to the constitutionality of Senate Bill No. 131 and House Bill No. 673, if enacted into law.

The purpose of both the proposed measures appears to be to prohibit the making of certain contracts between employers and employees, and between those who are about to enter into such relationship to each other. By their terms the proposed measures relate only to such employees as engage in hand labor or machine operation.

It is not clear whether section 1 of this act is intended to require all contracts therein included to be in writing, or whether it merely intends to require copies of such contracts as may be in writing to be delivered to employee or prospective employee. This matter should be clarified by amendment. The answer to the first question hereinafter set forth is based upon the assumption that the first section does not compel such contracts to be in writing, but intends to affect only such contracts as may be in writing.

Such provisions of these bills, set forth in their first sections, respectively, as are intended to require the giving of signed copies of written agreements which have been entered into with relation to terms of employment to the contracting employee, are, in my opinion, constitutional, as a valid exercise of the police power in a field wherein fraudulent practices may not unreasonably be determined by the Legislature to be likely of occurrence, even though the requirements are limited to a particular class of contracting parties.

The provisions of the proposed measures, such as are embodied in the second sections thereof, respectively, declare null and void contracts of employment which in effect require purchase of the capital stock of the employer by the employee. The provisions obviously are intended to apply only to corporations, on the one hand, and are specifically limited by their terms to workers who perform hand labor or operate machines, on the other. The bills as drawn not only impliedly prohibit the requirement of purchase of stock as a prerequisite to the obtaining or retaining of employment, which might conceivably be regarded as such a coercive measure on the part of an employing corporation as to warrant legislative enactment to protect the workman, but go much farther and render void contracts made between those as to whom the relation of employer and employee actually exists, relative to performance of the designated forms of labor, if such contracts contain as a condition or consideration the purchase of stock by the employee.

It is not a matter of common knowledge that the purchase of stock in corporations by their employees is contrary to the public welfare. The practice is not an uncommon one and it is not impossible that it may be of benefit to employees. It is not plain that hand laborers and machine operators form a special group as to which such forms of contract may not be beneficial. To single out this particular class of workmen and to deny to them and their employers the right to make binding contracts of this character does not, on its face, appear to be a reasonable mode of classification, but, rather, to be an arbitrary one. There is nothing in the phraseology of the bills which tends to show that the subject matter of the enactment bears a relation to any of the forms of public welfare for the protection of which contracts may be the subject of regulation by the police power inherent in the Legislature.

Much the same considerations are applicable to the third sections of the proposed bills. It may well be that some provisions of employment contracts "restricting the liberty of action" of the designated classes of employees are void under our existing laws. It does not necessarily follow, however, that provisions restricting the liberty of former employees in all forms of action are necessarily so oppressive and subversive of the general good of the community as to permit an interference with the right of contract by the Legislature under the guise of the police power. It is not apparent that the conditions of employment with regard to the special class of employers who may desire the benefits of such contracts, namely, those hiring hand laborers or machine operators, is such as to make their classification as a particular group which may not make contracts permitted to others a reasonable rather than an arbitrary one.

The character of the business to which this legislation relates appears to be a private one, not one necessarily charged with a public use. The Legislature, however, even in relation to business not charged with a public use, may to some extent regulate contracts between employer and employee in order to protect the safety, health, morals or, in a limited sense, the general welfare of the public, but unless the public welfare is so adversely affected the Legislature has no authority, under the guise of the police power or otherwise, to prescribe the conditions or regulate the contracts under which labor shall be performed by men of full age. *Opinion of the Justices*, 163 Mass. 589; *V Op. Atty. Gen.* 484; *Holcombe v. Creamer*, 231 Mass. 99; *Opinion of the Justices*, 220 Mass. 627; *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206; *Bogni v. Perotti*,

224 Mass. 152, 157; *Commonwealth v. Strauss*, 191 Mass. 545, 550-1; and cases cited in the foregoing.

For the foregoing considerations I am constrained to advise you that, in my opinion, the bills to which you have directed my attention would not, if enacted, be constitutional.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Municipality — Fire Department — Fire Chief.

A chief of a fire department of a town, who makes the duties of his office his vocation, is a permanent member of such department, within the meaning of G. L., c. 32, § 85; and the provisions of said section, once accepted by a town, apply after the town has become a city.

MARCH 1, 1928.

HON. THOMAS R. BATEMAN, *Chairman, House Committee on Bills in the Third Reading.*

DEAR SIR: — You have asked my opinion upon two questions involved in your consideration of Senate Bill No. 237, entitled "An Act relative to the retirement and pensioning of the chief of the fire department of the city of Gardner."

Your questions are these: —

"(1) Is the chief of the fire department of a town which has accepted the provisions of G. L., c. 32, § 85, or corresponding provisions of earlier laws, who holds said office under civil service or other form of unlimited tenure or by election or appointment for a stated term, a 'permanent member of the fire department,' within the meaning of said section 85?

(2) Do the provisions of said section 85, if accepted by a town, continue to apply to permanent members of its fire department after it has become a city?"

1. The words "permanent member of the fire department" or "permanent fireman," as used in our statutes for many years, have a somewhat technical meaning. They connote a man whose occupation is that of a fireman attached to some regularly constituted fire-fighting department, in contradistinction to a "call" fireman, who, though a member of such a department, renders his service to it only upon specific calls therefor, and who does not make fire fighting his vocation. As used in legislative enactments in this Commonwealth the word "permanent," as applied to a fireman, denotes nothing as to his tenure of office, with relation to its being unlimited or limited, or to the manner in which he is chosen for such office. The application of the words "permanent" and "call" to describe two different types of firemen, classified according to the mode in which they render service, is to be seen throughout G. L., c. 48, as amended, and a similar meaning is to be given to the words as used in G. L., c. 32, as amended.

A chief of a fire department appointed under the provisions of G. L., c. 48, § 42, would appear to be intended by the Legislature to be a "permanent fireman," from the very nature of the duties which he is called upon to perform. In any given instance it would appear to be a question of fact as to whether a particular fireman was to be deemed a permanent or a call member of a department, the determination of that fact depend-

ing solely upon a consideration of the character of the service which he was obliged to render and in no way upon the manner of his appointment or the term of his office. A chief of a fire department who was not required to perform the duties of such office merely upon specific "call" would be a permanent member of his department and affected by all pension laws pertaining to permanent members, irrespective of the fact that he was subject "to appointment at stated intervals by the municipal authorities," in the language of Senate Bill No. 237. See *Moffatt v. Lowell*, 215 Mass. 92.

Accordingly, I answer your first question in the affirmative, assuming that a chief of a fire department, as a matter of fact, makes the duties of his office his vocation. See IV Op. Atty. Gen. 151; V *ibid.* 469.

2. I answer your second question in the affirmative.

The provisions of G. L., c. 32, § 85, relative to pensions for firemen in towns, are identical in purpose and intent with those of G. L., c. 32, § 80, which applies to firemen in cities. Although the establishment by a city of a system of pensions for firemen is dependent upon its acceptance by vote of a city council, nevertheless, the same system, in effect, has, under the terms of your question, already been accepted by the municipal body, which is now a city. To hold that mere change in the form of government nullifies the effect of the adoption of the system by the town would be to place a strained construction upon two sections of the same chapter which accomplish identical results. Minor details with reference to the carrying out of the system, which necessarily involve changes therein, such as the performance of the duties of the old town officials by the corresponding new city officers, do not render the old system in opposition to the powers, rights and duties of the city as such. The city succeeds the town, and it and its officials are to carry out the obligations of the old body in so far as these are not in opposition to the new city charter. See *Codman v. Crocker*, 203 Mass. 146, 149; *Higginson v. Turner*, 171 Mass. 586, 591; *Hill v. Boston*, 122 Mass. 344, 357. A change in the form of government of a community does not *ipso facto* abrogate pre-existing law applicable thereto. An act of incorporation does not necessarily annul the rights and privileges of a town; it rather confers on the town a new name with additional powers. *Commonwealth v. Worcester*, 3 Pick. 462, 474.

Moreover, it is expressly provided by our statutes as follows:—

"Cities and towns shall be bodies corporate, and, except as otherwise expressly provided, shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in the acts relating thereto. Except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities." (G. L., c. 40, § 1.)

"Except as otherwise provided by law, city councils shall have the powers of towns; boards of aldermen shall have the powers, perform the duties and be subject to the liabilities of selectmen, except with respect to appointments, and the mayor shall have the powers, perform the duties and be subject to the liabilities of selectmen with respect to appointments, but all his appointments shall be subject to confirmation and rejection by the aldermen, and upon the rejection of a person so appointed the mayor shall within one month thereafter make another appointment. In cities having a single legislative board other than a board of aldermen,

such board shall, so far as appropriate and not inconsistent with the express provisions of any general or special law, have the powers, perform the duties and be subject to the liabilities of the board of aldermen." (G. L., c. 39, § 1.)

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Department of Conservation — Venue of Prosecution — Game Laws.

A person who, after killing a pheasant, fails to make a report to the Department, as required by its rules and regulations, may be prosecuted in Suffolk County irrespective of the place of such killing.

MARCH 1, 1928.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR: — You have asked my opinion as to the local jurisdiction in which a person who has failed to make a report to your Department within twenty-four hours after killing a pheasant may be prosecuted. You have not submitted a copy of the rules and regulations which you advise me require such a report, but I assume, for the purposes of this opinion, that they are in proper form and have such effect by law that failure to comply with their terms in the respect indicated authorizes a criminal prosecution and the imposition of a penalty.

The precise point which you raise relative to the venue of such a prosecution has not been passed upon by the Supreme Judicial Court of this Commonwealth, and its ultimate determination is one for judicial decision. I am of the opinion, however, that proper venue for prosecution of the offense which you have described is in the County of Suffolk, irrespective of the situs of the killing or the residence of its perpetrator. Crimes of omission are ordinarily regarded as committed at the place where the required act should have been performed, and the courts at such place have jurisdiction of the offender even if he has not been personally present at any time therein. The general principle has been stated by the Supreme Court of Indiana, in *State v. Yocum*, 182 Ind. 481, as follows: —

"Personal presence is not an indispensable element in the locality of crime. A neglect to do an act is punishable in the county where the act should have been done. . . . As a general rule, an offense which involves an act of commission is committed where the act is done, while an offense involving an act of omission is committed where the act should have been done."

This principle has been applied to cases involving neglect to support or abandonment of a wife or children, the offense in such instances being treated as having been committed at the place where the dependents were when failure to support or to maintain existed as a fact, even though the husband or father was not in the same judicial jurisdiction as the dependents. *State v. Dvoracek*, 140 Iowa, 266; *Cleveland v. State*, 7 Ga. App. 622; *State v. Yocum*, *supra*; *In re Price*, 168 Mich. 527; *People v. Quigley*, 134 N. Y. S. 953. It is also significant that the Supreme Judicial Court has *sub silentio* passed upon a similar situation in the case of *Commonwealth v. Acker*, 197 Mass. 91.

So a failure by a railroad corporation, having its usual place of business in one county, to construct a station, as required by law, in another

county has been held to give jurisdiction to the courts of the latter county, in which the prescribed act should have been performed. *Louisiana etc. Ry. Co. v. State*, 85 Ark. 12.

So the venue of an indictment charging embezzlement for failure to account has been held properly laid in the county where the defendant's duty required him to account. *People v. Davis*, 269 Ill. 256.

So the prosecution of a corporation for failure to place the word "incorporated" after its name in an advertisement, in violation of a statute, was held properly to be in the county where the corporation had its place of business and not in the county where it published the advertisement in a local newspaper. *Paracamph Co. v. Commonwealth*, 33 Ky. Law Rep. 981; *Commonwealth v. Nebo Cons. Coal & Coking Co.*, 141 Ky. 493.

Under your regulations, as you have described them in your letter, the killer of a pheasant was required to make a written report to the office of your Department in the State House at Boston. The failure to make the report at such place where it was due, within a certain time, constitutes such an omission as will give jurisdiction to the courts sitting in Suffolk County for the determination of criminal cases. The offense might be prosecuted by indictment in the Superior Court or by information in the Municipal Court of the City of Boston.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Notaries Public — Justices of the Peace — Commissions — Expirations.

Commissions of notaries public and justices of the peace appointed on February 29, 1928, for the term of seven years, expire on February 28, 1935.

MARCH 7, 1928.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You inquire whether commissions of notaries public and justices of the peace who were appointed on February 29, 1928, for the term of seven years, would expire on February 28 or March 1, 1935. It is my opinion that such commissions will expire on February 28, 1935.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Metropolitan District Water Supply Commission — Power to acquire Real Property owned by a Town.

The Commission, under St. 1927, c. 321, may acquire by purchase lands owned by a town, but it may not enter into an agreement for purchase of lands owned by a town under a plan for compensation by which the Commonwealth will become the debtor of the town for a period of unlimited duration.

MARCH 13, 1928.

Metropolitan District Water Supply Commission.

GENTLEMEN:— You request my opinion on two questions relating to proposed action by your Commission in pursuance of its duties and powers as expressed in St. 1927, c. 321. Sections 4 and 12 of said act, to which reference is hereby made, are not herein quoted because of their length.

The first question upon which you request my opinion is whether or not the Commission, in behalf of the Commonwealth, may acquire certain land and buildings owned by the town of Dana in its corporate capacity.

I assume from your request that the takings contemplated are reasonable and necessary for the successful and proper completion of the project authorized by St. 1927, c. 321. The language of section 4 is clearly broad and inclusive enough to authorize the purchase of lands or of any interest therein owned by the town of Dana in its corporate capacity. That the powers of the Commission extend thus far is also clearly shown by the fact that section 12 gives a specific remedy at law for a taking of such property. In view of the broad authorization of acquisition by purchase, contained in section 4, it cannot be said that the remedy by suit, contained in section 12, is the exclusive method by which compensation for the taking of such lands may be obtained. In my opinion, section 4 of the act authorizes the acquisition by purchase of the lands in question. Your attention is also called to the inclusive provisions of section 7 of said act.

The second question upon which my opinion is required is whether the Commission may enter into an agreement for the purchase of certain buildings in the town of Dana under a contract the terms of which are substantially those set forth in a memorandum accompanying your request. In substance, the memorandum of the contract proposes compensation for the taking of certain specified property of and in the town of Dana by —

(a) an agreement of the Commonwealth to take over and assume the payment of certain notes made by the town of Dana;

(b) an agreement that the Commonwealth shall permit the town to have the free use of the buildings taken, until the said buildings must actually be removed by the Commission for the execution of the Swift River project; and

(c) the establishment by the Commonwealth of a credit balance in the State treasury in favor of the town of Dana, against which the town may draw, in certain specified amounts, and upon the unpaid amount of which balance the Commonwealth shall pay to the town, semi-annually, interest at the rate of five per cent per annum.

The contract is not described with sufficient accuracy or in such detail in the memorandum attached to your request as to enable me to pass finally upon the validity of its provisions in detail. Upon broad, general principles I am, however, of the opinion that the agreements described in paragraphs (a) and (b), being in substance the equivalent of the present payment of compensation in money or the grant of privileges in diminution of damages, are valid and within the general authority of the Commission as set forth in St. 1927, c. 321, § 4, and by the express terms of section 7, which gives the Commission the broadest possible powers of settlement. Said section 7 provides as follows:—

“The commission may either before a taking or afterward make such settlements as it may deem for the best interests of the commonwealth with any person or corporation having a valid claim under this act.”

Whether or not the provision for a credit balance in favor of the town of Dana, described above in paragraph (c), is a proper exercise of the power of purchase under the provisions of St. 1927, c. 321, §§ 4 and 7, is a more difficult question. If the portion of the contract establishing this credit balance provides merely for the postponement of the payment of the principal sum to be paid by way of settlement, I am of the opinion

that the provision is proper. The powers of the Commission with respect to purchases of land are at all places in St. 1927, c. 321, of the broadest possible scope, leaving to the Commission free play for the exercise of a sound discretion. I am of the opinion that the broad powers given to the Commission to make settlements include not only the power to settle a taking claim by the spot payment of the principal sum of damages, but also, with the assent of the landowner, to pay the principal sum of damages at a future day or to make the payment of such principal sum subject to such reasonable conditions as may be agreed upon by the parties to the settlement.

On the other hand, if the provisions for the establishment of a credit balance in favor of the town of Dana are intended to constitute the Commission or the Treasurer and Receiver General either a trustee for the town or, in substance, a borrower from the town, I am of the opinion that such provisions are not reasonable conditions of a settlement contract under section 7, quoted above. The suggested provision for the payment of interest would indicate that the Commonwealth was planning formally to become the debtor of the town under a contract unlimited in duration. Such a provision, in my opinion, is beyond the powers of the Commission, since it is inconsistent with the general practice of settlement of land taking controversies, in force when the General Court enacted St. 1927, c. 321, in that it does not provide for payment for the taking by a form of compensation which is either a liquidated amount or the substantial equivalent of a liquidated sum of money.

In rendering this opinion, because of the fact that no specific contract is submitted to me in final form for approval, I express only my opinion as to the general powers of the Commission with respect to certain phases of contracts such as that described indefinitely in the memorandum accompanying the request for an opinion.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

*Department of Mental Diseases — Support of Inmates of State Hospitals —
Statute of Limitations.*

St. 1926, c. 281, does not operate to remove the bar of the statute of limitations fixed by G. L., c. 260, § 2, with relation to causes of action to recover for the support of inmates of State hospitals which accrued at least six years before the effective date of said St. 1926, c. 281.

MARCH 17, 1928.

Dr. GEORGE M. KLINE, *Commissioner of Mental Diseases*.

DEAR SIR: — You have asked my opinion as to whether the provisions of St. 1926, c. 281, amending G. L., c. 260, by adding to the latter a clause which permits actions to recover for the support of inmates in State institutions to be brought within twenty years next after the cause of action accrues, are to be construed as retroactive.

Prior to the enactment of said St. 1926, c. 281, such actions, like other actions of contract, might be commenced only within a period of six years from the time they accrued. G. L., c. 260, §§ 2 and 18.

The construction of a legislative measure as retroactive, so as to remove the bar of a statute of limitations which has heretofore, by its force through

the passage of time, vested persons with a legal defense, is not favored by the courts of the Commonwealth. Although there may be forms of remedies, lost by operation of a statute imposing limitations upon the time in which they may be instituted, that the Legislature may revive (*Dunbar v. Boston & Providence R.R. Corp.*, 181 Mass. 383, 386; *Danforth v. Groton Water Co.*, 178 Mass. 472), yet in the absence of specific language in a statute, which in effect removes the bar of a statute of limitations, indicating a legislative intent that the measure should have a retroactive effect, such a statute is not to be interpreted so as to permit the bringing of actions upon causes which have already been barred by the passage of time, under the terms of an earlier enactment. *Wright v. Oakley*, 5 Met. 400; *Bigelow v. Bemis*, 2 Allen, 496; *Kinsman v. Cambridge*, 121 Mass. 558; *Garfield v. Bemis*, 2 Allen, 445; *Bucher v. Fitchburg R.R. Co.*, 131 Mass. 156.

The language of St. 1926, c. 281, does not necessarily import that it is to act retroactively, and I advise you that it does not operate to remove the bar of the statute of limitations as fixed by G. L., c. 206, § 2, with relation to such causes of action as had accrued at least six years before the effective date of said St. 1926, c. 281.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Motor Vehicles — Registration — Applications.

The Registrar of Motor Vehicles may, in the exercise of a reasonable discretion, waive answers to certain questions on applications for registration of motor vehicles.

MARCH 29, 1928.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You have requested my opinion as to the right of the Registrar of Motor Vehicles to waive answers to certain questions on applications for registration of motor vehicles.

I am of the opinion that the Registrar may, in the exercise of a reasonable discretion, waive answers to any questions which may be contained on a printed form of application, such as you have annexed to your letter, provided that all the information which is specifically required by G. L., c. 90, § 2, to be contained in such an application is in fact set forth therein.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Department of Conservation — Permit — Fishing.

No official has power to authorize the taking of fish by the use of torches.

APRIL 2, 1928.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:— You have asked my opinion as to whether or not the Director of the Division of Fisheries and Game, or any other official of the Department of Conservation, has the right to exercise the rights conferred by St. 1913, c. 519, upon the Commissioners of Fisheries and Game. Said chapter 519 provides as follows:—

“SECTION 1. It shall be unlawful for any person to display torches or other light designed or used for the purpose of taking herring in so much

of the waters of Boston harbor as lies within the limits of the city of Boston inside of a line drawn from Moon Island to Point Shirley: *provided, however*, that the commissioners on fisheries and game may grant permits for the display of torches or other lights for the purpose aforesaid, but only on the waters aforesaid, with such restrictions as in their judgment will prevent the same from constituting a nuisance; and said commissioners may at any time revoke any such permit."

Section 2 provides a penalty for the violation of section 1. This chapter has never been repealed or amended.

Gen. St. 1919, c. 350, § 43, provided, in part, as follows:—

"The director of the division of fisheries and game shall exercise the functions of the board of commissioners on fisheries and game under chapter ninety-one of the Revised Laws and acts in amendment thereof and in addition thereto."

This section, which stated that the Director of the Division of Fisheries and Game should exercise all the powers of the Commissioners on Fisheries and Game, was expressly repealed by G. L., c. 282. There is no re-enactment of said section 43 to be found in the General Laws or in the laws passed subsequent thereto, nor am I able to find any existing law which confers upon the Director or upon any other person the authority to issue the permits specified in said chapter 519.

It follows that in the present state of the law it is contrary to law to use a torch in the manner and place specified in said chapter 519, and that no person or department has power or authority to issue permits for this purpose.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Constitutional Law — Restrictions — Release.

A proposed statute to remove restrictions on land on Newbury Street, Boston, would be constitutional if it purported to release only rights of the Commonwealth therein.

APRIL 10, 1928.

Senate Committee on Ways and Means.

GENTLEMEN:— You have asked my opinion as to the legality and propriety of legislation relative to removing certain restrictions on land on Newbury Street in Boston, as contained in Senate Bill No. 234. Said bill provides as follows:—

"For the purpose of enabling the city of Boston to widen Newbury street between Arlington street and Massachusetts avenue in said city, the commonwealth hereby releases any lands situated on said street from the operation and effect of any restriction or stipulation imposed by it or for its benefit which would prevent said lands from being used for highway, street and sidewalk purposes."

In 1850 the Back Bay district, which includes that part of Newbury Street described in the bill, was owned by the Commonwealth. The Commonwealth filled in the land, which consisted of tidal flats, laid out streets and lots, and sold the lots to various purchasers. These sales covered the period between 1857 and 1879. The deeds by which the lots on Newbury Street were conveyed contained, among others, a restric-

tion to the effect that buildings thereon should be set back twenty-two feet from the street, and this is the restriction which the present bill seeks to release.

The sale of the lots in the Back Bay district, including those on Newbury Street, together with the restrictions thereon, was in furtherance of a general scheme for the development of a desirable residential district, and, consequently, each purchaser of a lot acquired the right to compel the observance by all other purchasers of the restrictions common to all the lots. This right, being appurtenant to the land, passed to the heirs and assigns of the original purchasers. It is to be noted that the thirty-year limitation imposed by G. L., c. 184, § 23, upon the duration of such restrictions does not apply in this case, as the statute makes an exception if the restrictions were imposed prior to its passage or if they are imposed in a deed given by the Commonwealth.

It should be clearly stated in the bill that the release of the restriction is subject to the rights, if there be any, of parties other than the Commonwealth. The Commonwealth cannot by its own act release the rights of other property owners in the Back Bay district (*Allen v. Mass. Bonding & Ins. Co.*, 248 Mass. 378), and, as stated above, these owners unquestionably have the right to compel the observance of the restrictions. If the character of the neighborhood affected by the restrictions has so changed as to render the restrictions useless and of no avail, then, under the principle laid down in the case of *Jackson v. Stevenson*, 156 Mass. 496, the restrictions would cease to operate or to have any legal effect. The determination of this question is for the courts, in appropriate proceedings, and may not be determined by the Legislature. In the case of *Allen v. Mass. Bonding & Ins. Co.*, *supra*, at page 385, decided in 1924, the court said:—

“When the extent of the area included within the scheme of Back Bay development is considered, plainly the general character of the district has not been changed.”

It is further suggested that the bill clearly state that nothing therein contained shall be construed to operate as a release by the Commonwealth for any purpose other than that set forth in the bill.

The result is that the bill would be constitutional if it purports to release only the rights of the Commonwealth, but if it purports to affect rights of other persons it is invalid. As suggested above, the insertion of a clause to the effect that the release is subject to the rights, if there be any, of parties other than the Commonwealth, will render the bill valid.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Insurance — Group Insurance — Massachusetts Agricultural College.

Neither the Massachusetts Agricultural College nor its board of trustees is the employer of its professional staff, within the meaning of G. L., c. 175, § 133.

HON. WESLEY E. MONK, *Commissioner of Insurance*. APRIL 10, 1928.

DEAR SIR:— You have asked my opinion upon the following question: Is the Massachusetts Agricultural College or its board of trustees the “employer” of the members of the professional staff of said college, within the purview of G. L., c. 175, § 133?

G. L., c. 175, § 133, as amended by St. 1921, c. 141, defines group life insurance, and reads as follows:—

“Group life insurance is hereby defined to be that form of life insurance covering not less than fifty employees, with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer or by the employer and employees jointly, and insuring only all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, or by duration of service in which case no employee shall be excluded if he has been for one year or more in the employ of the person taking out the policy, for amounts of insurance based upon some plan precluding individual selection, and for the benefit of persons other than the employer: provided, that when the premium is to be paid by the employer and employee jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per cent of such employees may be so insured; or not less than forty per cent if each employee belonging to the insured group has been medically examined and found acceptable for ordinary insurance by an individual policy.”

The Massachusetts Agricultural College was incorporated by St. 1863, c. 220. By Gen. St. 1918, c. 262, the corporation was dissolved, and it was provided that the college should be maintained under the same name as a State institution.

Section 5 of said chapter 262 provided:—

“All employees of the institution shall be considered state employees, but shall not be subject to the civil service laws and regulations.”

G. L., c. 15, § 19, provides that the trustees of the college shall serve in the Department of Education.

G. L., c. 15, § 4, provided that the Commissioner of Education should be the executive and administrative head of said Department, but by an amendment of said section 4 (St. 1926, c. 322) it was further provided that nothing in said chapter 15 shall be construed as affecting the powers and duties of the trustees of the college as set forth in G. L., c. 75.

G. L., c. 75, § 13, provides, in part:—

“The trustees shall elect the president, necessary professors, tutors, instructors and other officers of the college and fix their salaries and define the duties and tenure of office.”

Similar provisions relative to salaries of various employees of the Commonwealth in other departments and institutions are to be found in the General Laws.

In the codification of the General Laws said section 5 of Gen. St. 1918, c. 262, was not embodied in G. L., c. 75, as were some of the sections of the former statute. The salaries of the professional staff of said college are paid in full by appropriations made by the Legislature annually, except as to some of such staff who, I am advised, receive at least a part of their salaries from the Federal government. The salaries paid by the Commonwealth, though fixed by the trustees, are subject to rules and regulations of the Division of Personnel of the Department of Administration and Finance. St. 1923, c. 362, §§ 45, 48 and 52. Such of the staff as receive part of their pay from Federal sources have been said to be joint employees of the Commonwealth and the Federal government,

and those whose salaries are paid solely by the Commonwealth to be employees of the latter. VI Op. Atty. Gen. 105.

In view of the language of Gen. St. 1918, c. 262, § 5, it cannot well be said that the board of trustees of the college or the college occupies the position of employer as regards the professional staff of the college. No special powers have been given by the statutes to the trustees which would tend to indicate, even in the absence of said section 5, that they occupied any relation to persons serving under them which is not the relation held toward persons similarly placed by the heads of other divisions, boards and institutions of the Commonwealth. Such relation is not that of employer and employee. The Commonwealth holds that relation to all persons in its service, irrespective of which of its many divisions, boards or institutions exercises immediate control over them.

The word "employer" as used in G. L., c. 175, § 133, with relation to group insurance has no peculiar significance which would make it possible to construe it as applicable to any department, division, board or institution created by the Commonwealth which is not in fact or law the employer of the persons who work under its immediate supervision.

Accordingly, I answer your question in the negative.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Constitutional Law — Mayors of Cities — Removal.

A proposed statute authorizing the removal of mayors by a judicial determination would not be unconstitutional.

House Committee on Bills in the Third Reading.

APRIL 18, 1928.

GENTLEMEN: — You have asked my opinion as to the constitutionality of House Bill No. 1183, entitled "An Act providing for the removal of mayors of cities by the justices of the Supreme Judicial Court in certain cases," which provides as follows:—

"Section four of chapter two hundred and eleven of the General Laws is hereby amended by striking out, in the seventh line, the word 'or' and inserting in place thereof a comma and by inserting after the word 'attorney' in the same line the words:— or mayor of a city,— so as to read as follows:— *Section 4.* A majority of the justices may, if in their judgment the public good so requires, remove from office a clerk of the courts or of their own court; and if sufficient cause is shown therefor and it appears that the public good so requires, may, upon a bill, petition or other process, upon a summary hearing or otherwise, remove a clerk of the superior court in Suffolk county, or of a district court, a county commissioner, sheriff, register of probate and insolvency, district attorney or mayor of a city."

The cases of *Attorney General v. Tufts*, 239 Mass. 458, and *Attorney General v. Pelletier*, 240 Mass. 264, were brought under said section 4. It was there held that district attorneys were not "officers of the Commonwealth," within the meaning of Mass. Const., pt. 2nd, c. I, § II, art. VIII.

Mass. Const., pt. 2nd, c. I, § III, art. VI, provides as follows:—

"The house of representatives shall be the grand inquest of this com-

monwealth; and all impeachments made by them shall be heard and tried by the senate."

Chapter I, section II, article VIII, provides:—

"The senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and maladministration in their offices."

If a mayor is an officer of the Commonwealth within the meaning of this section he may be removed by impeachment only, and the Legislature may not provide for his removal in any other manner. In *Attorney General v. Tufts, supra*, at page 479, the court, quoting from *Opinion of the Justices*, 167 Mass. 599, said:—

"On the one hand, it seems to us that the various officers of cities or towns do not fall within the class of officers of the Commonwealth, in the sense in which these words are used in this provision of the Constitution. . . . It seems to us that the better construction of the constitutional provision is that the county commissioners are not subject to impeachment as officers of the Commonwealth."

There seems to be no reason to doubt that the court would apply any other law to the office of mayor of a city. It follows, in my opinion, that a mayor is not an officer of the Commonwealth, within the meaning of the constitutional provision, and that there is no objection to the bill under the section of the Constitution set forth above.

There is no conflict with article XXX of the Declaration of Rights. The jurisdiction given to the court is purely judicial in character and establishes a procedure constitutionally appropriate for judicial determination.

Other constitutional objections to this law, in so far as district attorneys are concerned, were considered and disposed of in the decisions in the two cases above cited, and I am of the opinion that the principles of law there laid down are applicable to the office of mayor as well as to the office of district attorney.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Registrar of Motor Vehicles — Revocation of License — Judicial Recommendation.

A recommendation that the license of an operator of a motor vehicle be not suspended by the Registrar, if communicated to him by a court before actual revocation, though after transmission of a report of a conviction, may be acted upon by the Registrar; but if received by him after the license has been in fact revoked, it is without effect in connection with such revocation.

MAY 4, 1928.

HON. WILLIAM F. WILLIAMS, *Commissioner of Public Works*.

DEAR SIR:— You have asked my opinion concerning the correct interpretation of a portion of G. L., c. 90, § 24, as amended, as it relates to the two following questions:—

"1. Can a recommendation of the court referred to above be accepted after the receipt of the court record in the case referred to?

2. Can such a recommendation of the court be accepted after the Registrar has revoked the license of the party referred to in the recommendation?"

G. L., c. 90, § 24, as amended, defines certain offenses in connection with the operation of motor vehicles, and establishes penalties therefor. It then sets forth the following provision, as to which in your letter you direct my attention:—

"A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event and shall, unless the court or magistrate recommends otherwise, revoke immediately the license of the person so convicted, and no appeal from the judgment shall operate to stay the revocation of the license."

It is obvious from the language of the statute that it is mandatory upon the Registrar to revoke the license of a person convicted under the statute immediately upon receipt of the designated report of conviction. It is conceivable that between the time of the Registrar's receipt of such report and his revocation of the license the statutory recommendation might be received by him. There is no specific requirement of the statute that the report and the recommendation shall be transmitted as one document or even simultaneously. In the event of such an unusual occurrence as the receipt of the recommendation after the transmission of the report but before the actual revocation, the Registrar could not well refuse to accept the recommendation, and might act in accordance therewith.

There is no specific provision of the statutes relative to the duties of the Registrar in relation to the *acceptance* of a recommendation. It is immaterial whether he does or does not physically accept the recommendation. If a recommendation reaches the Registrar after he has performed the duty of immediately revoking a license upon notice of conviction, he has completed the act required of him, the license stands revoked and the subsequently received recommendation is without effect, as the contemplated act has already been accomplished.

The Registrar, however, has power under the same section, in his discretion, in accordance with certain statutory regulations, to issue new licenses to persons who have been convicted, and it may well be that a recommendation of a court or magistrate which purported to be made under the statutory provision referred to in your letter, although received too late to be considered in relation to the revocation of the license, would aid the Registrar in making a decision as to the propriety of issuing a new license.

The foregoing statements of my opinion as to the law answer both your questions fully.

Very truly yours,
ARTHUR K. READING, *Attorney General*.

Taxation — Corporations — Change in Federal Net Income — Interest on Abatement of Tax with Respect to Such Change.

After the effective date of St. 1927, c. 148, a corporation receiving an abatement of an excise assessed under G. L., c. 63, § 32, as amended, is entitled to interest upon the amount of tax refunded, where the refund is based upon a reduction in Federal net income.

MAY 5, 1928.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR:— You request my opinion as to your duty upon the following facts: Prior to the date upon which St. 1927, c. 148, became effective, a domestic business corporation seasonably reported, in compliance with G. L., c. 63, § 36, a reduction in its net income for a previous calendar year, as determined by the Federal taxing authorities. Subsequently, after the date upon which St. 1927, c. 148, became effective, you certified to the Treasurer and Receiver General that the corporation had overpaid its excise tax for the year following the calendar year above mentioned by an amount equal to the tax due upon the difference between the amount of net income originally returned by the corporation to the Federal government for the calendar year in question and the amount of net income upon which the Federal government finally assessed a tax for that year. You did not, however, certify to the Treasurer and Receiver General that the corporation was entitled to a repayment of the amount of the tax thus overpaid, *with interest* from the date of payment to the date of repayment of the tax overpaid. If the provisions of St. 1927, c. 148, apply to this repayment, then the corporation is entitled to a repayment of the overpaid tax *with interest* for the period above mentioned.

G. L., c. 63, § 36, prior to the effective date of St. 1927, c. 148, read as follows:—

“If the assessment made by the federal government is based upon a net income greater or less than the net income returned by said corporation, or if an additional assessment is at any time made on the ground that the net income was incorrectly returned in the first instance, or if, after the tax as assessed is paid to the federal government, any part of such tax is refunded, the corporation, within ten days after the receipt of such notice of said fact, shall make return on oath to the commissioner of the amount by which the net income originally returned differs from the net income on which the tax was computed by the federal government upon the latest determination by it of the proper tax, and of the facts giving rise to the difference. If upon such facts an additional tax is due the commonwealth, the commissioner shall assess the additional tax, and the corporation shall, within thirty days after receipt of notice from the commissioner of the amount thereof, pay such additional tax. If upon said facts a less tax is due the commonwealth than that paid by the corporation, the state treasurer shall, upon certification of the commissioner, repay within thirty days such difference without any further statutory appropriation therefor.”

St. 1927, c. 148, reads:—

“Chapter sixty-three of the General Laws is hereby amended by striking out section thirty-six and inserting in place thereof the following:— *Section 36.* If the assessment made by the federal government is based upon a net income greater or less than the net income returned by said corporation, or if an additional assessment is at any time made on the ground that the net income was incorrectly returned in the first instance, or if, after the tax as assessed is paid to the federal government, any part of such tax is refunded, the corporation, within seventy days after the receipt of notice of said fact, shall make return on oath to the commis-

sioner of the amount by which the net income originally returned differs from the net income on which the tax was computed by the federal government upon the latest determination by it of the proper tax, and of the facts giving rise to the difference; provided that in case the corporation appeals from a decision of the commissioner of internal revenue or from a decision of the United States board of tax appeals, the return required by this section shall be made within thirty days after notice of the final determination on such appeal. If upon such facts an additional tax is due the commonwealth, the commissioner shall assess the additional tax, and the corporation shall, within thirty days after receipt of notice from the commissioner of the amount thereof, pay such additional tax with interest at six per cent from October twentieth of the year in which the original return of the corporation was due to be filed. If upon said facts a less tax is due the commonwealth than that paid by the corporation, the state treasurer shall, upon certification of the commissioner, repay within thirty days such difference with interest at the rate of six per cent from the date of the overpayment without any further statutory appropriation therefor. The provisions of this section shall not be construed to authorize the commissioner to make any assessment, the time for making which has by law expired, except assessment, with interest as aforesaid, of such amount of additional tax as is incident to the increase in federal net income, nor to authorize refund in excess of the amount of tax paid with respect to the difference in net income determined by the federal reduction, with interest as aforesaid."

The statute (St. 1927, c. 148) does not clearly indicate whether it was intended to apply to proceedings pending at the time of its effective date or merely to those Federal tax refunds reported to the Commissioner after the date when the amendment became operative. Some indications there are in the statute itself that the amendment was intended to apply to all overpayments certified and all assessments made (where the Federal net income taxed was increased by the Federal taxing authorities) after the date when the statute became effective. Both from the sentence dealing with additional assessments and from the sentence dealing with refunds of overpayments it must be deduced that the obligation to pay interest, imposed upon the taxpayer and upon the Treasurer and Receiver General, respectively, arises upon the date of assessment or the date of certification of the overpayment by the Commissioner rather than at the earlier date upon which the Federal change is reported to the Commissioner. If this be so, then, unless the imposition of a duty to pay interest changes some substantive right of the taxpayer, the amendment would apply to all cases where the date of assessment or the date of certification followed the effective date of St. 1927, c. 148.

It is familiar law that statutes relating to remedy and procedure apply to pending cases equally with those arising after their enactment. *Hollingsworth & Vose Co. v. Recorder of the Land Court*, 262 Mass. 45, and cases cited. See *Bogigian v. Commissioner of Corporations and Taxation*, 248 Mass. 545, 548. Where, however, a statute regulates the substantive rights of the parties, a retroactive construction of that statute is avoided by the courts; and the statute will not be held applicable to cases pending. *Paraboschi v. Shaw*, 258 Mass. 531, 533, and cases cited, especially *Hanscom v. Malden & Melrose Gas Light Co.*, 220 Mass. 1, 3-5, where the authorities are reviewed at length.

The determination of the question involved in this case depends on

an analysis of the nature of a provision for the payment of interest in a statute otherwise solely remedial. Does such a provision change the substantive rights of the parties or is it merely remedial in its nature?

In *Tremont & Suffolk Mills v. Lowell*, 165 Mass. 265, the statute there construed provided that "in every judgment which shall hereafter be rendered for the amount of an abatement of taxes" under St. 1890, c. 127, "there shall be included all charges and also interest on the amount of the abatement made from the date of payment of the tax." It was held that the statute, because of its precise language, applied to judgments rendered after the effective date of the statute. The court does not decide whether a provision for interest is purely remedial or whether it affects substantive rights, for the opinion closes with the following words (at pp. 266-267):

"As the only parties against whom such judgments can be rendered are municipal corporations, no question of vested rights arises, and no contention is made by the respondent that it was not within the power of the Legislature to enact that interest should be allowed in pending cases."

The decision thus plainly is not conclusive of the present discussion, and no case closer to the situation presented for consideration has been found in the Massachusetts reports. Resort, therefore, must be had to general principles. It has been stated that "the general rule at law is that interest is allowed upon the ground of contract either expressed or implied for its payment, or by way of damages where money is detained, or for breach in the performance of a contract where some duty has been violated." (Mr. Justice Braley in *Goldman v. Worcester*, 236 Mass. 319, 320, 321.) Interest, if payable by the Treasurer and Receiver General upon the facts now under consideration, is payable because of the statutory provision which imposes an obligation to pay interest "by way of damages where money" due for taxes has been wrongfully detained. There is, of course, no contractual basis to the interest obligation, if any such obligation there be. The obligation, therefore, is in a real sense distinct from the primary tax liability of the taxpayer or the obligation of the State to repay excessive taxes. It is in the nature of compensation for the delay in withholding money the use of which the Commonwealth should have had for a period of years, in the case of an underpayment by the taxpayer; and in the case of an overpayment of taxes, the interest, if allowed, is to compensate the taxpayer for the wrongful detention of his money by the Commonwealth. The overcollection of the tax is one wrong; the withholding of the money is a separate and distinct wrong. The gravamen of the taxpayer's complaint is the overassessment of the tax, with its subsequent collection; the injury done to him by depriving him of the use of his money is but an incidental consequence of the overcollection. Similarly, interest upon taxes unpaid by the taxpayer is based upon a liability separate from the original liability to pay taxes, and it has been held permissible, under the Federal Constitution, for a State to provide that taxes which have already become delinquent shall bear interest from the time the delinquency began. *League v. Texas*, 184 U. S. 156, 161.

The language of that case indicates that interest, although not precisely on the same basis as court costs as an incident to the remedy provided for the collection of overdue taxes, is in its nature remedial rather than a part of the substantive tax obligation itself. This view is alike

consistent with the language and general nature of St. 1927, c. 148, and with the result in the decision in *Tremont & Suffolk Mills v. Lowell*, *supra*. I am of the opinion, therefore, that the provision in St. 1927, c. 148, for the payment of interest is purely remedial, as are the other provisions of the section, and that the section applies to all abatements and repayments certified to the Treasurer and Receiver General after the date when the section, as amended, became effective.

One further consideration leads me to this conclusion. By St. 1927, c. 148, G. L., c. 63, § 36, as it then stood, was stricken out and a new section inserted in its place. After the effective date of St. 1927, c. 148, the Commissioner was authorized to certify that tax repayments were due only in accordance with the provisions of the section as thus amended, calling for the repayment of excessive taxes, *with interest*. In a similar situation, the Federal courts have held that interest is computed to the date of the authorization of the tax refund, that, even as to pending petitions for refund, the statute in force at the date of the authorization of the refund controls the allowance of interest, and that only under that statute are the officials of the Government authorized to act. *Blair v. Birkenstock*, 271 U. S. 348, 350-1, affirming *S. C. 6 Fed. (2d) 679 (Ct. of Ap. D. C.)*.

I advise you, therefore, that you should certify to the Treasurer and Receiver General that interest is due, from the date of overpayment to the date of refund of the overpayment, upon the amount of the refund in the case which you stated to me in asking my opinion.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Inspector of Animals — Appointment — Continuance in Office until Appointment of Successor.

An inspector of animals, appointed under G. L., c. 129, §§ 15 and 16, holds over, after the expiration of his term, until his successor is appointed.

MAY 7, 1928.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:— You have asked my opinion as to whether or not a duly appointed inspector of animals, who was not reappointed in March as required under G. L., c. 129, § 15, holds over until a successor has been appointed. Said section 15 provides as follows:—

“The mayor in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the director. In cities at least one such inspector shall be a registered veterinary surgeon.”

Section 16 of said chapter 129 provides as follows:—

“A town shall, for each refusal or neglect of its officers to comply with the requirements of the preceding section, forfeit not more than five hundred dollars. The director may appoint one or more inspectors for such town, and may remove an inspector who refuses or neglects to be sworn or who, in the opinion of the director, does not properly perform the

duties of his office and may appoint another inspector for the residue of his term."

Section 15 places an affirmative duty upon mayors and selectmen to nominate inspectors, and provides that the nominee shall not be appointed until approved by the Director of Animal Industry. If an inspector is duly appointed, it is my opinion that, for the purposes of carrying out the duties assigned by law to him, he holds office until his successor is appointed. It could not be the intent of the Legislature that the important duties assigned to this officer should not be carried out if it should happen that no new appointment was made. It is true that section 16 gives to the Director the power to appoint one or more inspectors for such city or town as fails to comply with section 15, but unless and until this is done, it is my opinion that the old officer can legally perform the functions of the office.

It may well be that such officer who holds over is not entitled to compensation, but, for the purposes of performing the duties of his office, his powers are of the same dignity as if he had been duly nominated and appointed.

This question is not free from doubt, but all uncertainty would be removed if the statute provided that the inspector should hold office until a successor was duly appointed.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Taxation — Foreign Banking Associations and Corporations — Constitutional Law — Foreign Banks as Fiduciaries.

No provision of the existing statute law of this Commonwealth imposes an excise upon foreign banking corporations or associations doing business within this Commonwealth as fiduciaries, as authorized by St. 1928, c. 128, with respect to the doing of such business.

MAY 12, 1928.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:— You request my opinion as to whether you have the power, under the provisions of St. 1928, c. 128, and the provisions of G. L., c. 63, § 2, as amended by St. 1925, c. 343, § 1, to impose an excise tax upon such foreign banking associations and corporations as obtain a certificate under the provisions of St. 1928, c. 128, with respect to the activities of such associations and corporations under the authority of such a certificate.

St. 1928, c. 128, § 1, reads, in part, as follows:—

"Chapter one hundred and sixty-seven of the General Laws is hereby amended by inserting after section forty-five the following new section:— *Section 45A.* The board of bank incorporation may, subject to such conditions as the commissioner may prescribe, grant to a banking association or corporation whose principal office is in another state, a certificate authorizing it to act in a fiduciary capacity under the provisions, so far as applicable, of sections fifty-two to fifty-nine, inclusive, of chapter one hundred and seventy-two; . . . Any such banking association or corporation holding a certificate as aforesaid and appointed a fiduciary shall be subject to the provisions of general law with respect to the appointment

of agents by foreign fiduciaries and to the same taxes, obligations and penalties, with respect to its activities as such fiduciary and the activities of itself and the property held by it in its fiduciary capacity, as like associations or corporations having their principal office in this commonwealth, and no such certificate shall be issued to any such banking association or corporation until it has filed with the said board of bank incorporation an agreement in writing in which it binds itself to perform said obligations and pay any such taxes and penalties as aforesaid as may be levied or imposed upon it in this commonwealth."

G. L., c. 63, § 2, as amended by St. 1925, c. 343, § 1, reads as follows: —

"Every bank shall pay annually a tax measured by its net income, as defined in section one, at the rate assessed upon other financial corporations; provided, that such rate shall not be higher than the highest of the rates assessed under this chapter upon mercantile, manufacturing and business corporations doing business in the commonwealth. The commissioner shall determine the rate on or before July first of each year after giving a hearing thereon and shall seasonably notify the banks of his determination. Appeal by a bank from the determination of the commissioner may be taken to the board of appeal from decisions of the commissioner of corporations and taxation, in sections five and six called the board of appeal, within ten days after the giving of such notice."

The provisions of this section refer back to the definitions of "bank" and "net income" as contained in G. L., c. 63, § 1, as amended by St. 1925, c. 343, § 1, which section reads, in part, as follows: —

"'Bank', Any bank, banking association or trust company doing business within the commonwealth, whether of issue or not, existing by authority of the United States or of a foreign country, or of any law of the commonwealth not contained in chapters one hundred and sixty-eight to one hundred and seventy-one, inclusive, and chapters one hundred and seventy-three and one hundred and seventy-four.

'Net income', The net income for the taxable year as required to be returned by the bank to the federal government under the federal revenue act applicable for the period, adding thereto any net losses, as defined in said federal revenue act, that have been deducted and all interest and dividends not so required to be returned as net income except dividends on shares of stock of corporations organized under the laws of the commonwealth and dividends in liquidation paid from capital."

It is obvious that G. L., c. 63, § 2, as thus amended, does not afford any authority to tax a "banking association or corporation whose principal office is in another state," apart from the language of St. 1928, c. 128, § 1, subjecting such banking corporation "to the same taxes . . . with respect to . . . the activities of itself . . . as like associations . . . having their principal office in this commonwealth." "Bank" is defined in G. L., c. 63, § 1, as thus amended, in such a way as to exclude trust companies organized under the laws of other States, and the tax in G. L., c. 63, § 2, as thus amended, is limited to a tax on "banks" as thus defined in section 1. Furthermore, even if these corporations holding certificates be held to be included within the provisions of the tax imposed by section 2, the only tax imposed by that section is an excise with respect to the whole "net income" of the bank, as defined in section 1 of the chapter. Clearly, such a tax, measured by net income wherever earned, upon for-

eign trust companies doing only an incidental portion of their whole business within the Commonwealth would be unconstitutional. See *Southern Ry. Co. v. Kentucky*, 274 U. S. 76; cf. *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U. S. 271.

The Legislature cannot be presumed to have intended to enact an obviously unconstitutional tax statute, and the purposes of the General Court must be gathered in part from the powers possessed by it. *Eaton, Crane & Pike Co. v. Commonwealth*, 237 Mass. 523, 527. No provision of G. L., c. 63, authorizes the Commissioner of Corporations and Taxation to allocate the net income of any bank taxed under section 2 of the chapter in such a way as to determine the proportion of the net income attributable to corporate activities within Massachusetts and to assess a tax only with respect to such allocated net income — an excise which would probably avoid constitutional pitfalls. In the absence of statutory provision for such allocation, you, as Commissioner of Corporations and Taxation, cannot assess a valid excise with respect to the income earned in Massachusetts of foreign trust companies holding a certificate under St. 1928, c. 128. It is well settled that tax laws are to be construed strictly, and that the power to tax must be conferred in unequivocal terms and cannot be extended by implication. *Union St. Ry. Co. v. New Bedford*, 253 Mass. 314, 317; *Moulton v. Commissioner of Corporations and Taxation*, 243 Mass. 129, 130.

The language of St. 1928, c. 128, § 1, in and of itself imposes no tax and merely subjects foreign banks acting under a certificate granted under the chapter to the taxes imposed upon similar banks having their principal office in Massachusetts, with respect to their activities. The state of the law at the time of the passage of St. 1928, c. 128, was such that there was no tax imposed on those banks acting as fiduciaries and having their principal office in Massachusetts which could constitutionally be imposed upon foreign companies acting under a certificate under St. 1928, c. 128, and I can see no warrant in law, as the statutes are now framed, for the imposition of an excise upon such foreign companies.

It may be suggested that the language of St. 1928, c. 128, in no event contemplated the imposition of any excise or tax upon banks operating under certificates granted pursuant to that act with respect to the activities of those banks or measured by the profits made by those banks from their Massachusetts business. The distinction made in St. 1928, c. 128, § 1, between the "activities as such fiduciary" and the "activities of itself" would indicate a legislative intent to subject these banks not only to the taxes payable by the bank as a fiduciary on behalf of the beneficiaries of their trusts or upon property held by them as trustees, but also to the payment of taxes on their own behalf for such privileges as they might exercise within Massachusetts. It is a general canon of statutory construction not to regard any word found in a statute as superfluous or redundant, but to give each word some meaning. *Kennedy v. Commissioner of Corporations and Taxation*, 256 Mass. 426, 429.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Notary Public — Appointment — Age.

The appointment of a notary public who is a minor is not necessarily invalid.

MAY 14, 1928.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR:— Your Excellency has asked whether an appointment previously made, by a former Governor, of a woman twenty years of age as a notary public was valid, and as to whether the official acts of such appointee are themselves valid.

Neither the Constitution nor the statutes of the Commonwealth contain any provisions as to the age which a man or woman must have attained in order to be eligible to appointment as a notary public.

The origin, history and duties of the office of notary public are considered at length in *Opinion of the Justices*, 150 Mass. 586. The duties of such office have not substantially changed in character since the date of such opinion. The office still remains, as pointed out by the justices, not judicial in character. Since said opinion was rendered, by virtue of Mass. Const. Amend. LVII women have been made eligible to appointment as notaries public.

It is a general principle of the common law that minors, though not eligible to offices which are judicial in character, may be eligible to offices which are ministerial, requiring skill and diligence in their administration rather than experience or the exercise of grave discretion. *Golding's Petition*, 57 N. H. 146; *Moore v. Graves*, 3 N. H. 408; *State v. Dillon*, 1 Head (Tenn.), 389. The office of notary public is of the latter type. It has been held that a minor may be validly appointed to the office. *United States v. Bixby*, 9 Fed. 78.

Accordingly, I advise you that the appointment of the notary public concerning whom you inquire in your letter was not invalid because of her age at the date of appointment, and that her acts done by virtue of such appointment are not invalidated by reason of the fact that she was less than twenty-one years old at the time of her appointment.

Very truly yours,
ARTHUR K. READING, *Attorney General.*

Municipal Employee — Blasting — Permit — Bond.

An employee of a municipality, engaged in the work of blasting carried on by such municipality, is not required to have a permit or to furnish a bond.

MAY 19, 1928.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR:— You have asked my opinion as to whether an employee of a city or town can be required to give a bond, under G. L., c. 148, § 24, before receiving a permit under said section to do blasting for the city or town which employs him, and you have set forth certain facts relative to experience in the past in connection with a blasting operation.

G. L., c. 148, § 24, is as follows:—

“Before the issue of a permit to use an explosive in the blasting of rock or any other substance as prescribed by the department, the applicant for the permit shall file with the clerk of the city or town where the

blasting is to be done a bond running to the city or town, with sureties approved by the treasurer thereof, for such penal sum, not exceeding ten thousand dollars, as the marshal or the officer granting the permit shall determine to be necessary in order to cover the risk of damage that might ensue from the blasting; provided, that the marshal or the officer granting the permit may determine that a single and blanket bond in a penal sum not exceeding fifteen thousand dollars is sufficient to cover the risk of damage from all blasting operations of the applicant, either under the permit so issued or under future permits to use explosives in blasting operations. The bond shall be conditioned upon the payment of any loss, damage or injury resulting to persons or property by reason of the use or keeping of said explosive."

It is the apparent intention of the Legislature, as expressed in the language of said section 24, that under rules and regulations made by your department, under G. L., c. 148, § 10, a permit should be required as a prerequisite to blasting. It is obvious, however, that if a municipality is itself, through its own agents, as distinguished from public officers elected or appointed by the city or town to perform statutory duties with relation to the ways, about to perform the work of blasting, the provisions of said section 24 are not applicable to such municipality. The provisions of said section 24 do not apply to a municipality; for a municipality, like an individual, cannot be both the obligor and the obligee of a bond. It follows, then, that from the language of said section 24 it must be held that it was not the intent of the Legislature that the provisions for a permit and a bond as prerequisite to blasting should apply to a municipality performing such act through its own agents.

It has been said by our Supreme Judicial Court that if a municipality "has chosen to take the work of repairing or constructing a street or bridge out of the charge of the officers designated by law, and itself to assume direct control of the work, it may be held liable for the negligence of the servants or agents whom it employs for that purpose." *Haley v. Boston*, 191 Mass. 291; and see cases there cited.

It may well have been felt by the Legislature that when liability for blasting might rest upon a municipality, as such, the financial stability of such a body furnished ample security for the payment of damages which might be incurred, without the necessity of a bond with sureties further to ensure payment thereof; and it is not contemplated by said section 24 that a permit shall be issued to, or a bond exacted from, a mere employee of a municipality when blasting is in fact being carried on by the latter.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Municipalities — City Clerk — Appointment and Removal.

A city clerk is not the head of a department, under G. L., c. 43, §§ 60 and 61.

A city clerk under Plan A, G. L., c. 43, may not be removed in the manner set forth in section 18 of said chapter.

MAY 21, 1928.

HON. FRED D. GRIGGS, *House Chairman, Committee on Cities*.

DEAR SIR:—The Committee on Cities has, by a letter from you, requested my opinion as to whether, under Plan B for the government

of cities, set forth in G. L., c. 43, the city clerk is to be regarded as a head of a department subject to appointment and removal by the mayor, subject to confirmation in the first instance by the city council, and in the second by the approval of a majority of the council.

You have not advised me as to any measure before you for your consideration as to which your question is addressed, but I assume that your inquiry is made to me for the purpose of aiding you in the consideration of some legislative matter.

G. L., c. 43, sets forth several plans or forms of charters for city government. Whichever plan may be accepted by a municipality is intended to be complete in itself, but its particular provisions are governed and controlled by certain sections of the chapter which are common to all the plans and operative upon all. *Cunningham v. Mayor of Cambridge*, 222 Mass. 574, 577. Section 18 is such a section common to all the plans, and operative as to Plan B.

With relation to the office of city clerk section 18 provides: —

“3. The council shall, by a majority vote, elect a city clerk to hold office for three years and until his successor is qualified. He shall have such powers and perform such duties as the council may prescribe, in addition to such duties as may be prescribed by law. He shall keep the records of the meetings of the council.

The person holding the office of city clerk at the time when any of the plans set forth in this chapter has been adopted by such city shall continue to hold office for the term for which he was elected and until his successor is qualified.”

These provisions as to the election of a city clerk are controlling and are not abrogated by sections 60 and 61, relative to appointments and removal of heads of departments. The office of city clerk was not intended by the Legislature to be comprehended by the term “heads of departments,” as those words are used in said sections 60 and 61.

You have also asked my opinion relative to the appointment and removal of city clerks under Plan A, G. L., c. 43, §§ 52 and 54. These sections, like sections 60 and 61, do not change the effect of said section 18, and city clerks are not to be appointed and removed in the manner set forth in sections 52 and 54. That the intention of the Legislature was to provide a specific mode for the appointment of city clerks, applicable in all instances, irrespective of the manner provided for the appointment and removal of other officials under the four charter plans, is further indicated by section 54, which requires that the notice of removal of a head of a department by the mayor shall be filed with the city clerk, and that the official so removed may file an answer to the reasons for his removal, set forth by the mayor, with the city clerk. Such a provision is obviously inconsistent with a legislative intent that the provisions of said section 18, relative to the city clerk, should be nullified by later sections of the same chapter in which it occurs.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Corporations — Securities — Default.

Under G. L., c. 174, § 10, neither the seller's commissions nor his overhead expense shall be charged against the purchaser of a corporate security.

MAY 21, 1928.

Hon. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR: — You have asked my opinion as to whether the words "amount paid by said corporation on account thereof," as used in G. L., c. 174, § 10, should be construed to include payments by way of commissions to a salesman or should be limited to payments made to a bond or certificate holder.

The material part of G. L., c. 174, § 10, reads as follows: —

"Every corporation subject to this chapter shall provide in every bond, certificate or contract issued by it that, after one fourth of the total amount of instalments therein required has been paid and in any event after instalments for two full years have been paid thereon, in case of default in the payment of any subsequent instalment a paid-up bond shall be given to the holder of said bond, certificate or contract of not less than the full amount paid thereon less any amount paid by said corporation on account thereof, said paid-up bond to mature at the same date as the original bond, certificate or contract."

The intention of the Legislature as expressed in this section, read in conjunction with the provisions of the entire chapter, is that the holder of a security, in case of default in his payments thereon, shall receive a paid-up bond equal to the difference in amount between the sum of his payments and the purchase price of the security which he had intended to buy. It was not contemplated that the seller's commissions nor any part of the latter's overhead or other expense should be passed on to the purchaser.

Very truly yours,
ARTHUR K. READING, *Attorney General.*

Betterments — Land devoted to a Public Use.

Under St. 1925, c. 330, as amended, betterments relative to the Southern Artery may not be assessed against the United States Housing Corporation.

MAY 22, 1928.

Hon. WILLIAM F. WILLIAMS, *Commissioner of Public Works.*

DEAR SIR: — You have informed me that the Department of Public Works, under St. 1925, c. 330, as amended by St. 1926, c. 369, assessed betterments in connection with the construction of the Southern Artery, so called, among other parcels, upon three lots standing in the name of the United States Housing Corporation, and have asked me to advise you as to the powers of the Department relative to the assessments upon said three lots. I assume from the wording of your letter that title to said three lots was in the said corporation at the time of the making of the assessment.

By said St. 1925, c. 330, as amended by St. 1926, c. 369, § 2, the Division of Highways of the Department of Public Works was authorized

to take by eminent domain, under G. L., c. 79, lands deemed necessary for the purpose of carrying out the purpose of the statute by the construction of the said Southern Artery, and was required to assess betterments therefor under the provisions of G. L., c. 80; and it was further provided that "no awards and payments shall be made because of any taking of cemetery land or of any other land devoted to a public use, except as required by the Constitution, and no betterments shall be assessed on any such land."

Land belonging to the United States Housing Corporation is land devoted to a public use. It is immaterial whether such devotion to a public use arises from Federal or State law. The words as employed in the instant statute apply in either event. That land acquired by the United States Housing Corporation is for a public use is manifest from the Act of Congress, 40 Stat. (U. S.) 550, authorizing the acquisition of land for housing in connection with the prosecution of the World War, and from the Act of Congress, 40 Stat. (U. S.) 595, authorizing the creation of a corporation to hold such land, and from the formation of the United States Housing Corporation to carry out such purpose. See *United States v. City of New Brunswick*, 1 Fed. (2d) 741, and *Same v. Same*, 11 Fed. (2d) 476.

It is not necessary to enter upon a consideration of the nature of such a corporation as an agency of the Federal government, nor the extent of its immunity from taxation upon its property in the form of betterment assessments by a State. See *M'Culloch v. Maryland*, 4 Wheat. 316; *Clallam County v. United States*, 263 U. S. 341; *Lee v. Osceola etc. Improvement District*, 268 U. S. 643; *United States v. City of New Brunswick*, *supra*. The provisions of the instant statute itself do not authorize the imposition of such an assessment as has been made upon the three parcels of land belonging to the United States Housing Corporation.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Constitutional Law — Pardon — Parole.

The Governor may pardon a prisoner and the Board of Parole may issue a permit to be at liberty to a prisoner, but neither will necessarily free him from the form of restraint specified in the second sentence of G. L., c. 111, § 121.

MAY 24, 1928.

HON. FRANK A. BROOKS, *Chairman, Board of Parole*.

DEAR SIR:— You have transmitted to me the following communication:—

"A man was sentenced on March 24, 1922, to serve eighteen to twenty years at the Massachusetts State Prison for manslaughter. On May 10, 1926, he was transferred to the Prison Camp and Hospital, as he was found to be suffering from tuberculosis.

May I have a ruling as to whether or not it would be possible, under G. L., c. 111, § 121, for His Excellency the Governor to grant a pardon or the Board of Parole to release a man on parole when he had served two-thirds of his minimum sentence, if the disease is active."

The Governor, in the exercise of the power vested in him by the Constitution (pt. 2nd, c. II, § I, art. VIII), may pardon the prisoner to whom

you refer. If the pardon is unconditional it will operate so as to cause "the expiration of his sentence," within the meaning of G. L., c. 111, § 121, forthwith. Attorney General's Report, 1927, p. 123. Likewise, under the statutory authority of G. L., c. 127, §§ 128-131, as amended, the Board of Parole has authority to act and may grant a special permit to be at liberty to the said prisoner at the time indicated in your communication. When such a permit has been issued, the date of its becoming effective may also be construed as "the expiration of sentence," within the meaning of said section 121. The confinement of the prisoner in the Prison Camp and Hospital, under G. L., c. 127, § 109, does not withdraw him from the jurisdiction of the Board, vested in it by G. L., c. 125, § 7, and specifically made applicable to inmates of the Prison Camp and Hospital by G. L., c. 127, §§ 128 and 129, as would a commitment of a prisoner to a State hospital for the insane (see V Op. Atty. Gen. 141), nor does such confinement prevent the exercise of the power of pardon by the Governor, as does a commitment to a State hospital of one found not guilty of murder on account of insanity (see V Op. Atty. Gen. 591).

Nevertheless, the granting of a pardon or the issuance of a permit to be at liberty may not operate of itself to free a prisoner, such as you have described, from the form of restraint specified in the second sentence of said G. L., c. 111, § 121. This restraint is not imposed as a punishment nor because of the existence of any effective sentence of a court, but solely as a means of protecting the general public health. The determination of the necessity for its imposition and the length thereof are placed by the Legislature in the sound discretion of the attending physician of the institution where the prisoner has been confined.

Said section 121, in substantially the form in which it stands today but not including pulmonary tuberculosis, which was added by St. 1920, c. 306, was enacted by St. 1891, c. 420, which antedated the original enactment of G. L., c. 127, § 129, in so far as it relates to paroles for inmates at the Prison Camp and Hospital, by St. 1904, c. 243, and St. 1906, c. 243, and antedates G. L., c. 125, § 39, concerning the Prison Camp and Hospital, in its original form, St. 1898, c. 393. It does not appear that any of the statutes relative to parole contemplate the working of a repeal of the provisions of restraint for persons suffering from diseases set forth in G. L., c. 111, § 121. Since the provisions relative to such restraint, in the second sentence of said section 121, are not operative until after the expiration of sentence, it is obvious that a pardon, which may be said to cause a sentence to expire, does not have the further effect of preventing the enforcement of the restraint made necessary by disease.

The provisions of G. L., c. 111, § 121, have been on our statute books in substantially their present form for over thirty-five years. It does not appear that their constitutionality has been questioned. They purport to be such an interference with the liberty of a certain class of persons as may be justified as a health measure under the general doctrine of the police power inherent in the sovereign, and in the absence of authoritative judicial decision to the contrary should be regarded as binding by all executive and administrative officials.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Insurance — Group Policies — Fraternal Benefit Association.

Membership in a benefit association is not a condition pertaining to employment, under G. L., c. 175, § 133, as amended, which makes possible the insurance of the members of such an association in a policy of group insurance to the exclusion of fellow employees not members.

MAY 24, 1928.

HON. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR: — You have stated in a communication to me as follows: —

“It has come to my attention that certain policies of group life insurance have been issued to employers in this Commonwealth covering the lives of such of their employees as are members of a mutual or fraternal benefit association composed of their employees and operated for their benefit.”

And you have asked my opinion upon the following question relative thereto: —

“Is membership in such a mutual or fraternal benefit association ‘a condition pertaining to the employment,’ within the meaning of G. L., c. 175, § 133, or may a life insurance company lawfully issue such a policy insuring only such employees as belong to such an association?”

I answer your question in the negative. It is plain from the terms of G. L., c. 175, § 133, as amended, that the legislative intent was that all employees of a given employer, or at least all those engaged in the same general type or kind of work for such employer, should constitute a distinct group for the purpose of receiving the benefits of insurance. It is possible that there may be conditions growing out of the employment, such as locality or time of work, which may likewise permit the formation of distinct groups for the purpose of insurance. Nevertheless, membership in a benefit association is not one of “the conditions of employment,” as those words are used in said section 133, even though membership in such association is limited to employees of the employer seeking group life insurance. To create a special group within a larger class, all of whose members work under the same conditions actually pertaining to their employment, merely because the members of such special group belong to an association to which the other individuals of the class are not admitted, would be an unreasonable discrimination against such latter individuals. The fact that membership in such an association is limited to the employees of the one seeking group insurance does not of itself make such membership one of “the conditions pertaining to the employment” in any but such an indirect sense as not to be within the ordinary meaning of the words used in the statute.

Very truly yours,

ARTHUR K. READING, *Attorney General.*

Insurance — Life Policies — Incontestability — Date of Issue.

The words “date of issue,” as used in G. L., c. 175, §§ 132-134, describe a time which may in part be fixed by agreement of insurer and insured.

MAY 28, 1928.

HON. WESLEY E. MONK, *Commissioner of Insurance.*

DEAR SIR: — You have called my attention to certain facts and to certain provisions of the statutes relating to insurance policies, in these words: —

"G. L., c. 175, §§ 132 and 134, provide that life insurance policies issued in the Commonwealth shall contain certain provisions, including a provision that the policy shall be incontestable after two years from its 'date of issue.'

A certain life insurance company has filed a form of policy under said section 134 which contains the aforesaid provision, together with a stipulation that the date of issue of the policy is the date of the execution thereof set forth in the teste clause."

You have asked my opinion upon the following questions of law:—

"1. What date is meant by the words 'date of issue' as used in said sections 132 and 134?

2. May the insured and insurer agree that the date of the execution thereof or any other date is the 'date of issue' of a life insurance policy, or may the parties lawfully define in such a policy what is meant by the words 'date of issue' as used in said sections 132 and 134?"

I am of the opinion that the words "date of issue," as used in G. L., c. 175, §§ 132 and 134, as amended, were not intended by the Legislature to have the meaning of a certain, fixed, invariable point in the series of actions which go to the complete formation of contracts of life insurance, without regard to all the circumstances surrounding the making of any particular contract and excluding the expressed intention of the parties concerning the time of such issue, which intention constitutes one of the surrounding circumstances. The Legislature has determined that the "date of issue" of a policy shall be taken as the time from which the period of two years before the policy becomes incontestable is to be reckoned, but it has not defined the precise meaning of the words "date of issue." The words themselves, as used with relation to a policy of life insurance, are ambiguous. They are susceptible of several meanings. They do describe a point in the negotiation of a policy which exists with relation to each policy written, but which may vary in its position among the several actions included in the negotiations with the circumstances surrounding the making of any particular contract. The expressed intention of the parties as to the point in such series of actions which shall be, as between themselves, the "date of issue" of the policy is an important, if not a determinative, circumstance in fixing what is such date of issue as regards a particular policy. It follows that the parties to the contract may make clear by written expression of agreement, in connection with the policy, what is their intention as to the point among the contractual negotiations which they intend to constitute the "date of issue." Such expressed intention will govern the determination of what was in fact the date of issue of a particular policy, provided that such intention does not run so wholly counter to the other circumstances surrounding the making of the contract as to indicate that the expression of intention is merely colorable and not an indication of the real intention.

It is clear that there are at least three points in the negotiation of a policy which may be agreed upon as the "date of issue" of the policy by the contracting parties, namely: The time of delivery and acceptance; the time of preparation and signing of the instrument by the officers of the insurance company, irrespective of the date of delivery to the assured; and the date inserted in the policy purporting to be the date of the instrument itself. Which one of these is the date of issue of any particular policy is to be determined by the intent of the parties, as that can be

gathered from all the circumstances surrounding the making of the contract, including any actual expression of intention by the insurer and the insured. As to whether there are other meanings which may properly be attached to the words "date of issue," when interpreted in the light of all the surrounding circumstances, I express no opinion in the present absence of authoritative expression of judicial opinion in relation thereto.

The Supreme Judicial Court of this Commonwealth has said with relation to the word "issue," in *Coleman v. New England Mutual Life Ins. Co.*, 236 Mass. 552, 554, —

"Ordinarily by the 'issue' of an insurance policy is meant its delivery and acceptance whereby it comes into full effect and operation as a binding mutual obligation. . . . Sometimes it is used in the sense of the preparation and signing of the instrument by the officers, as distinguished from its delivery to the insured."

The Supreme Court of the United States, in a case decided since the opinion in *Coleman v. New England Mutual Life Ins. Co.*, *supra*, *Mutual Life Ins. Co. of New York v. Hurri Packing Co.*, 263 U. S. 167, has held that the words "date of issue," as used in a policy of life insurance, with relation to incontestability arising two years after the date of issue, may mean the actual date inserted in the written policy, when such date was intended by the parties to have such meaning, whether such date so inserted refers to the actual time of the execution of the instrument, to the time of its actual delivery or to neither. See also: *Russ v. Great Southern Life Ins. Co.*, 6 Fed. (2d) 940; *New York Life Ins. Co. v. Renault*, 11 Fed. (2d) 281; *Great Southern Life Ins. Co. v. Russ*, 14 Fed. (2d) 27; *Northern Life Ins. Co. v. Schwartz*, 19 Fed. (2d) 142.

Since a determination must be made of the intent of the parties as to what shall be, in any specific instance, the "date of issue" of a policy, in connection with all the circumstances surrounding the making of the contract, in order to decide what is the "date of issue" of such policy, with a view to establishing when the period of its incontestability begins, I know of no principle of law nor of any statutory provision which forbids or renders contrary to public policy an insertion of an agreement as to what shall be taken to be "the date of issue," showing the intent of the parties with relation thereto, in the policy itself.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Constitutional Law — Fire Insurance — Rate Making.

Rate making for policies of fire insurance may be undertaken by the Legislature.

JUNE 2, 1928.

Hon. JOHN C. HULL, *Speaker, House of Representatives*.

DEAR SIR:— On behalf of the House of Representatives you have asked my opinion "as to the constitutional right of the Commonwealth to determine or to supervise classifications of the risks and the rates to be made and charged therefor by fire insurance companies transacting business in this Commonwealth," in connection with the consideration of a resolve pending before the General Court, which provides "for a study by a special commission relative to the classification of risks and

the rates to be made and charged therefor by fire insurance companies in this Commonwealth."

The constitutionality of rate making and classification as to fire insurance by a State Legislature appears to have been established under the Federal Constitution by the decision of the Supreme Court of the United States. *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389.

The Supreme Judicial Court of Massachusetts has said, in *Opinion of the Justices*, 251 Mass. 569, 610, that the conclusion reached in said decision "is equally sound under the Constitution of the Commonwealth."

Moreover, the Supreme Judicial Court of this Commonwealth has upheld the power of the Legislature to fix rates and classifications in connection with automobile liability insurance. *Opinion of the Justices*, 251 Mass. 569.

The exercise of the power to fix rates and classifications, either by the Legislature itself or by public officials to whom the authority is delegated by the General Court, must be governed by certain fundamental principles which to some degree limit the extent of the power. No rate may be established which is not sufficient to yield a fair net return on the reasonable value of the property used or invested for doing the business. Rates and classifications, when established, are subject to review by the judicial branch of the government, for the purpose of determining whether they are unjust, unreasonable and confiscatory, judged by the standard of a fair net return. Provision for such review by the courts must be embodied in any act of legislation which purports to fix rates and classifications. *Opinion of the Justices, supra*.

Subject to the limitations which I have outlined, the Legislature has the power, under the Constitution of the Commonwealth, to determine classifications of the risks and the rates to be made and charged therefor for fire insurance companies transacting business in this Commonwealth in respect to property within Massachusetts.

Very truly yours,

ARTHUR K. READING, *Attorney General*.

Department of Agriculture — Division of Ornithology — Publications.

The Department of Agriculture has not the authority to purchase matter for publications under Resolves of 1921, chapter 5, and later resolves. The work necessary for such publications should be prepared by the Division of Ornithology itself.

JUNE 20, 1928.

DR. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:— You have asked my opinion "as to whether a contract entered into by and between the Commonwealth of Massachusetts, by its Commissioner of Agriculture, and Mr. Edward H. Forbush, for the purchase of a certain manuscript of facts relative to the birds of the Commonwealth, would be in conflict with the provisions of existing laws of this Commonwealth."

You advise me that Mr. Forbush was formerly Director of the Division of Ornithology, and was retired from the service on April 23, 1928, having then reached the age of seventy years; that he has a manuscript compiled by him over a considerable period of time, which you state to be his own property; and that such manuscript is necessary to supple-

ment the work of the present personnel of said Division in completing the third volume of a report on birds, authorized to be made by the Resolves of 1921, chapter 5, which reads as follows:—

“RESOLVE PROVIDING FOR THE PREPARATION AND PUBLICATION OF A
REPORT ON THE BIRDS OF MASSACHUSETTS.

Resolved, That the department of agriculture is hereby authorized, subject to such appropriations as may be made, to prepare a report on the birds of the commonwealth, including the facts ascertained by the director of the division of ornithology regarding the economic value, geographical distribution and life history of such birds.”

The printing of said third volume of the report provided for in 1921 has been authorized by the Resolves of 1927, chapter 25, and by the Resolves of 1928, chapter 13, and appropriations for such printing and for distribution have been made.

These resolves undoubtedly give an implied authority to the Department of Agriculture to make contracts necessary for and incidental to the printing and distribution of the volumes of the report.

It does not appear from the terms of the resolve of 1921 that the Legislature intended to give authority for the purchase of manuscript or other literary material from individuals unconnected with the public service, to be embodied in the report. It seems rather to have been the intent of the Legislature, as expressed in the provisions of the resolve of 1921, that the preparation of the report was to be done by persons in the service of the Commonwealth and that the report was to contain an account of data ascertained by the Director of the Division of Ornithology in his official capacity, without extra cost therefor. If, as you say, the manuscript now in the hands of the former Director is his personal property and the Commonwealth is not entitled to the information contained in it, I am of the opinion that there is no authority vested in any one by the existing legislation to purchase or to contract for the purchase of the same. The General Court might by appropriate action extend the powers of the Department of Agriculture so as to permit it to contract for the purchase of manuscript or data from private individuals, but at the present time the Department does not appear to possess such authority.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

*Taxation — Corporations — Change in Federal Net Income — Interest
on Additional Assessment of Excise with Respect to Such Change.*

After the effective date of St. 1927, c. 148, an additional assessment of an excise laid in accordance with G. L., c. 63, §§ 32 and 36, as amended, should include an assessment of interest where such assessment is based upon an increase in Federal net income.

JUNE 22, 1928.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:— You request my opinion with respect to the following situation: A corporation has reported, in accordance with the provisions of G. L., c. 63, § 36, a change made by the Federal government in the amount of its net income as returned to the Federal taxing authorities.

This change was made prior to the effective date of St. 1927, c. 148. No assessment with respect to the increased amount of net income was made by you in accordance with the provisions of G. L., c. 63, § 36, prior to the effective date of St. 1927, c. 148. Two questions now arise:

1. In making an assessment with respect to such increased net income after the effective date of St. 1927, c. 148, can interest be included in the assessment upon the additional amount of tax incident to the increase in Federal net income?

2. Assuming that you have already made an assessment without interest since the effective date of St. 1927, c. 148, with respect to the increase in Federal net income, is it now possible for you to make an additional assessment of the interest due upon that amount at the rate of six per cent from October twentieth of the year in which the original return of the net income in question was due to be filed by the corporation?

Reference is made to the reasoning contained in the opinion furnished by this office under date of May 5, 1928, in which you were advised that refunds made pursuant to G. L., c. 63, § 36, carry interest if certified subsequent to the date when St. 1927, c. 148, became effective, although the change was made and notice thereof given prior to that date. The reasoning of that opinion would lead to the conclusion, in answer to the first question raised above, that in making an assessment with respect to the increase in Federal net income you may include interest, as provided by St. 1927, c. 148. The decision in *League v. Texas*, 184 U. S. 156, 161, *et seq.*, shows clearly that there is no objection under the Federal Constitution to such an assessment. I can see no other objection to such an assessment.

I must also advise you that it is your duty to assess interest upon the taxes assessed by you since the effective date of St. 1927, c. 148, with respect to increases in Federal net income reported prior to the effective date of St. 1927, c. 148, where you have neglected to include interest in the original assessment. I can see no objection to making such additional assessment within a reasonable time after the original assessment incident to the increase in Federal net income has been made.

G. L., c. 63, § 36, as amended by St. 1927, c. 148, places no limitation upon the time within which an assessment with respect to an increase in Federal net income must be made, and no limitation exists other than that contained in G. L., c. 63, § 45, as amended by St. 1922, c. 520, § 7. It is not necessary to decide, for the purpose of this opinion, whether that section limits in any degree the assessment provisions of section 36, as amended. I have been unable to discover any statutory prohibition upon the correction of an assessment by the Commissioner within a reasonable time after the assessment is made under the provisions of section 36, and in the absence of such prohibition and in view of the affirmative direction of section 36 to assess the tax due *with interest*, I feel that interest should be assessed.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Schools — Pupils — Free Transportation — State Forest Reservation.

A pupil of the public schools living in a State forest reservation is entitled to free transportation by the town within which he resides.

JUNE 23, 1928.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion upon the question as to whether children of school age, residing within the limits of a town upon land purchased by the Commonwealth and held by it as a State forest reservation, are entitled to the benefits of the provisions of law, embodied in G. L., c. 71, § 68, for free transportation to an appropriate town public school situated more than two miles from their place of residence.

By the terms of G. L., c. 76, § 1, as amended, a child of school age, with certain designated exceptions, is required to attend a public school of the town in which he "resides," and under G. L., c. 71, § 68, his transportation to such school by such town, if the child lives more than two miles from the school where such attendance should be given, may be required of the town by the Department of Education.

Although a child may live upon the land of a State forest reservation, it cannot be said that he does not by reason of that fact reside in the town within the boundaries of which that part of such reservation lies whereon his place of abode is fixed.

There is no specific provision of the statutes which purports to withdraw from persons living on State forest reservations the rights which they otherwise possess in connection with the public school system as residents of the towns within whose bounds they reside. The Legislature has not by direct terms, nor by implication from any statutory enactment, so withdrawn the lands of the State forests from identification with the respective towns wherein they lie as to deprive those living in such forest reservations of the common right of access to the schools in the general public school system of the Commonwealth.

The power now vested in the said Department by G. L., c. 71, § 68, renders the opinion of the Supreme Judicial Court in *Davis v. Chilmark*, 199 Mass. 112, inapplicable to the situation which you have called to my attention in your letter, and earlier opinions of such court with relation to children residing upon land used by the Federal government are likewise inapplicable (*Newcomb v. Rockport*, 183 Mass. 74, and cases there cited); and the opinion of one of my predecessors in office (V Op. Atty. Gen. 435) is not inconsistent with the view which I have expressed.

Accordingly, I am of the opinion that children of school age living upon land within a State forest reservation are entitled to free transportation by a town to a public school more than two miles away in precisely the same degree and to the same extent as are other children of like age and similarly situated living within a town but not upon a State reservation.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Savings Banks — Investments — Bank Stock.

A savings bank may not invest more than \$100,000 of its funds in the purchase of bank stock, irrespective of the par value of such stock.

JUNE 25, 1928.

HON. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR: — You have asked my opinion with reference to the interpretation of G. L., c. 168, § 54, cl. 7th, which authorizes investment of the funds of savings banks in the following language: —

“In the stock of a banking association located in the New England states and incorporated under the authority of the United States, or in the stock of a trust company incorporated under the laws of and doing business within this commonwealth, but such corporation shall not hold, both by way of investment and as security for loans, more than twenty per cent of its deposits in the stock of such associations or companies, nor in any one such association or company more than three per cent of its deposits in, nor more than one hundred thousand dollars nor more than one quarter of the capital stock of, such association or company.”

The particular inquiry which you make of me in relation to the interpretation of the foregoing statutory provisions is as follows: —

“The question upon which I respectfully request your opinion is whether the \$100,000 limitation has reference to the amount of funds which may be used to purchase and invest in bank stock or whether it refers to the par value of the stock so invested in.”

In the earliest statute dealing with the investment of the funds of savings institutions in bank stock no specific limitation was placed upon the amount of its funds which a savings institution might so invest, although a designated limit was placed upon the amount of the stock of any one bank which such an institution might acquire, the obvious purpose of the legislation being to prevent a savings institution from acquiring the control of a bank of another. These provisions of limitation originating with St. 1834, c. 190, § 7, have been continuously retained in other acts dealing with the general subject, beginning with R. S., c. 36, § 78, and are now embodied in the last clause of the instant statute, G. L., c. 168, § 54, cl. 7th, by the words “nor more than one quarter of the capital stock of, such association or company.”

By St. 1855, c. 294, a limitation was first placed upon the amount of its own funds which a savings institution might invest in the stock of any other corporation. This provision has come down through re-enactment in a series of statutes until it is now set forth in the instant statute in the following words: —

“But such corporation shall not hold, both by way of investment and as security for loans, more than twenty per cent of its deposits in the stock of such associations or companies, nor in any one such association or company more than three per cent of its deposits in, nor more than one hundred thousand dollars.”

The attempt to codify in a single sentence both the limitations as to the amount which might be invested in bank stock and the amount of bank stock which might be acquired gives rise to a certain apparent

confusion in the reading of said clause 7th. The meaning of the clause, however, is clear when the sources of the two kinds of limitations therein referred to are set forth, one as in said St. 1834, c. 190, § 7, and the other as in said St. 1855, c. 294, which latter enactment reads as follows:—

“SECT. 1. No savings bank in this Commonwealth shall be allowed to invest more than ten per cent. of its deposits, nor, in case such percentage amounts to one hundred thousand dollars, more than one hundred thousand dollars of its deposits, in the capital stock of any one corporation.

SECT. 2. Any savings bank in this Commonwealth that may have invested a larger amount of its deposits than is expressed in the foregoing section, in the capital stock of any one corporation, shall reduce the same to the limits in said section named within twelve months after the passage of this act.”

Both the limitations upon the amount of money which might be invested and the amount of stock in any one institution which might be acquired were first combined in a single section in St. 1863, c. 175, § 2, in the following terms:—

“No savings bank or institution for savings shall hold both by way of investment and as security for loans, more than one-half of the capital stock of any corporation, nor invest more than ten per cent. of its deposits, and not to exceed one hundred thousand dollars in the capital stock of any corporation.”

That the words “stock of any corporation,” as used in St. 1855, c. 294, and in St. 1863, c. 175, had been interpreted to include bank stock, although the latter was not designated by name in the earlier acts, is made plain by the provisions of St. 1863, c. 234, entitled “An Act in relation to savings banks and institutions for savings holding bank stock,” which read:—

“Savings banks and institutions for savings holding stock in banks which may become banking associations, under the provisions of section sixty-one of the act of congress, entitled ‘An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof,’ may continue to hold such stock in such banking associations.”

The limitations both as to amount of money which might be invested and the amount of stock in any bank which might be acquired were codified in a single clause of St. 1876, c. 203, § 9. By the phraseology of chapter 203 the intent of the Legislature with relation to the two forms of limitations and the intent that not over \$100,000 of the funds of a savings bank should be invested in the stock of any other bank are made plain, and when read with due consideration of its relation to this statute of 1876 the meaning of the terms of the instant statute, G. L., c. 168, § 54, cl. 7th, becomes clear.

St. 1876, c. 203, § 9, reads, in part, as follows with relation to the deposits of savings banks:—

“All such deposits and the income derived therefrom . . . shall be invested only as follows:—

Fourth. In the stock of any bank incorporated under the authority of this state; or the stock of any banking association located in this state,

and incorporated under the authority of the United States; or on the notes of any citizen of this state with a pledge as collateral of any of the aforesaid securities at no more than eighty per cent. of the market value and not exceeding the par value thereof: *provided, however*, that such corporation shall not hold, both by way of investment and as security for loans, more than one-quarter of the capital stock of any one bank or banking association, nor invest more than ten per cent of its deposits, nor more than one hundred thousand dollars, in the capital stock of any such bank or association. Savings banks may deposit on call in such banks or banking associations, and receive interest for the same, sums not to exceed twenty per cent of the amount deposited in said savings banks."

In view of the sequence of legislation which has been outlined, it appears reasonably obvious that the instant statute prohibits the investment of more than \$100,000 of the funds of a savings bank in the stock of any one other banking association. It is immaterial whether or not such bank stock at any given time sells above its par value. The test of the legality of the investment in this respect is not the market value or other value of the bank stock purchased but the amount of money which has been expended from the funds of a savings bank for its acquisition. An actual expenditure of more than \$100,000 of the funds of a savings bank may not be made for the purchase of stock of a single bank.

Accordingly, I answer your question to the effect that the \$100,000 limitation, which originally was enacted with the apparent intention on the part of the Legislature to secure wide diversity in the investment of savings bank funds, has reference to the amount of funds which may be used to purchase the stock of any bank, and does not refer to the par value of the bank stock the acquisition of which is sought as an investment.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

State Forests — Improved Land — Fencing.

The provisions of G. L., c. 49, relative to fences are not applicable to lands of the Commonwealth.

JUNE 25, 1928.

Hon. W. A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:— You have in a recent communication advised me of the following facts:—

"There are now under title of the Commonwealth over 100,000 acres of forest land, having many miles of exterior boundaries, the major portions of which are along land privately owned and used by several of the owners for pasturage or other farm activities.

In the administration of the State forest areas the Department activities consist of plantings, thinnings, improvement cuttings and other forms of forestry practice that tend to produce a desirable tree crop on any given area, but no pasturage is permitted."

In connection with these facts you have asked my opinion upon certain questions of law, in the following language:—

"The purpose of this letter is to ask if, in your opinion, the areas upon which the above-mentioned activities are carried on each year constitute

improved land, within the meaning of G. L., c. 49, § 3; and if so, is the Commonwealth liable to pay one-half of the cost of maintaining boundary fences; and also I should like to know if, where no improvement work of any kind is carried on on State forest areas, the Commonwealth must pay one-half of the cost of maintaining boundary fences against land that is improved by the adjoining owner."

The provisions of G. L., c. 49, §§ 1-20, relative to fences have in their essential terms existed in substantially their present form for many years, most of them from 1785 or earlier. They do not purport to be applicable to lands held by the sovereign, and I am not aware of any judicial decision in which they have been construed as being so applicable. There does not appear to be any statute by which the Commonwealth has specifically made the provisions of said chapter 49 effective as to lands held by it. In the absence of consent upon the part of the Commonwealth to subject lands held by it in its sovereign capacity to the authority of local fence viewers, it cannot be said that such authority can be exercised with respect to its lands.

It does not appear, from an examination of the various statutes relative to the acquisition of forest land by the Commonwealth, that it takes or holds such lands in any other capacity than as the sovereign for purposes appertaining to the general public welfare, although in dealing with such lands it may possibly from time to time act in making a contract with relation thereto outside "the plane of its sovereignty." *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387.

Any claim which may exist in relation to neglect to fence, under G. L., c. 49, accrues as a result of prior action and determination by fence viewers, and though such claim may properly be considered as an obligation which is enforced as if it were *ex contractu*, though it arises *ex lege*, so that it would be of the class of claims for which recovery may be had against the Commonwealth under G. L., c. 258 (*Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28), nevertheless, since the proceedings of the fence viewers are essential to the creation of the claim and are at least quasi judicial in character, the Commonwealth cannot be made a party or subject to such proceedings in the absence of express consent on its part, and therefore such claims cannot come into being as against it.

Inasmuch as I am of the opinion that the provisions of G. L., c. 49, relative to fences, are not applicable to lands of the Commonwealth, it becomes unnecessary for me to answer your questions relative to the precise nature of duties and obligations relative to fences as set forth in said chapter.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Department of Public Health — Shellfish — Importations.

The Department of Public Health is not required by G. L., c. 130, as amended, to take any action relative to shellfish imported from foreign countries.

JUNE 25, 1928.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have asked my opinion relative to an interpretation of G. L., c. 130, as amended by St. 1928, c. 269, by the following question:—

"Will you kindly inform me what action, if any, this Department must take regarding shellfish imported into Massachusetts from other countries?"

I am of the opinion that section 144A of G. L., c. 130, which was added by St. 1928, c. 269, was not intended by the Legislature to apply to foreign countries, but that the words "grounds outside the Commonwealth," referred to therein, are limited in their application to the territory of States of the Union. The statute refers to "the state where such grounds are situated," and the intent of the Legislature that section 144A shall be applicable only as to the jurisdictions comprised within the United States is made apparent by the context, by the tenor of the other sections of G. L., c. 130, relative to shellfish, and by the reference in section 144A to "interstate commerce" in shellfish.

It is recognized by judicial opinions that the interpretation of the word "state" in statutes, as meaning only a State of the Union, where the context does not preclude it, is proper. *Houston etc. R.R. v. Inmon*, 63 Tex. Civ. App. 556; *Wynne v. United States*, 217 U. S. 234; *Eidman v. Martinez*, 184 U. S. 578; *People v. Black*, 122 Cal. 73; *Employers' Liability Ass. Co. v. Commissioner of Insurance*, 64 Mich. 614.

I therefore answer your question to the effect that your Department is not required by section 144A to take any action regarding shellfish coming to Massachusetts from foreign countries.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Department of Education — Commissioner — Conveyance of Land.

The Commissioner of Education has authority, under certain conditions, to convey land to a town.

JUNE 25, 1928.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You have requested my opinion as to whether the Department of Education is authorized to transfer a certain parcel of land in its control to the town of Framingham for highway purposes.

The provisions of St. 1927, c. 135, as they amend G. L., c. 30, § 44, by the addition of a new section, are as follows:—

"SECTION 44A. A commissioner or head of a state department having control of any land of the commonwealth may, in the name of the commonwealth and subject to the approval of the governor and council, sell and convey to any county, city or town, or transfer to the control of another state department, so much of such land as may be necessary for the laying out or relocation of any highway."

From the terms of this statute it is apparent that the Commissioner of Education rather than the Department has authority to sell and convey land in the control of the Department to a town for the purpose of laying out or relocating any highway. The words "sell and convey" would seem to indicate an intention that a real consideration should pass from the town to the Commonwealth, equivalent to the fair market value of the land transferred; and the conveyance is subject to the approval of the Governor and Council, and such approval would include necessarily an approval of the amount of the consideration.

The form of conveyance by the town should be so drawn as to set forth that the conveyance is not for highway purposes generally but for the purpose of laying out or relocating a highway, whichever it may be, specifying the highway, and should also contain the amount of the actual consideration.

Having these matters in mind and acting in accordance with these suggestions, I am of the opinion that you have authority, with the approval of the Governor and Council, to sell and convey to the town of Framingham the land in control of the Department of Education concerning which you have inquired.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Witness — Summons in Adjoining State — Forfeiture.

The Commonwealth is entitled to receive the fine or forfeiture laid upon a witness summoned to give testimony in an adjoining State, under G. L., c. 233, §§ 12 and 13, for failure to obey a duly issued process.

JULY 20, 1928.

HON. ROBERT T. BUSHNELL, *District Attorney for the Northern District*.

DEAR SIR: — You have written me as follows: —

“A witness is duly summoned by the State of New York in full compliance with G. L., c. 233, §§ 12 and 13. The witness fails to appear, and at the request of the New York authorities proceedings are instituted by me, as District Attorney, in the district court of the witness' residence. The court orders the maximum amount of \$300 paid as a forfeiture, under the statute. This money is paid to the clerk of the district court.

The New York authorities request reimbursement out of this forfeiture for the amount paid the witness, and expenses. The general question on which I require an opinion is as to whether the proceedings for forfeiture, although in the name of the Commonwealth of Massachusetts, are undertaken on behalf of the summoning State, so that all or any part of the amount of the forfeiture should be paid over to that State.”

You request my opinion upon the following questions relative to the facts which you have set forth as above: —

“Should the amount of the forfeiture be paid over by the clerk of the district court to the District Attorney for disposition?

(a) If not, what disposition should the district court clerk make of the payment?

(b) If so, should the District Attorney pay over all or any part thereof to the representative of the summoning State, and if a part, to what department of the government should the balance be paid?”

I am of the opinion that the entire amount of the forfeiture ordered by the court should be paid over, on receipt thereof by the clerk of the district court, to the town in which the witness was when process was served upon him. In this instance the inference from the statements in your communication would indicate that it was the town of his residence.

The original form of the act, now embodied in G. L., c. 233, § 13, is St. 1873, c. 319, and reads: —

"SECTION 1. If the clerk of any court of record in any state adjoining to this Commonwealth, shall certify that a criminal prosecution is pending in such court, and that a person residing in this Commonwealth is supposed to be a material witness therein, any justice of the peace for the county in which such witness may reside, shall, on receipt of such certificate, issue a summons requiring such witness to appear, and testify at the court in which such cause is pending.

SECTION 2. If the person on whom such summons is served, and to whom is paid or tendered double the fees allowed by law for travel and attendance of witnesses in the supreme judicial court of this Commonwealth, besides double travelling expenses for the whole distance out and home by the ordinary travelled route, shall neglect without a reasonable excuse, to attend as a witness at the court in such summons mentioned, he shall forfeit a sum not exceeding three hundred dollars for the use of the Commonwealth."

The provision contained therein relative to the forfeiture being "for the use of the Commonwealth" was omitted in the codification of the Public Statutes, but the latter contained a provision relative to fines and forfeitures generally, providing that the same should be paid to the counties.

P. S., c. 217, § 1, provides:—

"All fines and forfeitures recovered in criminal prosecutions or exacted as a punishment for any offence or for the violation or neglect of any duty imposed by statute, and all sums recovered on forfeited recognizances, shall, where no other provision is especially made by law, be paid to the respective counties."

By St. 1890, c. 440, § 5, it was provided that fines and forfeitures paid in any district court, where no other provision is made by law, were to be paid to the city or town in which the offense was committed. The terms of said St. 1890, c. 440, § 5, are now contained in G. L., c. 280, § 2. G. L., c. 233, §§ 12 and 13, which provide for the instant form of forfeiture, are silent as to whom it shall be paid. It follows, then, that in virtue of said G. L., c. 280, § 2, it should be paid to the town where the offense was committed.

It is obvious that the Commonwealth, which has succeeded to the rights of the Crown to receive fines, and forfeitures equivalent thereto, as is the one under consideration, may by its Legislature provide for payment thereof to one of its subdivisions, and I am of the opinion that, in the absence of statutory provision therefor, such a forfeiture may not be apportioned by the court or paid to any one other than the Commonwealth or such other governmental agency as is specially designated, — in this instance the town where the offense was committed. *Bryant v. Rich's Grill*, 216 Mass. 344; *Nelson v. Ewell*, 2 Swan (Tenn.), 271.

The offense of refusing to appear and be sworn as a witness when prosecuted under a criminal complaint has been said, with relation to venue, to be committed at the place named in the subpoena where the testimony was to be given. *State v. Scott*, 89 N. J. L. 726; *State v. Brewster*, 89 N. J. L. 658; *State v. Brewster*, 87 N. J. L. 75.

It is manifest, however, that this rule does not apply to the offense which is the subject matter of G. L., c. 233, §§ 12 and 13. The offense there described appears rather to be one against the dignity of the Commonwealth, in disregarding the process issued by a justice of the peace

within the Commonwealth directing the one named therein to perform an act outside the Commonwealth. The venue accordingly appears, as by the law of the particular case which you have called to my attention, to be that of the local district wherein the defendant resides. It would follow that the town where the offense was committed would be the town, within said district, in which the defendant resided when process was served upon him, and hence that such town would be entitled to the amount of the forfeiture, or fine, as the former might with equal propriety have been called in the statute.

There is nothing in G. L., c. 233, §§ 12 and 13, as is evident when read in connection with St. 1873, c. 319, which indicates an intent to divest the Commonwealth of its right to receive the fine or forfeiture in question in favor of a foreign sovereign.

I answer your first question in the negative.

(a) I answer this question to the effect that the district court clerk should pay over the amount of the forfeiture to the town in which the defendant had his residence at the time when the witness' summons was served upon him.

(b) In view of the foregoing, this question requires no answer.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Metropolitan District Commission — Easements — Acquisition.

The Metropolitan District Commission became vested with an easement formerly acquired by the city of Boston by adverse use in Beacon Street, Brookline.

JULY 25, 1928.

Metropolitan District Commission.

GENTLEMEN: — You request my opinion as to the right of the Commission to maintain water pipes laid in land owned by one Korkland abutting upon Beacon Street in Brookline. The land in question was formerly part of Beacon Street as then located, and the pipes were originally laid therein by the city of Boston, acting under legislative authority (St. 1880, c. 126). In 1887 the part of the way in question was discontinued by action of the town, under authority of St. 1887, c. 18, and apparently, in 1889 or shortly thereafter, the town gave a deed of this land to Korkland's predecessor in title.

In my opinion, the right of the city of Boston to maintain the pipes in the land in question ceased when the use of that land as a public way was discontinued. It is doubtful whether the Legislature could preserve the water pipe easement after the easement of travel, of which it was an incident, was discontinued; but however that may be, no legislative intent is here disclosed to attempt such a result. See *Natick Gas Light Co. v. Natick*, 175 Mass. 246; *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397; *Boston Electric Light Co. v. Boston Terminal Co.*, 184 Mass. 566.

It would seem, however, that the city had acquired by adverse use a right to maintain the pipes in the Korkland land. The discontinuance was in 1887 and the conveyance by the town, if that is material, was probably no later than 1890.

Assuming that the city of Boston had acquired the easement by adverse use, you suggest a further question as to whether the Metropolitan

Water and Sewerage Board succeeded to that right. That Board, by St. 1912, c. 694, was authorized to take "the main water supply pipes belonging to the city of Boston located in the town of Brookline." Although nothing is said as to taking the easement to maintain those pipes, such authority would no doubt be inferred. The taking by the Board from the city was of the pipe line through Beacon Street, as said street is now "or was formerly" laid out, and includes all the "property and rights acquired by the city of Boston by taking or purchase and now owned by it in connection with the said pipes." The word "purchase" includes acquisition of title by prescription. 23 Am. & Eng. Ency. L., 2d ed., p. 463, citing cases; Wharton's Law Lex. 8715.

In my opinion, therefore, the Board became vested with any easement that the city had acquired.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Insurance — Insured — Medical Examination.

A beneficiary under a contract of life insurance is not subject to the provisions of G. L., c. 175, § 123, relative to medical examination, even if by the terms of the policy he may in certain contingencies become one of the insurer's risks.

JULY 26, 1928.

HON. WESLEY E. MONK, *Commissioner of Insurance*.

DEAR SIR:— You have set forth certain facts and have asked my opinion with relation to the application to them of G. L., c. 175, § 123, as amended, as follows:—

"G. L., c. 175, § 123, as amended, provides, with exceptions not material to this request, that no life insurance company shall issue a policy of life insurance without having given the 'insured' a prescribed medical examination.

A certain life company doing business in this State proposes to issue a policy of insurance on the life of a minor. The father is named as beneficiary in the policy, the proceeds thereof being payable to him upon the death of the minor. The application for the policy is signed by the father, who is the contracting party with the company.

The policy contains the following provisions:—

'The Company will waive payment of all subsequent premiums on this policy, continuing the insurance in full force and effect, the same as if premiums were being duly paid, if . . . John Doe . . . (father of the minor insured), hereinafter referred to as the Applicant, becomes totally and permanently disabled as hereinafter defined, or in event of the death of the Applicant, provided such disability or death occurs prior to the anniversary of this policy on which the age of the Insured at nearest birthday is twenty-one years and prior to the anniversary of the policy on which the age of the Applicant at nearest birthday is sixty years, subject to the conditions stated herein. Such waiver shall commence with the premium due on the anniversary of this policy following the receipt of due proof of such disability or death.'

The foregoing facts raise the following question, upon which I respectfully request your opinion: Is the applicant and beneficiary an 'insured' within the meaning of said section 123?"

One pertinent portion of G. L., c. 175, § 123, as amended, reads as follows:—

“No life company shall, except as herein and in sections one hundred and thirty-three and one hundred and thirty-four provided, issue any policy or policies of life or endowment insurance upon a life within the commonwealth without having within ninety days prior thereto made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner; provided that an inspection by a competent person of a group of employees and their environment may be substituted for such medical examination in case of a policy of group life insurance as defined in section one hundred and thirty-three.”

I am of the opinion that the word “insured,” as used in G. L., c. 175, § 123, as amended, refers only to the individual to whom a policy is issued insuring his life, and has no reference to the beneficiary of such policy, even though such policy contains contractual provisions, as in the instant matter to which you have called my attention, which may be said to constitute a contract of insurance with the beneficiary, within the meaning of G. L., c. 175, § 2. Such contract of insurance with the beneficiary is subsidiary to the principal contract of life insurance made between the company and the person on whose life the policy is written. Although the word “insured” has had more than one meaning attached to it in the opinions of courts, under various circumstances, I am unaware of any instance in this Commonwealth in which the word, as used in a policy of life insurance, has been interpreted by the Supreme Judicial Court as meaning any one other than the person upon whose life a policy has been written, irrespective of who might be the applicant and beneficiary of such policy. The word as commonly used in connection with life insurance refers to an individual whose life is the principal subject of a policy.

G. L., c. 175, § 123, as amended, in substantially the same form as it stands today with relation to those parts applicable to the question before me, was enacted by St. 1895, c. 366. It contained the same words as occur in the present statute—“prescribed medical examination of the insured.” I am advised that in 1895 such a clause, with relation to a beneficiary of a life insurance contract, as appears in the matter which you have called to my attention was unknown in the writing of life policies; that it is uncommon even at the present time; and has never before been presented for the approval of the Commissioner of Insurance in this Commonwealth.

From these considerations it appears that the intention of the Legislature, as expressed in the wording of the instant statute, was to provide for a medical examination of the individual whose life constituted the main subject matter of the policy, and did not extend to providing for such an examination of any other person, irrespective of any contractual relations which might arise under the policy between the company and such other person.

One reason which may have actuated the Legislature to require prescribed medical examinations of insureds is the advisability of restraining to some extent the writing of extra-hazardous risks by life insurance companies. If the same reason applies to the acceptance of beneficiaries who become risks of a company to an extent less than the face of the policy, the Legislature might by appropriate and unequivocal language

provide that such beneficiaries should in like manner be required to submit to a medical examination, but such a requirement cannot be read into the law in the absence of an expression of legislative intent in this regard.

Accordingly I answer your question in the negative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Department of Correction — Massachusetts Reformatory — Authority to build a Dam.

A dam may be built upon a brook as to which the Commonwealth is a riparian owner, by its officials, subject to the rights of upper riparian owners.

AUG. 21, 1928.

HON. SANFORD BATES, *Commissioner of Correction*.

DEAR SIR:— You have requested my opinion upon the following questions:—

“1. May the Massachusetts Reformatory build a dam across Nashoba Brook, which runs through the property of the Commonwealth, the dam to be so arranged that at all times except during the ice-cutting season the level of the water would remain as at present, and during the ice-cutting season the water level would be raised by flashboards?

2. May the reformatory officials cause the water to be raised so that the meadows of other owners would be flooded to an extent no greater than at times of normal spring high-water level?”

The erection of a dam such as you have described, for the purpose of cutting ice, would constitute a reasonable use of the waters of Nashoba Brook by the Commonwealth as a riparian owner. The rights of riparian owners are stated at length in *Taft v. Bridgeton Worsted Co.*, 237 Mass. 385, 388–389; *S. C.*, 246 Mass. 444. See also *Collins Mfg. Co. v. Wickwire Co.*, 14 Fed. (2d) 871; *Isbell v. Greylock Mills*, 231 Mass. 233; *Stratton v. Mount Hermon Boys' School*, 216 Mass. 83; *Roach v. Sturdy*, 250 Mass. 357.

Briefly summarized, a riparian owner has the right to make a reasonable use of water as it passes through his land, having due regard to the correlative rights of other riparian owners above and below. I call your attention to the requirements of G. L., c. 130, §§ 17–19, with respect to fishways, which should be complied with in the erection of a dam, in so far as applicable.

1. Assuming that the officials in charge of the said reformatory have been duly authorized by the Department of Correction to make use, for the designated purpose, of land of the Commonwealth under their control, I answer your first question in the affirmative upon the facts which you have set forth.

2. An answer to your second question must necessarily depend upon the extent to which lands of upper riparian owners are overflowed by the raising of the dam during ice-cutting seasons. Small and trivial flowage of such lands would be regarded as injuries not meriting compensation, under the doctrine laid down in the cases of *Stratton v. Mount*

Hermon Boys' School, supra, and *Isbell v. Greylock Mills, supra*. Any flowage, however, which perceptibly prevented an upper riparian owner from having the normal use of any of his property during the season of ice cutting would be an infringement of his property rights, for which he would be entitled to compensation.

Cases decided under the Mill Act, now G. L., c. 253, are not applicable to the situation which you describe.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Insurance — Industrial Life Policy — Surrender Value.

Prior to 1908 it was unlawful to make a contract for a surrender value of an industrial policy to be payable otherwise than in money.

Subsequent to 1908 and prior to the effective date of St. 1928, c. 205, such a contract might have been lawfully made, but it may not be so made since the enactment of said St. 1928, c. 205.

SEPT. 14, 1928.

HON. ARTHUR E. LINNELL, *Acting Commissioner of Insurance*.

DEAR SIR:— You have asked my opinion upon the following questions:—

“1. Was it lawful for a domestic life insurance company and a person insured under an industrial life policy described in R. L., c. 118, § 76, and issued while said section was in force, to agree, prior to the effective date of St. 1907, c. 576, § 80, that the surrender value of such policy should be applied to the purchase of extended term insurance instead of being paid in cash as set forth in said section 76?”

2. Was it lawful for such a life company and the insured under such a policy described in R. L., c. 118, § 76, and issued while said section was in effect, to agree, subsequent to the effective date of St. 1907, c. 576, § 80, and prior to the effective date of St. 1928, c. 205, that the surrender value of such policy be applied as aforesaid instead of being paid in cash as set forth in said section 76?”

3. Was it lawful for such a company and the insured under such a policy described in St. 1907, c. 576, § 80, and issued while said section was in effect as to industrial life policies, to agree, prior to the effective date of St. 1928, c. 205, that the surrender value of such policy should be applied as aforesaid instead of being paid in cash as provided in said section 80?”

4. Is it lawful for such a company and a person insured under such a policy described in R. L., c. 118, § 76, or in St. 1907, c. 576, § 80, and issued while either of said sections was in effect, to agree, subsequent to the effective date of St. 1928, c. 205, that the surrender value be applied as aforesaid instead of being paid in cash as set forth in said section 76 or 80?”

1. I answer your first question in the negative. The last sentence of R. L., c. 118, § 76, reads as follows:—

“Any condition or stipulation in the policy or elsewhere which is contrary to the provisions of this section, and any waiver of such provisions by the insured, shall be void.”

This provision rendered it unlawful for the insurer and the insured to enter into such an agreement as you describe in your question.

2. I answer your second question in the negative. In whatever respect St. 1907, c. 576, § 80, may be said to have changed the law with relation to agreements made subsequent to the effective date thereof, concerning the manner of payment of the amount of the surrender value of policies of industrial insurance, yet said statute, in section 79, provided:—

“All policies issued prior to the first day of January in the year nineteen hundred and eight by any domestic life insurance company shall be subject to the provisions of law limiting forfeiture which were applicable and in force at the date of their issue.”

It is therefore plain that the same statutory prohibition applied to industrial policies which were issued before 1908 as had applied prior to the said statute of 1907, and the same considerations which impelled me to answer your first question in the negative require a like answer to your second question.

3. I answer your third question in the affirmative. The statute of 1907 specifically repealed R. L., c. 118, § 76 (St. 1907, c. 576, §§ 80 and 122), and substituted for it a new enactment embodied in said section 80, which did not contain a provision similar to that found in the last sentence of R. L., c. 118, § 76, and quoted above. In the absence of such a provision there existed no statutory regulation which forbade the making of an agreement between the insurer and the insured as to the manner in which the fixed amount payable as cash surrender value might be applied for the benefit of the insured.

4. I answer your fourth question in the negative. The provisions of St. 1928, c. 205, as they amend G. L., c. 175, § 22, by the addition of section 22B, now specifically forbid the making of such an agreement as is outlined in your question. Said section 22B reads:—

“No company and no officer, agent or employee thereof, and no insurance broker, shall make, issue or deliver any policy of insurance or any annuity or pure endowment contract, or make or procure the making of, solicit or accept any oral or written agreement containing a waiver or a provision for a waiver by an applicant for, or the insured under or holder of, any such policy or contract, of any provision of this chapter except as expressly authorized thereby. Any such agreement, waiver or provision shall be void. Whoever violates this section shall forfeit not less than one hundred nor more than five hundred dollars.”

The provision of St. 1907, c. 576, § 80, that the cash surrender value of industrial policies “shall in all cases be payable in cash” is now to be found in G. L., c. 175, § 145, relative to industrial policies issued before December 31, 1911, and the said provisions of St. 1907, c. 576, § 79, as they relate to policies of life insurance issued before 1908 are now embodied in G. L., c. 175, § 143. Both said sections 143 and 145 of G. L., c. 175, are now affected by the prohibitions of section 22B.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

State Fire Marshal — Permit — Blasting Operations — Civil Suit.

The State Fire Marshal should proceed to act upon an appeal from an order granting a permit for blasting, even though a suit for damages resulting from blasting is pending against the one to whom such permit has been awarded.

SEPT. 19, 1928.

MR. GEORGE C. NEAL, *State Fire Marshal.*

DEAR SIR:— You have informed me that an appeal has been filed with you by certain persons claiming to have been aggrieved by the granting of a permit by the fire commissioner of Boston to the Rowe Contracting Company, permitting said company to engage in blasting operations at its quarry in West Roxbury. You also state that a suit for damages is pending in the courts against the Rowe Contracting Company by one of the applicants. You ask whether you should take any action on the appeal while the civil suit is pending.

In my opinion, you should take such action in the premises as you may deem proper, disregarding the pendency of a civil suit. This, of course, is based upon the assumption that an appeal by a person aggrieved is properly pending before you. Under G. L., c. 148, § 45, no appeal may be taken except by a "person aggrieved."

As a public officer your duty is set forth in the statute, and the pendency or outcome of a civil suit for damages does not in any way conclude the questions which you must decide. It is obvious that for any one of a number of reasons the court might find for the defendant in a civil suit for damages, and at the same time it might clearly be your duty to refuse to issue a permit or, upon appeal, to reverse the finding of the fire commissioner. The function of the court in a civil case is to determine whether or not, upon the evidence then and there presented, the particular plaintiff has sustained an injury for which the law provides relief. Your function is to determine, upon all the facts which come to your knowledge, whether or not, in the best interests of the public safety, a permit should issue.

While it is true that an appeal may not be filed except by a "person aggrieved," nevertheless, assuming such an appeal to have been properly filed, I am of the opinion that your duty is to determine the matter in the light of the safety of the general public and not confine yourself to questions involving simply the appellant himself. Even though certain portions of the evidence presented in the court and of the facts upon which your decision must be based are identical, nevertheless, your field of inquiry is necessarily much broader than that of the court, and it is probable, and consistent, that your decision would properly be based upon facts which in any particular lawsuit would not be competent.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Questions of Public Policy — Submission to Voters — Legislative Resolutions.

A question as to whether representatives in the General Court from a district shall be instructed to vote for resolutions requesting the President and Congress of the United States to take steps to submit

for ratification the repeal of an amendment to the Constitution of the United States may be a question of public policy under G. L., c. 53, § 19, as amended.

OCT. 4, 1928.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR:— You have informed me that an application, signed by two hundred and twenty-four voters, asking for the submission of the following question to the voters of the Ninth Worcester Representative District, was filed with you on September 4th of the current year:—

“Shall the representatives in the General Court from the 9th Worcester Representative District be instructed to vote for resolutions requesting the President and Congress of the United States to take steps to submit for ratification the repeal of the Eighteenth Amendment to the Federal Constitution?”

You have asked me to determine whether or not the above question is one of public policy. If it is such a question, it must be placed upon the ballot in a form deemed by the Secretary of the Commonwealth and the Attorney General to be simple, unequivocal and adequate. If it is not a question of public policy, it may not be placed upon the ballot.

The statute under which the application is made is found in G. L., c. 53, § 19, as amended by St. 1925, c. 97, which provides as follows:—

“On an application signed by twelve hundred voters in any senatorial district, or by two hundred voters in any representative district, asking for the submission to the voters of that senatorial or representative district of any question of instructions to the senator or representatives from that district, and stating the substance thereof, the attorney general shall upon request of the state secretary determine whether or not such question is one of public policy, and if such question is determined to be one of public policy, the state secretary and the attorney general shall draft it in such simple, unequivocal and adequate form as shall be deemed best suited for presentation upon the ballot. Upon the fulfilment of the requirements of this and the two following sections the state secretary shall place such question on the official ballot to be used in that senatorial or representative district at the next state election.”

The precise object sought by the application is the submission to the voters of the district of the question as to whether or not the representatives in that district shall be instructed to vote for resolutions requesting the President and Congress of the United States to take steps to submit for ratification the repeal of the Eighteenth Amendment to the Federal Constitution. It may be assumed that if such resolutions are not sanctioned or recognized by law the question presented cannot be one of public policy.

It is true that even if the representatives carry out the instructions, and that a joint resolution of both branches of the General Court or a resolution of the House of Representatives is sent to Congress and to the President, requesting them to take steps toward the repeal of the Eighteenth Amendment, yet there is no duty upon the part of the President or of Congress to obey or follow out the request. But the mere fact that there is no binding obligation upon Congress or the President to follow out a resolution of the representatives in the General Court does not necessarily mean that such resolution is not sanctioned or recognized

by law. Such a resolution cannot properly be said to be a nullity. It may well have persuasive force, irrespective of its lack of a compelling authority.

It may be assumed that such action on the part of the representatives as is sought by the question is not a "law." If the Legislature, or either branch thereof, voted to follow out the instructions, it would not be subject to the referendum, for the reason that it is not a "law." See *Opinion of the Justices*, 262 Mass. 603.

But the power of the Legislature is not confined to the making of laws. Mass. Const., pt. 2nd, c. I, § I, art. IV, provides that the General Court may from time to time "make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth." Such a resolution as that sought by the petition under consideration seems clearly to come within this broad and inclusive ground. "Orders . . . directions and instructions" include the right on the part of the Legislature to request Congress to take action on a public matter such as that under consideration. The language used is broad and comprehensive and it cannot be that the framers of the Constitution were in this article using synonymous terms. Further, it has long been the custom of the Legislature, by joint or separate action, to memorialize Congress on matters which it has deemed important. The joint rules and the rules of each branch of the General Court recognize this right and provide in great detail for the method of introducing, voting and signing this type of resolution or memorial. The same rule as to quorum governs action of this type as governs the enactment of a law. The right of a representative body to memorialize and to adopt resolutions is inherent in any parliamentary body, and the fact that this right has been exercised from the earliest days of the Legislature is strong evidence that it possesses that right. The application under consideration here involves instructions to the representatives from a district of the Commonwealth of Massachusetts to do something which they, as such representatives, may legally do.

There is no attempt here to instruct the representatives to perform any act which is a part of the machinery of amending the Federal Constitution. The voters here are not requesting that their representatives petition Congress to call a convention to amend the Federal Constitution, and no question is here involved, therefore, as to whether instruction to vote in such a case would conflict with provisions of the United States Constitution. The result is that the action by the representatives requested by the voters is confined to matters within the sovereignty of the Commonwealth of Massachusetts.

The words "public policy" should be construed broadly. These words, as used in this statute, are not limited or qualified in any way, and therefore it seems to have been the intent of the Legislature that no restricted meaning should be given to them. *Opinion of the Justices*, 262 Mass. 603, 605. The people of each representative or senatorial district are vitally interested and concerned in the question whether an amendment to the Constitution of the United States shall continue in force or be repealed.

An opinion of former Attorney General Benton, given to the Secretary of the Commonwealth on September 9, 1926 (not published), was to the effect that the Secretary might determine that a question of instruc-

tions to the representatives of a district to vote for a resolution requesting the President and the Senate of the United States to take steps to bring the United States into full co-operation with the League of Nations was a question of public policy, within the meaning of G. L., c. 53, § 19, as amended by St. 1925, c. 97, and such question was duly placed upon the ballot.

I therefore advise you that, in my opinion, the question presented upon the instant application is one of public policy, and therefore may be placed upon the ballot at the coming election.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Department of Public Health — Drainage — Hearing.

Under St. 1888, c. 309, it is not mandatory that the Department of Public Health shall give hearings upon the approval of drainage systems.

OCT. 4, 1928.

DR. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have asked my opinion as to whether you are required to give a public hearing at the request of the officials of a street railway company relative to your approval of a proposed system of drainage constructed under St. 1888, c. 309.

Section 9 of said statute, to which you have directed my attention, reads, in its pertinent parts, as follows:—

“Such system of drainage, before its construction, shall be subject to approval by the state board of health, who may modify and amend the same if desirable, and may give public hearings thereon before approving it, if need be. In case of the violation of any of the provisions of this act, or the creation of a nuisance, appeal may be had to the state board of health, who may order the abatement of any nuisance, if in their judgment there is cause therefor.”

It is obvious that the provision for approval of the system of drainage by your Department is for the purpose of protecting the public health in connection with the general scheme of drainage contemplated. It may well be doubted if the approval of a system of drainage by you requires you to consider the mode of carrying on the work involved in the construction of the system otherwise than as it relates to the public health. In any event, the giving of public hearings is not mandatory upon the Department but is left to its discretion.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

Department of Public Health — Regulations — Public Places.

The Department of Public Health may not, under G. L., c. 111, § 8, make regulations regarding the use of common drinking cups and towels in parts of buildings which are in fact private places.

OCT. 5, 1928.

DR. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have submitted to me regulations, made by the Department of Public Health under G. L., c. 111, § 8, which prohibit the

use of a common drinking cup and a common towel in various designated public places, vehicles and buildings. You particularly direct my attention to those parts of the regulations which prohibit a common drinking cup "in any part of any factory, market, office building, or store of any kind which is open to the general public," and request my opinion as to whether you have authority to amend the regulation by striking out the words "which is open to the general public" in that phrase of the regulations above quoted.

I am of the opinion that you have not such authority.

G. L., c. 111, § 8, is as follows: —

"In order to prevent the spread of communicable diseases, the department may prohibit in hotels and in such public places, vehicles or buildings as it may designate the providing of a common drinking cup or a common towel, and may establish rules and regulations for this purpose. Whoever violates any such rule or regulation shall be punished by a fine of not more than twenty-five dollars."

It is plain that the intent of the Legislature, as disclosed by the words of said section 8, was to prevent the use of a common drinking cup or common towel in places to which the public has a right of access. It was not intended to forbid their use in places which were private. Portions of various buildings mentioned in said phrase of the regulations may be, and in fact often are, private, and the public has no right of access to them. It would not be within the scope of your authority in making regulations under this statute to apply the inhibition against the designated utensils to such private places. Your present regulations, as set forth in your letter, appear to be within the authority delegated to you by the statute, and in the form in which they would stand by the adoption of the proposed amendment would exceed such authority.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Director of Accounts — Towns — Municipal Indebtedness.

The unlawful disbursement of the funds of a town in payment of a liability lawfully incurred is not such a violation of G. L., c. 44, §§ 2-13, that the Director of Accounts may, in his discretion, refuse to certify notes issued in relation to such payment.

OCT. 6, 1928.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR:— You have asked my opinion as to whether the Director of Accounts is authorized to certify notes issued by the town of Westport under date of August 13, 1928.

The warrant for the annual town meeting held on March 13, 1928, contained the following article:—

"Article 24. To see if the Town will vote to purchase a five hundred gallon Triple Combination fire truck and proper equipment for same, appropriate money for such purchase and act anything thereon."

The vote of the town meeting thereon was as follows:—

"That the Town purchase a five hundred gallon Triple Combination fire truck and necessary and usual equipment for the same, and that the Town raise and appropriate the sum of \$9,200 dollars therefor, and that

a committee be appointed by the Moderator for the purpose of carrying the provisions of this vote into effect."

G. L., c. 40, § 5, provides: —

"A town may at any town meeting appropriate money for the following purposes:

(30) For the compensation of all town officers whose election or appointment is authorized or required by law, and for all other necessary charges arising in such town."

The words "all other necessary charges" have been "construed to authorize a town to raise and appropriate money in respect to matters where it has a corporate duty, right or interest to perform, defend or protect." *Leonard v. Middleborough*, 198 Mass. 221. Protection from fires always has been treated as a general function of government. *Williams College v. Williamstown*, 219 Mass. 46, 48. It was within the corporate powers of the town to raise and appropriate money for the purchase of a fire truck.

The next question to consider is whether or not there has been a sufficient compliance with the provisions of G. L., c. 44.

The article in the warrant under which the town voted to raise and appropriate the money necessary to purchase the fire truck is as follows: —

"Article 52. To determine the manner of raising the appropriations to defray the Town's charges for the year ensuing."

The following vote was adopted thereunder: —

"Voted: That for the purpose of meeting the appropriation made under Article 24 there be raised in the tax levy of the current year the sum of \$1,700.00 and the Treasurer with the approval of the Selectmen be and hereby is authorized to borrow the sum of \$7,500.00, and to issue bonds or notes of the Town therefor, such bonds or notes to be payable in accordance with the provisions of Section 19, Chapter 44, General Laws, so that the whole loan shall be paid in not more than 5 years from the date of issue of the first bond or note or at such earlier dates as the Treasurer and Selectmen may determine."

No question has been raised by your inquiry of proper service of the warrant, and I shall presume for the purpose of this opinion that proper service was made.

The wording of the article in the warrant under which the foregoing vote was adopted has been held by the courts in numerous cases to be sufficient for a town to appropriate money thereunder.

You do not state in your letter that the authorization of the loan was in violation of G. L., c. 44, § 10, and I shall also presume that the indebtedness of the town of Westport does not exceed three per cent on the average of the assessors' valuation of the taxable property for the three preceding years.

G. L., c. 44, § 7, as amended by St. 1923, c. 338, provides: —

"Cities and towns may incur debt, within the limit of indebtedness prescribed in section ten, for the following purposes, and payable within the periods hereinafter specified, provided that as to each such purpose, except those described in paragraphs (15), (16) and (17), only such sum may in any year be authorized to be borrowed as exceeds twenty-five

cents per one thousand dollars of the valuation of the city or town for the preceding year:

(11) For the cost of additional departmental equipment, five years."

If the sum of \$1,700 to be raised in the tax levy of the current year represents a sum equal to twenty-five cents per one thousand dollars of the valuation of the town for the preceding year, all of the requirements of the statutes with reference to the purchase and mode of payment for the fire truck have been complied with.

You state that an "audit of the accounts of the town has recently been made, and it was found that an appropriation of \$9,200 was voted for the purchase of a fire truck and equipment, \$7,500 of which was to be raised by a loan and \$1,700 by taxation. It was also found that the truck and equipment had been purchased and that bills had been paid to the amount of \$9,196.77, although the treasurer had not issued the loan authorized," and thereby raise the question as to whether or not the wrongful disbursement of public funds by the treasurer of the town in payment of the fire truck, a liability lawfully incurred, renders the whole proceeding in connection with the vote to purchase the said fire truck and the manner prescribed for its payment so defective as to warrant the refusal of the Director of Accounts to certify these notes.

G. L., c. 44, § 20, provides, in part, as follows:—

"The proceeds of any sale of bonds, or notes, except premiums, shall be used only for the purposes specified in the authorization of the loan; provided, that transfers of unexpended amounts may be made to other accounts to be used for similar purposes."

There is nothing before me to show that the town of Westport, by a vote of the town meeting, intends to use the proceeds of the sale of the notes for any purpose other than that specified in the authorization of the loan.

A town is a constituent element of sovereignty, and its affairs, within the authority specified by general law, or the powers incidental to its corporate duties as an existing body politic, are conducted by the qualified inhabitants thereof, who meet, deliberate, act and vote in their natural and personal capacities, in the exercise of their corporate powers.

To say that the act of the treasurer would render the mandates of the town nugatory and void is contrary to sound reason and law. Such a pronouncement would, in many instances, lead to serious disruption of the lawful conduct of the governmental and proprietary functions of a municipality.

The Supreme Judicial Court, in *Spector v. Milton*, 250 Mass. 63, 71, said:—

"Misconduct of a public officer in the performance of a public function cannot prevent the proper operation of governmental authority when set in motion through appropriate channels."

I am of the opinion that the unlawful disbursement of the funds of the town of Westport in payment of a liability lawfully incurred is not a violation of the laws relating to municipal indebtedness (G. L., c. 44, §§ 2-13, inclusive), and that the Director of Accounts has no discretionary power to refuse to certify the notes in question.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Commissioner of Public Safety — Order of State Fire Marshal — Appeal.

An appeal from an order of the State Fire Marshal revoking a permit granted by the board of aldermen of a city for a filling station does not lie since the enactment of St. 1928, c. 320.

OCT. 15, 1928.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You ask my opinion as to “whether the Commissioner may hold a hearing on the appeal from the State Fire Marshal’s order” revoking a permit granted by the board of aldermen of the city of Somerville to “erect and use a filling station in the said city of Somerville.”

You state that the permit was granted by the board of aldermen of the city of Somerville on July 12, 1928; that an appeal to the State Fire Marshal was taken on July 31, 1928; and that the order of the State Fire Marshal revoking the permit was dated August 21, 1928.

Before the order of the State Fire Marshal was made, and during the pendency of the appeal to him, St. 1928, c. 320, amending G. L., c. 147, § 5, became effective. Prior to the enactment of this statute a person affected by an order of the State Fire Marshal could appeal to the Commissioner, who, after hearing, could amend, suspend or revoke such order; and, if such person was aggrieved by an order approved by the Commissioner, he could appeal to the Superior Court. See G. L., c. 147, § 5. An appeal to the Commissioner was therefore a condition precedent to be performed before the Superior Court could review the matter.

St. 1928, c. 320, repealed this provision in G. L., c. 147, § 5, and a person aggrieved by an order of the State Fire Marshal may now appeal directly to the Superior Court.

The statute, as amended, regulates the practice in appeals from orders of the State Fire Marshal, and does not affect the substantive rights of any person aggrieved. “Statutes regulating practice, procedure and evidence . . . and not affecting substantive rights . . . commonly are treated as operating retroactively, and as applying to pending actions or causes of action.” *Hanscom v. Malden & Melrose Gas Light Co.*, 220 Mass. 1.

I am of the opinion that St. 1928, c. 320, applies to the instant case, and that the person affected cannot appeal to the Commissioner of Public Safety, and therefore that you cannot hold a hearing.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Commissioner of Public Safety — License — Revocation.

The Commissioner of Public Safety cannot demand and require the surrender of a license granted under G. L., c. 140, § 183A, after its suspension or revocation.

OCT. 16, 1928.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You ask my opinion as to whether it is “within the province of the Commissioner, when he has suspended or revoked his approval (which action automatically suspends or revokes the license),” under the provisions of G. L., c. 140, § 183B (St. 1926, c. 299), “to demand and take up such license.”

A license is in the nature of a permission to carry on a business which the Legislature has deemed it wise to surround with restrictions. *Sullivan v. Borden*, 163 Mass. 470. A "license," in the sense in which the word is used in your letter, means the written document by which the right or permission is conferred.

When the Commissioner suspends or revokes his approval of a license granted under the provisions of G. L., c. 140, § 183A, the right to carry on any of the callings therein stated is thereupon suspended or revoked, as the case may be. The mere fact that the document issued at the time of the granting of such license may be in the possession of the licensee after the suspension or revocation does not permit said licensee to continue to carry on the business for which he was licensed. The licensee, if he does carry on the business after suspension or revocation, and even though the certificate has not been surrendered, may be prosecuted under G. L., c. 140, § 183C.

I am of the opinion that the Commissioner cannot demand the surrender of the "license."

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

*Director of Registration — Board of Dental Examiners — License —
Registration.*

One who becomes a registered dentist after April first in any year need not pay a fee for registration in that year.

The certificate of registration issued to a dentist authorizes him to practice until it is revoked or suspended. He is required to pay a fee annually.

OCT. 22, 1928.

MR. W. F. CRAIG, *Director of Registration*.

DEAR SIR:— You have asked my opinion on the following three questions:—

1. Under the provisions of G. L., c. 112, § 44, as amended by St. 1927, c. 147, does a new practitioner beginning practice in any month subsequent to March 31st in the calendar year comply with the law if he notifies the Board of Dental Examiners of his office address, or must he also pay the two-dollar registration fee?

2. Does the certificate of registration cover from April first of one year to March thirty-first of the following year, or does it cover simply the particular calendar year? Does compliance with this law require any official notice from the Board other than a simple receipt for the registration fee, with the date thereon?

3. What is the meaning and effect of the word "license" as used in said chapter 147?

In answer to your first question, I advise you that a new practitioner who begins practice in any year after March thirty-first need not pay the annual fee of two dollars until the next year. The statute requires that the two-dollar fee shall be paid annually before April first; and if a person is not a registered dentist between January first and April first, he need not pay the fee for that year. Of course, every new practitioner must notify the Board of his office address when he begins practicing.

I shall consider your second and third questions together. The certificate of registration originally issued to a dentist authorizes him to

practice until it is revoked or suspended. The duty imposed by St. 1927, c. 147, is to pay to the Board two dollars each year sometime between January first and April first. When a registered dentist complies with this provision he has done all that is necessary. It is not necessary that a new license or certificate be given to him. His authority to practice dentistry exists solely by virtue of his original certificate and not by virtue of anything he obtains in return for the annual two-dollar fee. It is to be noted that if he does not pay the two-dollar fee his authority to practice may be suspended by the Board. Unless and until the Board takes some affirmative action to suspend his authority he still practices legally by virtue of his original certificate. If the statute contemplated that a genuine license should be issued in return for the annual two-dollar payment, there would be no need of "suspending" the authority to practice for failure to comply with the statute; there would be no authority to practice, and suspension would be unnecessary.

Further, G. L., c. 112, § 45, provides that a certificate of registration shall be issued to an applicant who successfully passes the examination required by the Board. This certificate is *prima facie* evidence of the right of the holder to practice dentistry and must be kept in his office in plain view of the patients, and on application must be shown to any member or agent of the Board. This section has not been amended or changed in any way. If the Legislature by said chapter 147 contemplated a real license to take the place of, or to supplement, the certificate of registration, it would have amended said section 45 by requiring the new license to be exhibited in the dentist's office instead of, or together with, the certificate of registration. It is to be noticed that the annual report of the Board of Dental Examiners for the year 1926, which is the basis of this legislation, contemplated merely the annual registration of dentists for the purpose of securing more effective supervision of the profession. The report clearly shows that the Examiners did not desire or contemplate that a new or supplemental authority to practice was to be required annually.

The result is that a registered dentist complies with the law if he pays two dollars annually between January first and April first, and it is not necessary that the Board issue to him any new license or certificate. It may be advisable, however, to give such dentist a receipt indicating that for that calendar year he has paid the two dollars between January first and April first.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

State Hospitals — Patients — Absentee Voting.

The Department of Mental Diseases may, in its discretion, deliver or forward blank forms of application for absentee ballots on behalf of a patient, exercising in each instance due regard to the condition and welfare of the patient.

OCT. 29, 1928.

DR. GEORGE M. KLINE, *Commissioner of Mental Diseases*.

DEAR SIR:— You have asked my opinion with relation to the duties of your Department and its superintendents of State hospitals for the insane in connection with "blanks for absentee voting" sent the patients

confined in such hospitals, either by commitment or by voluntary application. I assume that by "blanks for absentee voting" you refer to the blank forms of application for an official absent-voting ballot, as described in G. L., c. 54, §§ 86-89, as amended.

It is not necessary, in order to advise you upon the subject matter of your communication, to enter upon a consideration of the right of a patient in a State hospital to vote. The right of any citizen to have his name upon the list of registered voters in any city or town is a question the determination of which lies in the jurisdiction of such registrars. The due registration of a citizen's name as a voter is a prerequisite to his exercise of a right to vote. The blank form of application for an absentee ballot is to be sent in by the person desiring to vote. G. L., c. 54, § 86, as amended by St. 1925, c. 101, § 1.

G. L., c. 123, § 98, vests in your Department wide discretionary powers relative to letters sent to or from patients. The word "letters," as here used, may well be said to comprehend applications for ballots. The intent of the statute in this regard is to confer authority upon your Department to supervise the correspondence of all patients in institutions over which it has control. See IV Op. Atty. Gen. 219. It would follow that your Department, acting through its superintendents, may well exercise its discretion in delivering or forwarding the blank forms of application, with a view in each instance to the condition and welfare of the patient.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

State Employee — Vacation — Pay.

A State employee is not entitled to a "vacation" after his employment has ceased, nor to pay for the period which would be covered by such vacation, in lieu thereof.

Nov. 2, 1928.

Dr. GEORGE M. KLINE, *Commissioner of Mental Diseases*.

DEAR SIR:— You have requested my opinion as to the application of G. L., c. 149, § 38, to the following facts:—

"A carpenter entered the service on August 22, 1927. After working a full year his retirement deductions were taken out of his pay. He objected, and when it was explained to him that the deductions were compulsory he gave his notice verbally to the foreman mechanic under whose direction he was working. This was about September 1st. He then asked that he be given his vacation. This request was denied, as he was on his notice. He completed working his notice of two weeks and demanded his pay for two weeks' vacation. As it was denied him he refused to take his last week's pay."

G. L., c. 149, § 38, reads as follows:—

"All laborers, workmen and mechanics permanently in the employ of the commonwealth or the metropolitan district commission who are within the provisions of section thirty as affected by sections thirty-two and thirty-six shall be entitled to an annual vacation of at least twelve working days with pay."

I assume from the facts as you have set them forth that the workman or mechanic who was hired by your Department as a carpenter was in the permanent employ of the Commonwealth, and that on or about September 1st, some days after he had completed a year of such employment, he duly resigned his position, such resignation to take effect two weeks after the day of its tender, and that such resignation was duly accepted and became effective at the end of the two-week period. He received no vacation.

It is obvious that prior to the date of the employee's resignation he would have been entitled to a vacation of twelve working days, with pay. It cannot be said that after his resignation, which was to take effect in two weeks, he was then permanently in the employ of the Commonwealth, as that word is used in the instant statute. The word "vacation," as used in the instant statute, implies a period of rest between periods of permanent employment, and may not properly be used in reference to a period of rest after permanent employment ceases. It contemplates that a person should be in the permanent employment of the Commonwealth at the time when the vacation commences.

As a matter of fact, the employee never had a vacation, and he is not entitled to receive two weeks' pay in addition to what has already been paid or tendered to him. If this were not so, the pay would be in the nature of a bonus or gratuity rather than pay. (See opinion to the Commissioner of Labor and Industries, dated February 8, 1928, page 38 of this report.)

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Commissioner of Public Safety — License to store Oil — Vessel.

A license to store oil is required on behalf of a vessel anchored in that portion of Boston Harbor which is a part of the city of Boston. Such license may be issued by the street commissioners of said city.

Nov. 2, 1928.

Gen. A. F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You have asked my opinion as to whether or not a license is required from the street commissioners of the city of Boston to enable a person to keep, store and sell fuel oil in a quantity not exceeding 200,000 gallons at any one time in an iron hull boat to be permanently anchored in Boston Harbor. I am informed that the boat is to be anchored about one and one-half miles from the Boston shore, outside the shipping channel, and I am further informed by the harbor master of Boston Harbor that he has approved the anchoring of the boat and the location thereof.

G. L., c. 148, § 28, establishes the Metropolitan Fire Prevention District, which includes, among other cities, the city of Boston.

G. L., c. 148, § 30, as amended by St. 1928, c. 274, provides that within the Metropolitan District the Fire Marshal shall have the powers given by section 14 of said chapter 148, as amended, to license persons or premises or to grant permits for the keeping, storage, use, sale, manufacture and transportation of crude petroleum or any of its products. Section 31 of said chapter provides that the Fire Marshal may delegate the granting or issuing of licenses and permits authorized by section 30 to the head of the fire department or to any other designated officer in any city or town

in the Metropolitan District. In accordance with the provisions of said section 31, the Marshal has delegated the issuing of licenses in the city of Boston to the street commissioners of that city.

If the Metropolitan Fire Prevention District includes that portion of Boston Harbor in which the boat is to be anchored, I am of the opinion that a license from the street commissioners is necessary in this case. It has been determined under the provisions of G. L., c. 42, § 1, that that portion of Boston Harbor in which the boat is to be anchored is a part of the city of Boston, and it follows, therefore, in my opinion, that a license from the street commissioners of that city is necessary in this case.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

INDEX TO OPINIONS.

	PAGE
Agriculture, Department of; Division of Ornithology; publications . . .	82
Betterments; land devoted to a public use . . .	76
Birth records; change of name in record by town clerk . . .	33
Constitutional law; contracts between employers and employees . . .	51
Fire insurance; rate making . . .	81
Mayors of cities; removal . . .	63
Municipalities; plants for purifying shellfish . . .	37
Pardon; parole . . .	77
Restrictions on land abutting on Newbury Street, Boston; release . . .	60
Corporate securities; default in instalment payments; seller's commissions or expenses . . .	76
Correction, Department of; authority to build dam across Nashoba Brook . . .	96
County accounts; deputy sheriff; fees . . .	44
County treasurer; county tuberculosis hospital treasurer; salary . . .	45
Dental Examiners, Board of; license; registration . . .	107
District Attorney for the Northern District; special assistant . . .	35
Education, Commissioner of; conveyance of land to a town for highway purposes . . .	90
Fees; deputy sheriff; chief of police . . .	44
Probate Courts; petitions for administration d. b. n., c. t. a. . .	34
Fencing; lands of the Commonwealth . . .	88
Fisheries and Game, Division of; taking of fish by the use of torches . . .	59
Game laws; venue of prosecution . . .	55
Inspector of animals; appointment; continuance in office until appointment of successor . . .	69
Insurance; fraternal benefit society; death fund . . .	50
Group insurance; fraternal benefit association . . .	79
Massachusetts Agricultural College; employees . . .	61
Industrial life policy; surrender value . . .	97
Life policies; incontestability; date of issue . . .	79
Medical examination of an insured . . .	94
Mutual liability insurance company; dividends . . .	48
Title insurance company; incorporation . . .	46
Journeyman plumber; right to engage in plumbing business . . .	31
Justices of the peace; expiration of commission . . .	56
Licenses; amusements conducted in connection with business of innholder, common victualler, etc.; revocation; surrender . . .	106
Master plumber; renewal . . .	31
Storage of oil; vessel permanently anchored in Boston Harbor . . .	110
Massachusetts Reformatory; Concord sewerage system; apportionment of expense . . .	40
Master plumber; renewal of license; employment by corporation; loan of license . . .	31
Metropolitan District Commission; acquisition of easement in Beacon Street, Brookline . . .	93
Metropolitan District Water Supply Commission; power to acquire real property owned by a town . . .	56
Motor vehicles; registration; applications . . .	59
Non-residents . . .	41
Motor Vehicles, Registrar of; revocation of license; judicial recommendation . . .	64

	PAGE
Municipalities; city clerk; appointment and removal	74
Employees; blasting; permit; bond	73
Vacations	38
Fire department; fire chief; permanent member	53
Indebtedness; approval of notes by Director of Accounts	103
Plants for purifying shellfish	37
Notaries public; appointment; age	73
Expiration of commission	56
Plumbers, Board of Examiners of; approval of rules by Department of Public Health	31
Public Health, Department of; drainage systems; approval; hearing	102
Regulations as to common drinking cups and towels; public places	102
Shellfish; importations from foreign countries	89
Water supply; taking; hearing	43
Questions of public policy; submission to voters; legislative resolutions	99
Retirement, Board of; State employee; death while at work in performance of duties; pre-existing disability; widow's pension	36
Riparian owners; erection of dam by the Commonwealth	96
Savings banks; investments; bank stock	86
Schools; pupils; free transportation; State forest reservation	85
Shellfish; importations from foreign countries	89
Purifying plants; municipalities	37
State employees; vacation; pay	109
State Fire Marshal; order revoking permit granted by board of aldermen of a city; appeal	106
Permit for blasting; appeal	99
State forests; improved land; fencing	88
State hospitals; patients; absentee voting	108
Support of inmates; statute of limitations	58
Taxation; corporations; interest on abatement of tax with respect to change in Federal net income	65
Interest on additional assessment of excise with respect to change in Federal net income	83
Foreign banking associations and corporations; foreign banks as fiduciaries	70
Vacations; municipal employees	38
State employees	109
Witness summoned in an adjoining State; payment of forfeiture	91

RULES OF PRACTICE

IN INTERSTATE RENDITION.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:—

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(b) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate.

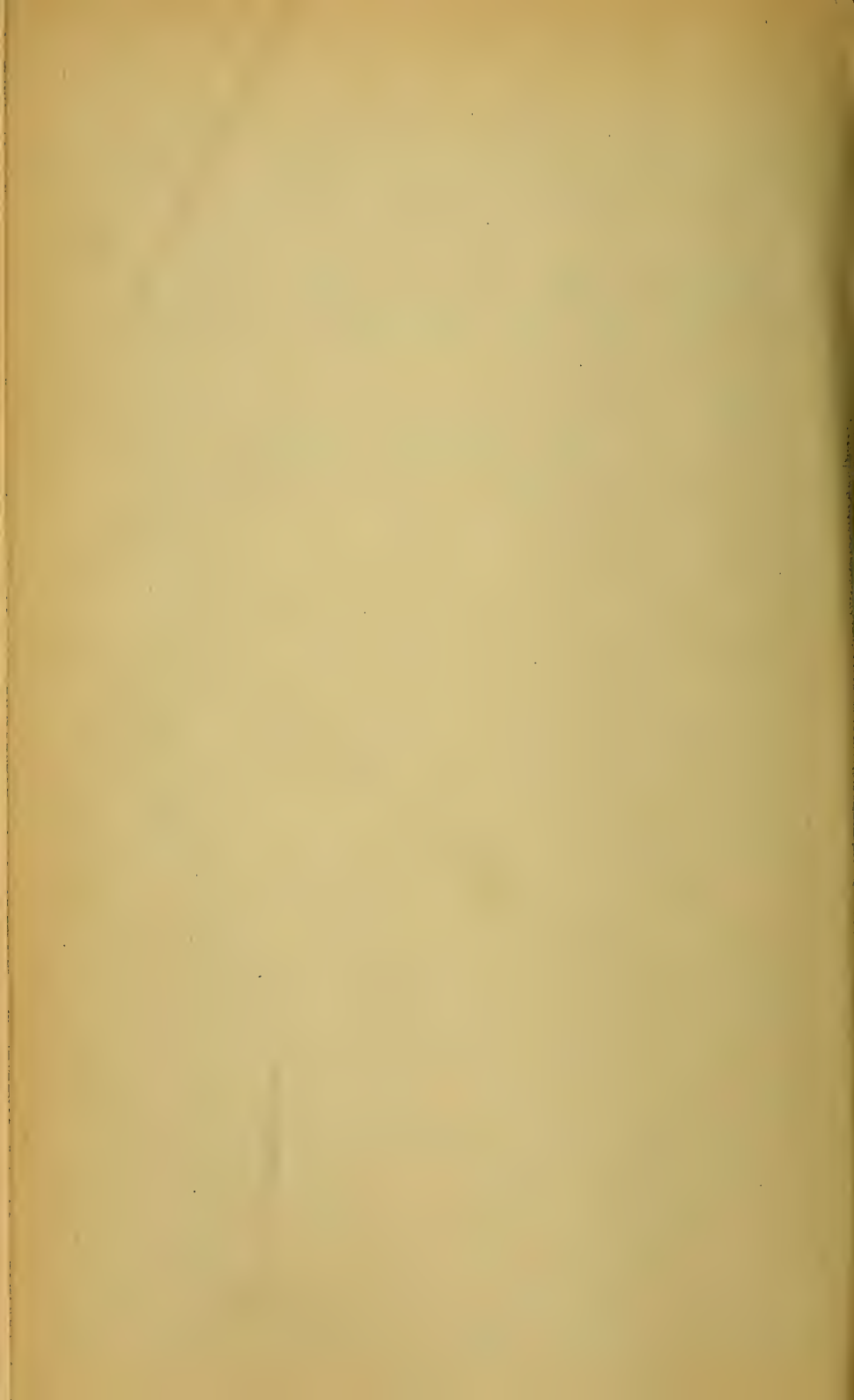
A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge hereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1929



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1929



The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, January 15, 1930.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1929.

Very respectfully,

JOSEPH E. WARNER,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL, State House.

Attorney General.

JOSEPH E. WARNER.

Assistants.

FRANKLIN DELANO PUTNAM.

ROGER CLAPP.

CHARLES F. LOVEJOY.

EMMA FALL SCHOFIELD.

GERALD J. CALLAHAN.

JAMES S. EASTHAM.

R. AMMI CUTTER.

EDWARD T. SIMONEAU.

STEPHEN D. BACIGALUPO.

GEORGE B. LOURIE.

LOUIS H. SAWYER.¹

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

¹ Appointed May 1, 1929.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1929	\$106,000 00
Appropriation for small claims	5,000 00
Supplemental appropriation	3,000 00
Special attorney for electric light rates cases	25,000 00
	<hr/>
	\$139,000 00

Expenditures.

For salary of Attorney General	\$8,000 00
For law library	555 05
For salaries of assistants	47,126 99
For salaries of all other employees	19,803 46
For legal and special services	10,694 78
For office expenses and travel	4,927 31
For court expenses	2,810 36
For small claims	1,888 22
For publication of opinions	4,420 31
For special attorney for electric light rates cases	20,000 00
	<hr/>
Total expenditures	\$120,226 48

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, January 15, 1930.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my report.

The cases requiring the attention of this Department during the year ending November 30, 1929, to the number of 10,125 are tabulated below:

Corporate franchise tax cases	1,656
Extradition and interstate rendition	273
Grade crossings, petitions for abolition of	55
Land Court petitions	132
Land-damage cases arising from the taking of land:	
Department of Public Works	76
Department of Mental Diseases	8
Department of Conservation	1
Department of Public Health	3
Department of Correction	3
Metropolitan District Commission	62
Metropolitan District Water Supply Commission	15
Miscellaneous cases	947
Petitions for instructions under inheritance tax laws	48
Public charitable trusts	275
Settlement cases for support of persons in State hospitals	15
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	
Indictments for murder, capital cases	31
Disposed of	20
Now pending	11

I. ADMINISTRATION OF CRIMINAL JUSTICE SUPERVISED BY THE ATTORNEY GENERAL.

It is the duty of the Attorney General to "take cognizance of all violations of law . . . affecting the general welfare of the people . . ." In any criminal proceedings undertaken as a result of such cognizance, the district attorneys may assist him, and under his direction act for him. (G. L., c. 12, § 10.)

The district attorneys appear for the Commonwealth in the Superior Court in all cases arising within their respective districts, and "aid the attorney general in the duties required of him, and perform such of his duties as are not required of him personally." (G. L., c. 12, § 27.)

The administration of criminal justice, therefore, is effected in general either through the office of the Attorney General or the offices of the district attorneys in prosecution of violations of law, with which, by statute, he is primarily charged, or effected through the offices of the district attorneys in prosecution of violations of law arising in their several districts, with which, by statute, they are primarily so charged.

The fourteen counties of the Commonwealth are divided into eight districts with district attorneys, as follows:

Western (Berkshire and Hampden Counties), Charles R. Clason.

Northwestern (Hampshire and Franklin Counties), Charles Fairhurst.

Middle (Worcester County), Charles B. Rugg.

Northern (Middlesex County), Robert T. Bushnell.

Eastern (Essex County), William G. Clark.

Suffolk (Suffolk County), William J. Foley.

Southeastern (Norfolk and Plymouth Counties), Winfield M. Wilbar.

Southern (Bristol, Barnstable, Dukes and Nantucket Counties), William C. Crossley.

In so far as law enforcement is effected by prosecutions of violations of law in the Superior Court, these eight district attorneys and the Attorney General are the sole units upon which the people must rely. Law enforcement primarily in the various cities and towns lies within the purview of the district and municipal courts and city and town officers; the measure of its aggressiveness must depend for its stimulus upon the genuineness of community sentiment.

The mere number of undisposed of cases upon a criminal docket is entitled to little significance; as, for example, it records every defendant not yet in custody; already found guilty by verdict or plea but awaiting sentence; on probation; complying with orders of court as to payments; insane; under observation for insanity; defaulted; booked after last court sitting. Nor can mere numbers be taken as sole index to determine increase or decrease of crime or of criminals. Every so-called "count" in an indictment is a "case." Several counts in an

indictment may but relate to the various aspects of a single crime. A verdict on a single count may eliminate all the others. Several "cases" may apply to but one individual.

The sum total of cases is not a fair standard of increase or decrease of criminality, as such total necessarily includes both the misdemeanor and the felony. Felony alone leads to state prison. (G. L., c. 274, § 1.) A sober gauge of criminality is the prevalence of felony.

Nor is the number of pending triable cases of itself a basis for true comparison either as to the efficiency or zeal of a district attorney. In some districts criminal sittings are had more often and more continuously than in others, affording greater facility for hearing and disposition of cases. In two counties the sitting of the Superior Court, in each, is a mixed session for the transaction of both civil and criminal business, which, of course, curtails opportunity for disposition of felonies; and in one of these there has been no court sitting since April, particularly for the disposition of misdemeanors.

Some districts are bounded in a single county and have a single trial docket; others have two or more counties, with intercepted court sessions. The districts vary also in character. The Northern is considered largest in population plus area; Suffolk, most constricted in area and congested in population, had, this year, 40 per cent of the State's criminal business; the Southern is the rangiest, with Bristol County, urban and rural; Barnstable, doubly coast bordered, stretching more than seventy miles; old Nantucket, sea girt; and the County of Dukes County, the Isle of Marthas Vineyard. Lack of uniformity makes comparison impossible.

The dockets disclose disposal of 17,534 cases, and in general, that there are pending but four triable murder cases, not a great number of felonies, nor an unusual number of misdemeanors; that both felonies and misdemeanors have been tried without delay; that appellants from lower courts have not benefited by appeals; that the criminal dockets are not congested; that district attorneys are now ready to prosecute at once violations as they shall arise; that the violators of law in this Commonwealth can find no comfort in any reliance upon a congested docket either to delay trial or to barter the riddance of a case for a plea to a lesser offense. We challenge historians to show any period in comparable annals of the Bay State when criminal justice has been swifter or surer than it is today.

In capital cases the statute already requires that, whenever a person is held in custody on indictment by a grand jury, the State be ready to prosecute at the sitting of the court next after six months from the date of indictment. (G. L., c. 277, § 72.) Another statute prescribes precedence for trial of felonies and liquor violations. (G. L., c. 212, §§ 24-29; St. 1926, c. 228.) But let it be particularly noted that in all districts the trial of a felony invariably is had at the sitting of the court immediately subsequent to the indictment.

Moreover, the use of district court judges sitting in the Superior Court to hear misdemeanor cases, begun in 1923, has proved of great value. So, congestion of the criminal docket has almost vanished and clearance has been promoted, with a logical and subsequent specialized attention to both groups, thereby facilitating and particularizing misdemeanor dispositions as well as assuring more careful and thorough trial of those on appeal. This procedure has demonstrated the futility of frivolous appeals.

In the Western District, Mr. Clason reports that there are 63 cases pending in Berkshire and 190 in Hampden. Of the 63 cases in Berkshire, excluding secret indictments and defendants on probation, there are but 35 pending triable cases — all misdemeanors, principally appeals from the lower court since the last sitting of the Superior Court in July, with prospect of disposition at the January sitting in 1930; that, of the cases disposed of in that county during the current year, approximately a third were those arising since January 1, 1929; that the oldest pending cases are a non-support from 1927 and only 9 from 1928 (4 of which are bails); that as to the 190 cases pending in Hampden, the misdemeanors concern but 54 defendants, the felonies but 3; that on January 1, 1929, the number of cases pending was less than half the number pending January 1, 1927; and that by January 1, 1930, there will be about one-fifth of this half; that the trial of the last murder case in this county was on October 1, 1928, within five months from the date of indictment, obtained at the very first sitting of the grand jury after commission of the murder.

In the Northwestern District, Mr. Fairhurst reports that the Hampshire County docket affects 60 defendants; 5 felonies, with plea of guilty in 1; no court sitting since April for disposition of misdemeanor balance; 1 murder case, with sanity not yet determined; in Franklin County, 2 felonies, and 4 misdemeanors.

In the Middle District, Mr. Rugg reports 14 criminal cases pending in Worcester County, with pleas of guilty in 8; none of murder, manslaughter, or robbery; that, in the only two capitals occurring and tried in the last two years, conviction in one was had two months after arrest of the accused, and in the other, three months after commission of the murder; that in the four years, January 1, 1920, to January 1, 1924, the number of docketed cases nearly doubled; that there has been a steady annual reduction since, so that, although January, 1929, showed slight increase over January, 1928, the number then pending was only 300 more than in January nine years before.

In the Northern District, Mr. Bushnell reports that in Middlesex County there are no murder cases pending; that all cases were disposed of in the arduous ten months of court sittings.

In the Eastern District, Mr. Clark reports only one murder case pending, with defendant under observation; that the felony docket is in better condition than ever before; that in this district there are five trial justices whose jurisdictions are so limited that many misdemeanors, usually dealt

with by district courts, require grand jury proceedings, augmenting misdemeanor totals.

In the Suffolk District, Mr. Foley reports that there are but two triable murder cases pending, murders committed in September and October last; that in five others, he awaits arrest of defendants in three and restoration to sanity in two; that of total pending cases, those prior to January 1, 1928, involve but seven defendants not yet in custody, or sane; that the total is less than half that of January, 1929, which was then the lowest recorded; that during his administration one trial for murder was had within sixty-seven days from the date of murder, and no murder trial has been had later than seven months after the date of murder, including indictment and apprehension.

In the Southeastern District, Mr. Wilbar reports that in Norfolk and in Plymouth counties no triable murder case pending; that in the other capital cases, insanity or question of sanity prevents trial; in Plymouth County but one felony pending (polygamy), and not more than four larcenies; that the current total in the district is about the same as in 1928, with a slight decrease in cases for prosecution of liquor violations.

In the Southern District, Mr. Crossley reports no capital case pending in the four counties; few felonies of magnitude; that in Barnstable County the misdemeanor list is low; in Nantucket County, two misdemeanors; in Dukes County, two misdemeanors, and a recent indictment for assault to murder and charges for robbery undisposible until the next court session in April; that in Bristol County, for one example, in the current year, five defendants were apprehended, indicted, convicted and sentenced, four of them receiving long sentences, on charges arising out of a robbery at gun point, — all within sixteen days.

Recommendations of District Attorneys.

The recommendations of the district attorneys in which I concur are as follows:

1. That there be revision and clarification of the criminal statutes, to the end that they may be carefully harmonized; that this be done by a learned commission of wide practical experience in the criminal law, appointed by the Governor; that a final report be required not earlier than the second General Court from the date of its appointment; that it may recommend substantive changes and repeal of obsolete and archaic laws.

The learned Judicial Council is chiefly, if not principally, concerned with procedure. Though a special commission under Res. 1923, c. 34, made investigation "relative to the criminal law," its constructive report stated that substantive changes were not within the scope of its authority, and that, even if they had been, such fundamental changes could not be sufficiently formulated in the few months designated in the resolve.

Certain private agencies have recently undertaken to study some aspects of the substantive and procedural criminal law in force in Massachusetts. Notable among these investigations now in progress is that of the Harvard Law School Committee, authorized by the President and Fellows of Harvard College to make use of certain of the resources of the Milton Fund for this purpose. This investigation, which was first undertaken some two years ago, has not yet been terminated by a formal report. The fact that the committee has been at work so long indicates the amount of time needed to obtain and digest the statistics essential to a comprehensive report. Despite the fact that any commission appointed by the Governor will presumably have at its disposal the work of various private agencies, including that of the Harvard Law School Committee, it will be necessary, in my opinion, to give to the commission at least two years in which to gather and compile information and data, and probably a further period in which to prepare adequate and well-considered recommendations.

2. That police officers may have the same powers, which investigators and examiners appointed by the Registrar of Motor Vehicles have, to arrest persons operating motor vehicles while under the influence of intoxicating liquor. As the law now is, a police officer cannot arrest a person *upon such charge* without a warrant, if the person has his license to operate in his possession, unless such person is drunk or is a suspicious person, in which event he may be arrested on the respective charges.

The power of officers to make arrests without warrant for violations of laws relating to motor vehicles is found in G. L., c. 90, as amended by St. 1921, c. 349, which provides for the arrest of "any person operating a motor vehicle on any way who does not have in his possession a license to operate motor vehicles granted to him by the registrar, and who violates any statute, by-law, ordinance or regulation relating to the operation or control of motor vehicles; . . ." The power of investigators or examiners appointed by the registrar to make arrest without warrant is also defined therein, namely, to make arrest of "any person operating a motor vehicle while under the influence of intoxicating liquors, irrespective of his possession of such a license."

G. L., c. 90, § 21, as amended by St. 1921, c. 349, should be so amended that the powers of a police officer may specifically include power to make arrest of "any person operating a motor vehicle on any way while under the influence of intoxicating liquor or drugs," and who "otherwise" violates any statute, etc.

II. ADMINISTRATION OF CIVIL BUSINESS.

Cases of Interest wherein the Attorney General appears for the Commonwealth.

A. CASES DECIDED DURING THE YEAR.

1. IN THE SUPREME COURT OF THE UNITED STATES.

Ex parte Worcester County National Bank, 270 U. S. 347. This case involved the construction and the constitutionality of certain portions of the so-called MacFadden bill amending the National Banking Act, authorizing the direct consolidation of State trust companies with national banks under the charter of a national bank involved in the merger. The Supreme Judicial Court of Massachusetts (263 Mass. 444) had decided that the Federal act purported to authorize the consolidated national bank to succeed without any new appointment by the court to the executorship trust and other fiduciary positions held by the absorbed State trust company under appointments of Massachusetts probate courts, and that, if this was the will of Congress, the act was unconstitutional as interfering with the reserved power of the State to regulate the administration and probate of estates of deceased persons who last dwelt within the Commonwealth.

The case arose upon the petition of the consolidated national bank to file an account as executor in an estate in which the absorbed trust company had originally been appointed. The case, although involving no large amount of money, raised a very important principle of constitutional law in which the State had a decided interest from the standpoint of maintaining the integrity of its probate courts from interference by the Federal government. The Attorney General requested leave of the Supreme Court of the United States to file a brief as *amicus curiae*, which was granted. The court, departing from its usual custom, also granted leave to this department to present an oral argument. The case was argued by Hon. Newton D. Baker for the appellants and by Assistant Attorney General Putnam for the Commonwealth. Oral argument was made. The Supreme Court affirmed the decree of the Massachusetts court upon grounds which, as is disclosed by the printed record, were first suggested in the brief of the Attorney General.

2. IN THE FEDERAL COURTS.

Rate Cases.

The electric light rate cases brought by the Worcester Electric Light Company and the Cambridge Electric Light Company, and referred to as pending in my report of last year, were ended during the present year by entries of decrees in the United States District Court sustaining the contention of the Commonwealth. The lower rates ordered by the Department of Public Utilities thus remain in effect.

3. IN THE SUPREME JUDICIAL COURT.

(a) *Tax Cases.*

Beside one tax case¹ in the Supreme Court of the United States, this department has represented the Commonwealth in seventeen cases before the full bench of the Supreme Judicial Court, involving important points in the construction of our corporation and legacy tax acts, and in five cases before a single justice. In all but one² of the eleven³ tax cases decided by the Supreme Judicial Court of the Commonwealth, the contentions of the Commonwealth have been sustained.

(b) *Other Cases.*

In the eleven cases involving constitutionality of statutes,⁴ charitable trusts,⁵ validity of departmental acts,⁶ the Commonwealth was sustained.

¹ *Macallen Company v. Commonwealth*, 264 Mass. 396; reversed by the Supreme Court of the United States, *sub nom. Macallen Company v. Massachusetts*, 279 U. S. 620.

² *Henry B. Cabot et als., Executors, v. Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 1239, held that a receipt in full given by the Commissioner of Corporations and Taxation prevents the Commissioner from later making an additional assessment where the net estate of a Massachusetts decedent is increased due to a rebate of a Federal estate tax previously allowed as a deduction by the Commissioner in computing the Massachusetts inheritance tax.

³ *Hood Rubber Co. v. Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 1747, sustained the construction of G. L., c. 63, § 36, adopted by the Department of Corporations and Taxation since the enactment of the statute.

Anna W. Wolbach v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1929) 1757, sustained an income tax upon interest paid to the relatives of a deceased partner by the surviving partners.

Charles F. Ayer v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1929) 2195, sustained an income tax imposed upon dividends received by the taxpayer from a joint stock company organized under the laws of Michigan for the purpose of conducting mining operations in that State.

Edith C. C. Ames v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1929) 2247, sustained the action of the Commissioner of Corporations and Taxation in denying a refund of certain taxes paid by the taxpayer "on account" of a legacy tax.

Harold S. Coolidge et al., Trustees, v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1929) 1831, is mentioned subsequently in this report.

Queens Run Refractories Co. v. Commonwealth, Mass. Adv. Sh. (1930), sustained the contention of the Tax Department that the complainant company was "doing business" within the meaning of G. L., c. 63, § 32.

Essex Theatres Co. v. Commonwealth, Mass. Adv. Sh. (1928) 1967, sustained the minimum excise on certain corporations provided in G. L., c. 63, § 32A.

George A. Bacon v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1929) 747, sustained an income tax imposed upon an annuity received by a taxpayer under the provisions of G. L., c. 62, § 5.

Mary J. Follett v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1929) 917, sustained the tax imposed upon a liquidating dividend received by the taxpayer.

Boston Safe Deposit & Trust Co. v. Commissioner of Corporations and Taxation, Mass. Adv. Sh. (1929) 1233, sustained the validity of a Massachusetts succession tax upon a trust created *inter vivos* without the absolute power of revocation; the trust provided for the payment of the income to X during her life, and upon her death the principal of the trust back to the settlors if living, and if not living over to grandchildren of the settlors.

⁴ *Commonwealth v. Kresge Co.*, Mass. Adv. Sh. (1929) 1205, held that St. 1926, c. 321 (regulating sale of eyeglasses), was constitutional; and upheld conviction for violation thereof.

Bauer v. Civil Service Commission, Mass. Adv. Sh. (1929) 2399, upheld constitutionality of G. L., c. 31, § 23 (in the Veteran's Preference Act), and dismissed petition for mandamus to compel the commissioner to certify the name of a non-veteran who had received the highest examination mark, but whose name had been given by the commissioner an inferior position on the eligible list.

⁵ *Arthur H. Brooks v. Caroline A. Pierce et als.*, Mass. Adv. Sh. (1929) 357, sustained the contention of the Attorney General that under a particular will a charitable gift to a class of unknown persons took precedence over arrears in annuities to beneficiaries named in the will.

⁶ *Selectmen of Topsfield v. Department of Public Utilities*, Mass. Adv. Sh. (1929) 945, sustained validity of an order granting a right to locate transmission lines across certain public ways.

4. IN OTHER COURTS OF THE COMMONWEALTH.

(a) *Eminent Domain Cases.*

In eminent domain cases, commonly known as "land damage" cases, the Commonwealth takes the land of individuals for a public purpose, such as the construction of highways and state institutions. An award is always made to the owner of the land for his damage sustained by the taking. If dissatisfied with the amount of the award, each owner may appeal to a jury for assessment of damages. In every case assessment necessarily is against the Commonwealth. However, in a great majority, satisfactory verdicts were obtained. Many others have been settled upon terms mutually agreeable to the petitioners and to the Commonwealth.

(b) *Other Cases.*

In 10 tax cases before the Superior Court, and in numerous hearings in connection with legacy tax matters before the Probate Court, the department was successful in upholding the tax or contention, in major measure.

B. CASES PENDING NOVEMBER 30, 1929.

1. IN THE UNITED STATES SUPREME COURT.

(a) *Interstate Controversy.*

The State of Connecticut v. the Commonwealth of Massachusetts. For the purpose of providing an adequate water supply for the Metropolitan District, St. 1926, c. 375, and St. 1927, c. 321, respectively, authorized the diversion of a small quantity of water from the Ware and Swift rivers which otherwise would flow into the Connecticut River through this Commonwealth and thence into Connecticut.

The State of Connecticut, late in 1927, filed a bill in equity against this Commonwealth in the Supreme Court of the United States seeking to enjoin the diversion, alleging that, in the event this enterprise is carried out, the State of Connecticut and its citizens will suffer serious injury due to the diminution of the flow of the Connecticut River in

Horton v. Attorney General.

Same v. Secretary of the Commonwealth (decided Dec. 30, 1929, while this report is in press).

Dismissed petitions to quash Attorney General's certificate of an initiative measure and for mandamus to restrain Secretary of the Commonwealth from transmitting such measure to the General Court.

Brest v. Commissioner of Insurance.

Nichols v. Same,

Casassa v. Same (decided Jan. 8, 1930).

Sustained demurrers of the respondent to each of the bills petitioning review of rates made by the Commissioner of Insurance for compulsory motor vehicle insurance.

Wallace, Petitioner, Mass. Adv. Sh. (1928) 2071, denied petition for a writ of *habeas corpus* and sustained the executive warrant.

Delia Dwyer v. Keniston et al. (decided Jan. 1930), dismissed petition for mandamus against the Metropolitan District Commission to grant entrance into premises from a boulevard.

that State. This department filed an answer in behalf of the Commonwealth and the case is now pending in court.

The Secretary of War approved the Ware River project so far as its effect on navigation was concerned on March 14, 1928. Similar approval of the Secretary of War was obtained with reference to the diversion from the Swift River on May 11, 1929. Subsequent to the action upon the Ware River project, the State of Connecticut filed a motion in the Supreme Court of the United States seeking to join the Secretary of War and the Chief of Engineers as parties defendant in the pending case, and to enjoin them from giving approval to the Swift River diversion, and to compel them to revoke the action upon the Ware River diversion. A brief was filed by this Commonwealth in opposition to that motion, and after consideration by the court the motion was denied.

The State of Connecticut has very recently filed a motion seeking to have the answer filed by this Commonwealth dismissed, and also a motion to have certain portions of the answer stricken out in the event that the entire answer is not dismissed. A brief has been filed by this Commonwealth in opposition to those motions, and the motions are now pending before the court. Oral argument upon the motions will take place on January 20, 1930.

Upon motion of Massachusetts, the court recently appointed Charles W. Bunn, Esq., of Minnesota as Special Master to hear the case and report to the court. In the event that the court decides adversely to Connecticut upon the pending motions, it is expected that hearings before the master will commence shortly thereafter.

This case is of the utmost importance to this Commonwealth. Upon it depends an adequate water supply for the Metropolitan District and an undertaking estimated at \$65,000,000. The State of Connecticut has left no stone unturned to upset this project, and has taken advantage of every possible legal avenue of attack. Thus the Commonwealth has successfully opposed the only issue which has been decided by the Supreme Court so far, and every effort will be made to carry the entire case to a successful conclusion.

Bentley W. Warren, Esq., who was appointed Special Assistant Attorney General to conduct the case for the Commonwealth of Massachusetts, is being assisted by Assistant Attorneys General Callahan and Cutter.

(b) *Tax Cases.*

In *Harold J. Coolidge et al., Trustees, v. Commissioner of Corporations and Taxation*, decided September 13, 1929, the court affirmed the constitutionality of a Massachusetts succession tax on the property passing by a trust instrument which was executed *inter vivos* on July 29, 1907, before the enactment of the taxing statute, and wherein no power of revocation was reserved, and in a later assignment of which, in 1917, no beneficial interest

was retained in the settlors. The decision is important in its stressing of the succession aspect of the Massachusetts tax, and the importance of the determination of whether or not the succession is dependent in any way upon the death of the settlors.

Federal questions having been raised in the Massachusetts courts, appeal to the United States Supreme Court is now pending.

Willcutts, Collector of Internal Revenue, v. Bunn (U. S. Sup. Ct., Oct. Term 1929, No. 535). In this case this department has recently moved for and obtained leave to file a brief as *amicus curiae*. The lower Federal courts decided that the Federal government could not impose an income tax upon the gain derived from the sale of municipal securities issued by subdivisions of the State of Minnesota. For many years Massachusetts, by the provisions of G. L., c. 62, § 5 (c), has imposed an income tax upon the gain derived from the sale of Federal government bonds. A decision in the pending United States Supreme Court case will to all intents and purposes decide the validity of a tax long imposed by Massachusetts. At the request of Commissioner Long, therefore, this Department has by its brief sought to support the argument to be made by the Solicitor General of the United States in behalf of the tax imposed by the Federal government upon the gain from the sale of the Minnesota bonds.

2. IN THE SUPREME JUDICIAL COURT.

Billboard Cases.

The billboard litigation is a consolidation of various bills in equity brought in the Supreme Judicial Court by the General Outdoor Advertising Company, the O. J. Gude Company, Edward C. Donnelly and John Brink against the Commissioners of Public Works, with which has been heard the bill in equity brought by the General Outdoor Advertising Company against the selectmen of the town of Concord. The John Brink case involves the Chevrolet sign on Beacon Hill. All the cases involve the constitutionality of the 1924 rules and regulations of the Department of Public Works for the control and restriction of billboards, signs and other advertising devices, under G. L., c. 93, §§ 29-33, as amended, and under Amendment L of the Massachusetts Constitution.

The complainants' case was finished in 1928. During the present year the preparation and presentation of evidence, on behalf of the respondents, and the rebuttal evidence by the advertising companies consumed almost the entire time of Assistant Attorney General Eastham, to whom the case had been assigned. In addition to five days spent on a "view" of the main highways of the Commonwealth by counsel and the master, there were forty-nine court days of hearings and seven days of argument. The record in the case contains 8,564 pages of testimony, between five and six thousand exhibits, and registers the total number of one hundred and sixteen court days.

It is expected that the arguments will be completed before the master, Frank H. Stewart, Esq., by December 26, 1929, and his report to the Supreme Judicial Court of the Commonwealth ready during the early part of 1930.

III. STATUTORY SERVICES OF INTEREST.

1. Settlement of Small Claims against the Commonwealth.

Since the period covered by my last annual report 34 claims have been presented against the Commonwealth under St. 1924, c. 395; 20 were approved, with a total expenditure of \$2,742.52; 11 were rejected; 3 are still pending.

Of these claims 58 per cent was for damages occasioned by the operation of State automobiles.

2. Interstate Rendition.

There is great need for a uniform method of interstate rendition. The essential elements are now covered by the Constitution of the United States and Federal statutes enacted thereunder. Except as to certain minor details, which are left to the States, the Federal law is supreme and binding upon all States equally, and it is, of course, uniform in its application in the entire country. No State may constitutionally enact a statute which in any way conflicts with, adds to, or modifies the requirements set forth in the Federal law.

The chief difficulty is lack of thorough understanding of the law by officials charged with its administration. The governor of a State must, under the law, return to a demanding State a fugitive who is found within his State provided —

1. That a set of papers is duly received, authenticated by the governor of the demanding State, containing a copy of an indictment or affidavit, sworn to before a magistrate, charging the fugitive with having committed a crime within the demanding State.

2. That the governor of a State in which the fugitive is found is satisfied that the person is in fact the person so charged with the crime and named in the papers.

3. That the governor of the State, in which the fugitive is found, is satisfied that the person is a fugitive from justice. Under the law a person is a fugitive from justice if he was in the demanding State at or about the time the crime is alleged to have been committed, and if he is subsequently found in the asylum State.

4. That the request for the return of the fugitive is made in good faith on the part of the officials of the demanding State.

If these elements all appear, a governor, upon whom a request is made, must, under the law, return the fugitive; and other considerations, however important they may seem to him, must be entirely disregarded.

In certain cases executives of other States, it would seem, refuse to honor the request of the Governor of this Commonwealth for the return

of a prisoner on grounds other than those of law. The law provides no method of compelling a governor to comply with his duty in these cases, nor is there any appeal in case he refuses to do so. Although his *right* to refuse to honor a requisition is closely limited, nevertheless his *power* to do so is supreme and unlimited. There is nothing that the General Court of Massachusetts may do to correct the faulty administration of this matter in other States. In this Commonwealth requisitions from other States are treated in strict conformity with the law.

The weakness in the law of rendition, as pointed out above, is that there is no method of compelling a governor to return a fugitive in a proper case, and many governors, more or less naturally, confuse their legal right to refuse rendition with their power to refuse. In a proper case the governor's duty arises from a clear mandate in the Constitution of the United States and in the Federal statutes enacted thereunder. The duty is none the less mandatory even though no method is provided to compel a governor to perform his duty. Indeed, the obligation in some respects thereby becomes greater.

The rendition of fugitives from justice is an important phase of the administration of law in this country and Commonwealth. A full and complete understanding of the law by the governors of the States will do more than any other thing to place its administration on a basis which conforms to the law.

3. Quo Warranto (at Relation of Insurance Department).

At the relation of the Commissioner of Insurance, under the provisions of G. L., c. 175, § 6, as amended, a petition was filed against the Bristol Mutual Liability Insurance Company which the Commissioner believed to be insolvent. The matter was heard by the Supreme Judicial Court and a permanent injunction restraining the company from doing business was almost immediately issued, and a receiver was appointed by the court to settle its affairs and to protect the interests of policyholders and creditors.

4. Charitable Trusts.

The duties of the Attorney General to "enforce the due application of funds given or appropriated to public charities within the commonwealth" and to prevent "breaches of trust in administration thereof" (G. L., c. 12, § 9) both entail, first, supervision of the administration of funds by functioning charities, and second, recommendation to the courts for use of trust funds, non-functioning because original purposes have become impracticable or impossible of execution.

The first involves on the part of the Attorney General approval of all trustees' accounts of all charitable trusts (such approval is now made prerequisite by the judges of the several probate courts for allowance of such accounts), and investigation and approval of successors to trustees

resigned or deceased. Current experience, noting misappropriation of trust property, suggests that probate courts require all trustees of charitable funds, or at least the treasurer of each board of trustees, to provide bond for the faithful performance of duties, and that sole charge and custody of the funds be not delegated to any one member of a board.

As to the second, there have been many *cy pres* proceedings. I mention two or three of interest.

Charles A. Reade Fund.

Experience of a long period of years in effort to carry out literally the desires of the donor for scientific lectures demonstrated such insufficient interest and consequent impracticable use of the fund that, through proceedings initiated by the Attorney General, supported by the officials of the city of Salem, a decree was entered by the Superior Court of the County of Essex allowing the income of this fund for free musical concerts, with scientific features, for the inhabitants of the city of Salem. Radio broadcast of the first concert enabled other citizens of Massachusetts to share the benefits of this gift.

Massachusetts Total Abstinence Society.

Proceedings have been commenced for application of the funds of this society, a charitable corporation, idle through death of interested leaders and other incidents.

National Sailors' Home.

The trustees of this home, a charitable corporation, which for sixty years has maintained a home in Quincy for former members of the United States Navy, sought permission of the Supreme Judicial Court to discontinue maintenance of any home and to utilize the funds at their disposal in other modes. The allowance of this petition was opposed by the Attorney General in the belief that the need for such an institution in our Commonwealth had not ceased. Continuance of this home for our sailors, provision for more suitable facilities, and readjustment of the personnel of the board, with added representation for naval veterans, are the present endeavors of the Attorney General.

5. Estates under Public Administration.

As estates wherein there are no heirs are payable to the Treasurer of the Commonwealth (G. L., c. 190, § 3, cl. 17), the State is a party in interest, occasioning supervision by the Attorney General over public administrators in investigation and approval of their accounts and appearance in courts in determination of genuineness of alleged heirship of those claiming estates.

In a current case, through the action of this department, a claimant to an estate was found guilty of perjury in the jurisdiction in which he dwelt, with subsequent sentence of imprisonment.

6. Proceedings to enforce the Regulations of the Department of Public Safety.

G. L., c. 148, § 26, requires the Attorney General to enforce regulations of the Department of Public Safety relative to blasting with explosives.

Consequent to certain regulations of the Department of Public Safety, proceeding is now pending in the Superior Court for the County of Essex for prevention of certain blasting operations alleged to be to the detriment of the inhabitants of the town of Swampscott.

7. Service to Special Recess Commissions: Special Reports.

Assistant Attorney General Cutter assisted the Special Recess Tax Commission in the legal work connected with its duties, and devoted much of several months to this work.

At my designation, Assistant Attorney General Callahan served as a member of the Special Recess Commission to study Laws relating to Plumbing (Res. 1929, c. 16) and of the Commission to survey and revise the Game and Inland Fish Laws (Res. 1929, c. 34).

The investigations, requested by the General Court, as to certain claims (Res. 1929, c. 46) and as to removal, repair and maintenance of bridges over certain locations of the Southern New England Railroad Corporation and former location of the Hampden Railroad Corporation (Res. 1929, c. 42) were conducted by Assistant Attorney General Simoneau, designated by me as authorized in the resolves.

8. Industrial Accident Cases; Proceedings against the Commonwealth under the Provisions of G. L., c. 30; Approval of Contracts and Titles.

The department represented the Commonwealth at 18 hearings before the Industrial Accident Board and at 6 conferences in cases arising under the Workmen's Compensation Act (G. L., c. 152), providing for compensation to laborers, workmen and mechanics employed by the Commonwealth, who receive personal injuries arising out of and in the course of their employment.

The department also prepared or passed upon 475 contracts as to form; 29 leases, 5 easements; and 185 deeds as to both legal form and title.

Under G. L., c. 30 § 39, as amended, relating to certain liens against security for the construction of public works, 10 cases have been concluded and 12 are still pending.

9. Corrupt Practices.

Either at the relation of the Secretary of State, for non-observance of law in the filing with him of returns relative to elections, or upon representation of other parties claiming such violations, the activities of certain persons and organizations with reference to corrupt practices in elections, other than in cities or towns, were investigated. One investigation, after prosecution, resulted in the imposition of a penalty of \$1,000 on a certain company for expenditure of moneys contrary to the law, and a less penalty on a defendant treasurer of an organization, working in conjunction with that company, for causing an incorrect return to be filed.

10. Opinions.

Opinions of interest are annexed.

IV. CERTAIN CONSTITUTIONAL FUNCTIONS REQUIRED OF THE ATTORNEY GENERAL IN PERSON.

Initiative Measures.

The time for filing initiative measures with the Secretary of State begins on the first Wednesday of a September and ends with the first Wednesday of a following December. Before a measure may be so filed it must first be presented to the Attorney General and be certified by him as in proper form, as not containing anything excluded from initiatives by the Constitution and correct in certain other respects. Upon presentation to him, petitioners may require him to act, — either to certify or to refuse to certify, — or, with his permission, withdraw the measure. Upon a certification, parties opposed to a measure may bring proceedings in an attempt to quash the Attorney General's certificate and to prevent the Secretary of State from printing blanks for additional signatures. Upon a refusal to certify, if petitioners feel refusal is arbitrary and that the proposed measure is in fact within the Constitution, they have equal right to bring proceedings to force him to certify. As the date for filing measures with the Secretary of State begins the first Wednesday of a September, it behooves petitioners, if they expect benefit of the full period of the succeeding ninety days allotted in the Constitution for the obtaining of signatures, to present proposed initiatives before and not after the day when the ninety days have begun to run. Subjected, as he may be, to review by the Supreme Judicial Court for any errors in certification, the responsibility of the Attorney General is too great for hurried consideration of measures, frequently covering many typewritten pages.

There were seventeen initiatives presented this year relating to five different subjects: one to strike out G. L., c. 138, § 2A (the so-called "Baby Volstead"); one to prohibit certain steel traps; six to set up a

State fund for automobile insurance; three to add to the Public Bequest Fund; and six to set up a workmen's compensation fund.

Of the seventeen measures presented, four were certified; four were withdrawn [three by Mr. Frank A. Goodwin and others to establish a fund for automobile compulsory insurance and one by the American Federation of Labor (Massachusetts branch) to establish a workmen's compensation fund]. The Attorney General refused to certify the other nine, and assigned reasons therefor.

MEASURES CERTIFIED.

1. The initiative containing the following measure: "Chapter 138 of the General Laws is hereby amended by striking out section 2A, inserted by chapter 370 of the Acts of 1923," certified September 4. Section 2A forbids — unless in each instance with permit or other authority required therefor by the laws of the United States and the regulations made thereunder — the (1) manufacture; (2) transportation by (a) air craft, (b) water craft or (c) vehicle; (3) importation or (4) exportation of spirituous or intoxicating liquor, namely, (1) beverages containing more than $2\frac{3}{4}$ per cent of alcohol by weight at 60° Fahrenheit; (2) distilled spirits; and (3) certain non-intoxicating beverages, namely, those containing not less than $\frac{1}{2}$ and not more than $2\frac{3}{4}$ per cent of alcohol by weight at 60° Fahrenheit.

2. The initiative, presented September 16 and certified September 24, contained a measure to amend G. L., c. 131, by inserting a new section numbered 59A, which related to the use of traps for capture of certain fur-bearing animals.

3. The fourth petition of Mr. Goodwin and others, presented October 28 and certified November 1. Three preceding petitions, presented by the same petitioner and others, were withdrawn. The first petition was presented September 23 and withdrawn October 2; the next, presented October 7, was withdrawn October 16, and the third, October 23.

4. The fourth petition of the American Federation of Labor, "An Act to establish a fund for workmen's compensation," presented November 27 and certified November 29. Of its three prior petitions, the Attorney General refused to certify the first on September 5; on the second, presented more than seven weeks later (October 29), petitioners requested at a hearing on November 1 no action be taken; the third, presented two weeks later (November 19), the Attorney General refused to certify on November 21, and assigned reasons.

UNCERTIFIED MEASURES.

Two petitions (purporting to contain measures to create a State fund under the administration of a commission for the compulsory insurance of motor vehicles registered in the Commonwealth); the first (presented

September 19) was refused September 25; the second (presented October 29), refused October 31; with reasons assigned therefor.

Three (purporting to contain measures to provide "that certain money escheating to the Commonwealth shall be added to the so-called Public Bequest Fund"); the first (presented July 31) was refused September 9; the second (presented October 17) was refused October 18; the third (presented October 29) was refused October 30; with reasons assigned therefor.

Two (purporting to establish a workmen's compensation fund) by petitioners other than the American Federation of Labor were refused, with reasons.

Descriptions of the measures certified were furnished to the Secretary of State by the Attorney General after petitioners had filed them with the Secretary, for, as pointed out in *Brooks v. Secretary of State*, 257 Mass. 91, a description is "not made until *after*" a petition is filed.

Petitions for mandamus against the Secretary of State and for certiorari to quash the certificate of the Attorney General were brought November 3 to prevent the transmission to the Legislature of the certified initiative measure (the fourth petition of Mr. Goodwin) for the establishment of a State fund for automobile insurance.¹

V. GENERAL OBSERVATIONS.

1. Power of Attorney General relative to Investigations.

In my last report I pointed out that the Attorney General has no power in any independent inquiry to summon witnesses and examine them under oath for the ascertainment of facts to effect thorough investigation of matters, civil as well as criminal, concerning the public peace, public safety and public welfare, with responsibility for which he is popularly charged. I renew recommendation for grant of such power, if such investigations are desired.

2. Recording Automobile Conditional Sales to avoid Futile Litigation.

I renew my suggestion that conditional sales of motor vehicles be recorded with the Registrar of Motor Vehicles. I believe that litigation resulting from disputes with reference to ownership, sales, attachments and liens, by resort to a central office, can be minimized.

3. Continuation of Commission Studying Proceedings relative to Children and Domestic Relations.

In my last report I recommended the appointment of a commission to make a thorough study of these matters. Such a commission was appointed. The work has proved too extensive for a final report. I recommend that it be continued.

¹ The Supreme Judicial Court sustained the action of the Attorney General as this report goes to press.

4. Continued Study of General Tax Revision.

The Special Recess Commission on Taxation has prepared an exhaustive report dealing mainly with the major problems now arising in connection with State taxation. With the general policies of taxation this department has nothing to do, but its work is much affected by provisions in the structure of the statute law concerning taxation, voluminous, inter-related and intricate. Comprehensive revision demands long and careful study. I favor its continuance.

5. For a New Board of Tax Appeals.

One portion of the very comprehensive report of the 1929 Special Recess Tax Commission has a very definite relation to the work of the Attorney General as representing the Commissioner of Corporations and Taxation in litigated matters of taxation. The commission proposes the establishment of a board of tax appeals, consisting of three members appointed by the Governor with the consent of the Council, solely on the basis of their qualification to perform their duties. At present, appeals from the decisions of the Commissioner of Corporations and Taxation are heard either by one of the many courts of the Commonwealth (depending upon the nature of the tax) or by the board of appeals from decisions of the Commissioner of Corporations and Taxation. That board consists of three State officers, who have many other heavy administrative duties to perform for the Commonwealth. A board of tax appeals should be an impartial body; there should be no possibility that any citizen seeking a tax abatement could have any feeling that the board is biased in favor of the Commonwealth. With State officials, having other duties to perform for the Commonwealth, acting as members, this possibility is not wholly absent, although an examination of the statistics of cases decided by the present board shows that the board has granted abatements about as frequently as it has denied them.

The tax laws of Massachusetts are growing in volume and in complexity. This is probably the inevitable result of the complicated structure of modern business and of the economic life of the community. Problems of taxation are now dealt with principally by specialists, and a board of tax appeals should be composed not only of persons who are tax specialists but of members who have a very thorough business and legal training. There is absolutely no certainty that any one of the three gentlemen who serves upon the present board *ex officio* will be a lawyer, and even less certainty that he will have a specialized knowledge of the Massachusetts tax statutes. I hope this proposal will receive favorable consideration.

6. Just Provisions to relieve Motor Vehicle Owners by Amendment to the New Motor Vehicle Excise Tax Law.

The administration of the new motor vehicle excise (G. L., c. 60A), which supplants the old local personal property tax upon motor vehicles, has resulted in much recourse to this department, particularly with respect to those provisions relating to persons who transfer motor vehicles during the calendar year.

This law should be amended —

(1) To make it certain that the year of actual manufacture or assembling of the motor vehicle is taken as the year upon which the value of the privilege taxes is measured.

(2) To provide a fair abatement of the tax paid early in the year by one who transfers or turns in his car during the year.

At my direction, such suggestions were presented to the Special Recess Tax Commission, and I hope such remedial amendments will be favored.

In passing, I must commend Mr. Henry F. Long, Commissioner of Corporations and Taxation, who, by a very liberal and sensible construction of the provisions of G. L., c. 60A, in his departmental regulations, averted litigation which otherwise would have arisen under this statute.

7. Readjustment in State Taxation of National Banks.

The 6-3 decision of the Supreme Court of the United States in the *Macallen* case (*supra*), in which this office represented the Commonwealth, was a blow to the method now in force in Massachusetts of taxing national banks, as well as in the States of California, Oregon and New York. The case itself did not involve a national bank, but dealt with the taxation of a domestic business corporation, part of the excise upon which was measured in much the way that the excise upon national banks is measured. The court held that the excise was invalid to the extent that it was measured by the net income derived from tax-exempt Federal and State obligations.

By a parity of reasoning, the excise levied upon national banks would likewise be held invalid. Inasmuch as a very large proportion of the gross income of national banks is derived from tax-exempt bonds, the loss to the State tax revenue will be materially greater. The situation will be in part obviated if the Legislature adopts the recommendations for the taxation of corporations and banks about to be presented to the General Court by the Special Recess Tax Commission.

Any substantial increase in the amount of revenue obtained by the States from the taxation of national banks can come only through an amendment of the act of Congress under the authority of which the States are permitted to impose excises upon national banks. (U. S. Rev. Stat. § 5219.)

It is generally conceded by authorities on constitutional law, and by tax lawyers who have studied the question, that the solution of the national bank tax problem by legislation, adopted by Massachusetts in 1925 and by California, New York and Oregon at a later date, is definitely overturned by the Macallen case. The States must give up any thought of increasing the amount of revenue received from national banks through the inclusion of interest from tax-exempt bonds within the gross income of the banks upon which the net income measure of the excise is computed. Those who are studying the question are directing their efforts towards obtaining a new solution of the problem.

It is hoped that some arrangement, agreed to both by the banks and by the interested States, may be reached for a bill to be presented to Congress which has the approval of all parties to the controversy. In the meantime, and in the event such amendments are presented, the members of Congress from this Commonwealth should be apprised of the exigency confronting this State and the attitude of the legislative bodies with respect thereto solemnly expressed.

8. Vigilance in Safeguarding State Probate Practice and State Banks from Federal Encroachment.

The decision of the Supreme Court of the United States in the case of *Ex parte Worcester County National Bank*, elsewhere referred to in this report, raises an interesting question of the relation between the powers of the Federal government to forward the interests of its fiscal agencies, the national banks, and the powers of the States with respect to the administration of estates in their probate courts.

It seems altogether likely that, in these days of governmental encouragement of bank consolidations, particularly at a time when the Federal government is doing all that lies within its power to encourage consolidations under national bank charters, further attempts will be made by Congress to give trust powers to national banks which will tend to infringe upon the power of the probate courts of the Commonwealth to control in every detail the administration of decedents' estates.

If Congress further relieves national banks, doing trust business, from the control of State probate courts with respect to such trust business, it will result not only in an interference with the proper operation of the probate courts, but will tend to give to national banks a distinct advantage in competition with State banks and trust companies doing a similar trust business.

How far Congress has constitutional power to relieve national banks, acting as trustees under State court appointments, from State court regulation is still perhaps an open question. The *Worcester County National Bank* case (279 U. S. 379) leaves the point undecided. It would seem, however, that the eagerness on the part of national banking author-

ities that consolidations take place without complicated transfers should not be allowed to outweigh the important principle, laid down in this Commonwealth from the earliest times, that the estates of deceased persons within this Commonwealth are to be administered under the most rigid court supervision, so that the interests of widows and orphans in the estates of their relatives may be fully protected from careless, negligent, or dishonest administration. Consolidations unquestionably must take place. Banks should be free to consolidate under national charters under easy and simple provisions of statute law. It is perfectly possible, however, to permit them to do this and at the same time leave to the probate courts fully as complete control of the estates in which banks that are parties to a consolidation are acting in fiduciary capacities as the court has over any other estate.

I suggest, therefore, that every new legislative proposal introduced into Congress be carefully inspected to make sure that the powers of the State over its probate courts are not interfered with in any embarrassing manner.

9. Greater Recourse by the Courts to Commitments for Treatment of Drug Addicts than Use of Imposition of Penalties.

The disposition of drug addicts has, indeed, as much a medical aspect as a criminal one. Sentence and fine do not correct offenders; witness, invariable repetition. I advocate use by the courts of provisions enacted in 1909 (c. 504) for commitment for treatment rather than first use of sentence and fine.

10. Greater Recourse by the Courts to Psychiatric Information in Civil as well as Criminal Proceedings afforded by Present Provisions of Law.

G. L., c. 123, § 99, authorizes any court to request the Department of Mental Diseases to assign a member of a State hospital medical staff to make a mental examination "of any person coming before any court." No fee is chargeable under this section. Although, under this provision, service may be rendered not only to the criminal but to the probate and civil courts, only 23 cases were referred to the Department of Mental Diseases in 1929. Its purpose was to enable courts to determine the mental condition of persons coming before them. Recourse to such service, available and free, would give added assurance against penal commitment of persons suffering from mental disease or defect, as well as added assurance of treatment for the mental trouble which caused the commission of the offense rather than imprisonment for a stated period of time, effecting no cure. Provision for psychiatrists, designated to serve the courts in defined districts, is worthy of consideration.

11. Provision assuring Availability to the Court, before Trial or Disposition of Capital Cases and Second Offenses, of Psychiatric Information now by Law required to be filed in Court by the Department of Mental Diseases.

Whenever a person is indicted by a grand jury for a capital offense, or for any offense more than once, or has been previously convicted of felony (G. L., c. 123, § 100A; St. 1921, c. 415), notice is given to the Department of Mental Diseases, which, after examination, — had to determine mental condition or defect affecting criminal responsibility, — files a report with the clerk of the trial court. There is no requirement as to time for making such examination, or for filing such report, or for contingency of trial and disposition upon such report. About 21½ per cent of the total number of persons examined under these provisions since 1921 was found to have mental conditions affecting criminal responsibility. If eight years of psychiatric examination has shown that penal restraints could not affect the reform or correction of one-fifth of capital and second offenders, future dispositions should be aided by a positive requirement that such examinations should be made and report thereon be available to the court at the earliest possible moment.

12. Consideration of Measures enabling Property Damage Insurance, to obviate Claims therefor under the Guise of Claims for Personal Injuries, and providing Protection for Injured Persons in Cases of Insolvency of Insurers of Persons Liable to Such Injured Persons.

Irrespective of the extent to which claims for personal injuries are made as a result of automobile collisions, where no actual personal injuries have been suffered and the claims are put forward merely for the purpose of recovering from an insurance company an amount sufficient to cover the property damage sustained by the claimant's automobile, many such false claims would be obviated by requiring the statutory form of compulsory automobile liability policy to cover property damage as well as personal injury. In so far as this may be accomplished and rates fixed upon an accurate basis, I suggest its consideration.

The insolvency or bankruptcy of insurance companies carrying compulsory automobile insurance leaves the very persons, who by the statute were intended to be adequately protected, without protection. I favor legislation designed to afford protection to such persons, whereby there may be solvent resources from which they may be indemnified when injured by automobiles.

13. Regulation of "Overnight" Camps.

I renew my recommendation of last year for general legislation regulating "overnight" camps in registration of guests for identification purposes.

14. Literary and Dramatic Censorship.

Last year I called attention to the general unrest within the Commonwealth over the method of censoring literary and dramatic productions, and suggested that a special recess commission, with representation from all groups interested in the subject, be appointed to investigate the whole situation. In view of the fact that the unrest to which I referred last year has not in any way diminished, but on the contrary has considerably increased, I renew this recommendation.

The principal change in the law sought by those advocating a modification of the so-called censorship provisions of the General Laws deals with G. L., c. 272, § 28, which reads in part:

Whoever imports, prints, publishes, sells or distributes a book, pamphlet, ballad, printed paper or other thing *containing* obscene, indecent or impure language, . . . shall be punished . . .

A bill has been proposed which recommends that the word "containing" be changed to "which considered as a whole is."

The idea of any amendment of G. L., c. 272, § 28, is to make sure that books, for the sale of which persons shall become subject to trial on criminal charges, should be judged not by any isolated passage, as under the present law, but by the effect and tendency of the book as a whole to corrupt the morals of the community. I believe that some such change in the statute should be enacted. The precise wording of any amendment is purely a legislative problem. I believe that a book which is really objectionable would be as effectively banned under the proposed amendment, as under the present law.

Anything which savors of censorship calls for a rather nice adjustment between the desire to have complete freedom of the press, in accordance with our constitutional traditions, and the desire to protect the morals of youth from contaminating influences. Probably no statute will ever be framed which will by its own terms establish a hard and fast definition of obscenity applicable to all possible cases which may come before the courts.

All that such a statute can lay down is a standard of reasonable conduct. An alleged violation of such standard will be determined in view of all the circumstances surrounding any particular case. My thought is that a solution of this perplexing problem, affecting, as it does, literature and art, publishers, booksellers, the press, the theatre, the public library, science and medicine, the church and the public, can be appropriately reached only by a most careful study of the situation, undertaken in an intelligent spirit of co-operation and forbearance.

15. Suggestion that "False Swearing" be a Misdemeanor obviating Necessity of Proof of Materiality of Testimony Necessary in Prosecution for Perjury.

G. L., c. 268, § 1, defines perjury. Materiality of the testimony is an essential element of the crime. It must be proved. Prevarication in testimony in trials is not easily met by this provision for prosecution of perjury. Whether or not the testimony be material to the issue, it should be the truth. I suggest consideration of enactment of a law that "a person who in a proceeding in the course of justice, wherein he is lawfully required to depose the truth, wilfully and knowingly testifies or certifies falsely in regard to any matter or states in his testimony any matter to be true which he knows to be false, shall be guilty of a misdemeanor, namely, false swearing."

16. Enabling Measures for Local Police Forces.

In the enforcement of law, dependent upon many agencies as they relate to its many aspects, namely, detection, apprehension, prosecution, correction and prevention of crime, local police are the "first line."

Criticism should not be hasty until an urban community has itself first made provision for its competent discharge in meeting increasing exactions of the day. Voluntary efforts for self improvement and the merit of local police service call for encouragement, either by legislation or by provision in municipalities, as may be best designed to effect it; for instruction, with tests in all phases of modern-day, active police work, either by attendance at a school or by a local or district instructor; for a numerical force sufficient to protect a community properly, considering population, territory and incidents; for standardization of pay; for uniformity in providing personal equipment; for quarters, respectable and dignified; and for installation of latest devices for intrastate and interstate contacts.

17. New Court House.

I add my solicitation for construction of a new Court House in Boston, a vital and necessary factor for furtherance of the general administration of justice.

18. Greater Protection of Poultry Owners against Thieves.

The penalty for breaking and entering, with intent to commit larceny, or for entering without breaking any building or enclosure kept for poultry is a fine of *not more* than \$500 or imprisonment in the house of correction for *not more* than two years. (G. L., c. 266, § 22.) I advocate the naming of a specific minimum penalty, and suggest consideration of measures regulating by license those dealing with poultry owners, and the transportation of poultry over highways between sunset and sunrise. The

heavy losses, estimated at \$40,000, this year, emphasize the urgency of consideration of measures for greater protection of poultry owners from thieves.

19. For the Protection of the Commonwealth against Liability for Injuries or Damages in Construction of Ways, not State Highways, authorized by Special Acts.

G. L., c. 81, § 18, provides that the Commonwealth shall not be liable for injuries sustained by travelers caused by State highway defects "during the construction, reconstruction or repair of a state highway." Occasionally, special acts authorize the Department of Public Works to construct ways not laid out as State highways. To remove all question of liability of the Commonwealth for injury or damages during such construction, either the special acts should in each case be so worded that the general provision remains clearly applicable to the particular way, or a new section in G. L., c. 81, be enacted, to the effect that the Commonwealth shall not be liable for any injury or damages sustained during the construction, reconstruction or repair of any way for the construction, improvement or repair of which money has been appropriated by the General Court.

20. To minimize Litigation arising out of Petitions for Access, for Commercial Uses, to Premises abutting Metropolitan Boulevards.

The Metropolitan Parks System was intended to combine the features of health, recreation and beauty with opportunities for safe and unimpeded use by the traveling public not inconsistent therewith.

Demands for the development of property abutting the boulevards for business uses effecting consequences which the Commission deemed inconsistent with the design of the system, have resulted and will result in much controversy and litigation for direct access to the boulevards, even in cases of access already existing from the same properties to the same boulevards, on side streets.

If the same powers to regulate the use of abutting property, as are enjoyed by local municipal authorities, were vested in the Commission, recourse to adjudication by the courts would be minimized, and I suggest its consideration.

21. Supervision of Foreign Charitable Corporations.

To engage in charity, all one has to do is to start collecting. Any individual, or group of individuals, or society, or unincorporated organization may collect for or conduct a charity without any regulation by law. Any seven or more, if a majority be inhabitants of this Commonwealth, may petition to become a charitable corporation, under G. L., c. 180, § 1. If so incorporated and the personal property of the corpora-

tion is such as that recited in the statute (G. L., c. 180, § 12), whereby it is exempt from taxation, written report to the Department of Public Welfare is required, showing purpose, receipts and expenditures, whole and average number of beneficiaries, and such other information as the department may require. This is the State's sole provision for statutory control over persons conducting charities. If incorporated as a "church," even this provision does not apply. An organization, incorporated under the laws of another State, may engage in charity work in this Commonwealth without any regulation or supervision whatever.

Inquiries by this department into certain "charities" disclosed that their "workers" or collectors received half the alms and the "cause" whatever remained after the cost of "support" of the "organization." How common this practice may be I do not know. I hesitate to recommend enactment of laws encroaching upon personal freedom to engage in the relief of humanity, and thus impose upon worthy charities regulations designed to correct its abuse by unscrupulous persons who themselves appear to be the principal recipients of "relief." However, there is no reason why foreign charitable corporations should not be subject to the same laws as our own, and I recommend legislation effecting this.

22. Determination of Policy as to whether Certain Expenses incurred in Extradition Proceedings shall be borne by the Commonwealth or by the Particular County in Behalf of which a District Attorney applies to the Governor that he demand the Executive Authority of Another State to return Fugitive.

Traveling expenses of district attorneys and their assistants, except in Suffolk County, are payable by the Commonwealth. (G. L., c. 12, § 23.) Expenses of any agent appointed, after application for the arrest of a fugitive is complied with, are payable by the county where the proceedings are pending, or in whole or in part by the Commonwealth, as the Governor may direct. (G. L., c. 276, § 15.) Frequently an assistant attorney general furthers the demand of the Governor in proceedings in other States, both in hearings before Executive authorities and before courts. Though such service is rendered in presentation of the Governor's demand, yet in fact it is performed for the county for which demand was made. It should be determined by the General Court whether expenses so incurred are hereafter to be payable by the county or by the Commonwealth.

23. Publication of Another Volume of the Opinions of the Attorneys General.

In my judgment, there is sufficient public interest to warrant the publication of Volume VIII of the Opinions of the Attorneys General.

I recommend appropriation of a sufficient sum of money for this purpose.

24. Uniform Laws.

I favor earnest consideration of all measures proposed by the Commission for Uniform State Laws, especially those with regard to crime and extradition.

CONCLUSION.

The foregoing record notes but a few of the varied and comprehensive services of this department, too numerous even to list, which statutes yearly supplement. And as to such services, only those particular matters are mentioned as are thought informative.

To the zeal, assiduity and ability of the Assistant Attorneys General, individually and collectively, and to the competency and fidelity of all the members of the office staff, the Attorney General acknowledges the accomplishments of the administration of the department.

Respectfully submitted,

JOSEPH E. WARNER,

Attorney General.

DETAILS.**1. Disposition of indictments pending Nov. 30, 1928:**

Northern District (in charge of District Attorney Robert T. Bushnell).

Frederick Hinman Knowlton, Jr.

Indicted in Middlesex County, April, 1928, for murder of Marguerite Isabelle Stewart, at Concord, on March 30, 1928; arraigned April 11, 1928, and pleaded not guilty; trial June, 1928; verdict of guilty of murder in the first degree; motions for new trial denied and exceptions overruled; sentence thereupon; carried out May 14, 1929.

Eastern District (Essex County cases: in charge of District Attorney William G. Clark).

George Metaxatos.

Indicted September, 1927, for murder of Hassen Abrams, at Peabody, on Feb. 17, 1927; arraigned Oct. 4, 1927, and pleaded not guilty; trial February, 1928; verdict of guilty of murder in the second degree; motion for new trial filed and allowed Feb. 28, 1928; *nolle prosequi* Dec. 3, 1928.

George Elmer Harrison Taylor, *alias*.

Indicted September, 1927, for the murder of Stella Pomkala, at Salisbury, on June 5, 1927; arraigned Oct. 4, 1927, and pleaded not guilty; trial October, 1927; verdict of guilty of murder in the first degree; motions for new trial, claim of appeal and assignments of error denied; sentenced on Jan. 25, 1929; carried out March 6, 1929.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Mary E. Fitzgibbons.

Indicted May, 1928, for the murder of Eleazar G. Saunders on April 21, 1928; arraigned Dec. 4, 1928, and pleaded not guilty; trial February, 1929; verdict of not guilty by reason of insanity; committed to the Boston State Hospital for life.

Harry Lamb and Ung Hong Yen, *alias*.

Indicted November, 1928, for the murder of Ley Wey Kin on Oct. 16, 1928; arraigned Jan. 7, 1929, and pleaded not guilty; trial February, 1929; verdict of not guilty as to each defendant.

Antonio Selvitella.

Indicted June, 1928, for the murder of Santa Zona on April 20, 1928; arraigned Feb. 4, 1929, and pleaded not guilty; trial February, 1929, during which he retracted former plea and pleaded guilty to murder in the second degree, which was accepted; defendant thereupon sentenced to State Prison for life.

Charles Trippi, *alias*.

Indicted November, 1928, for the murder of Frederick Pfluger on Nov. 11, 1928; arraigned Nov. 15, 1928, and pleaded not guilty; trial January, 1929; verdict of guilty of murder in the first degree; defendant's claim of appeal and assignments of error denied July 1, 1929; sentenced Sept. 13, 1929; Nov. 14, 1929, respite of execution of sentence to and including Nov. 29, 1929, granted by the Governor and Council; sentence carried out Dec. 3, 1929.

Middle District (in charge of District Attorney Charles B. Rugg).

Joseph R. Dogil.

Indicted in Worcester County, October, 1928, for the murder of Cosimo Milyaro, at Clinton, on Dec. 1, 1928; placed on file by order of the court May 28, 1929, as defendant then serving sentence of not less than eighteen years nor more than twenty-five years for robbery.

Southern District (in charge of District Attorney William C. Crossley).

Henri LeBrun, *alias*.

Indicted in Bristol County, November, 1928, for the murder of Thomas Campeau; arraigned Nov. 21, 1928, and pleaded not guilty; retraction of former plea, and plea of guilty to manslaughter accepted by the Commonwealth Feb. 13, 1929; sentence thereupon to State Prison for not less than seven years nor more than ten years.

2. Indictments found and dispositions since Nov. 30, 1928:

Northern District (Middlesex County cases: in charge of District Attorney Robert T. Bushnell).

Arthur J. Manning.

Indicted January, 1929, for the murder of Mary A. Lee, at Somerville, on Dec. 23, 1928; arraigned Jan. 11, 1929, and pleaded not guilty; defendant retracted former plea and pleaded guilty to simple assault, April 15, 1929; plea accepted; sentence thereupon to the house of correction at Cambridge for the term of fifteen months.

John Onashuck.

Indicted June, 1929, for the murder of Walter Poplusi, at Cambridge, on May 30, 1929; arraigned June 5, 1929, and pleaded not guilty; defendant retracted former plea and pleaded guilty to simple assault, June 12, 1929; plea accepted; sentence thereupon to the house of correction at Cambridge for the term of one year.

Thomas J. Panetta.

Indicted June, 1929, for the murder of Dominick Simonetti, at Cambridge, on May 30, 1929; arraigned June 5, 1929, and pleaded not guilty; retracted former plea and pleaded guilty to manslaughter, June 19, 1929; plea accepted; sentence thereupon to State Prison for a term of not less than twelve years and not more than twenty years.

John J. Sheehan.

Indicted September, 1929, for the murder of Patrick McGagh, at Lowell, on July 22, 1929; arraigned Sept. 5, 1929, and pleaded not guilty; trial December, 1929, verdict of not guilty by reason of insanity; thereupon committed to the Danvers State Hospital for life.

Suffolk District (in charge of District Attorney William J. Foley).**George W. Taylor.**

Indicted in Suffolk County, May, 1929, for the murder of James Talbot on April 7, 1929; arraigned May 29, 1929, and pleaded not guilty; retracted former plea and pleaded guilty to manslaughter, Oct. 15, 1929; plea accepted; sentence thereupon to State Prison for not more than ten years and not less than seven years.

Southeastern District (Norfolk County cases: in charge of District Attorney Winfield M. Wilbar).**Joseph Bellamo and Jerry Bellamo, *alias*.**

Indicted April, 1929, for the murder of Peter Terrazzini, at Needham, on Jan. 29, 1929; Joseph Bellamo arraigned Dec. 13, 1929, and pleaded guilty to manslaughter; plea accepted; sentence thereupon to State Prison for a term of not less than twelve years and not more than fifteen years; Jerry Bellamo discharged by the court at the suggestion of the District Attorney, Dec. 13, 1929.

Octave Robillard.

Indicted December, 1928, for the murder of Loretta Froment, at Bellingham, on Sept. 21, 1928; arraigned April 1, 1929, and pleaded not guilty; retracted former plea and pleaded guilty to murder in the second degree, April 25, 1929; plea accepted; sentence thereupon to State Prison for life.

Middle District (Worcester County cases: in charge of District Attorney Charles B. Rugg).**Thomas Cooper.**

Indicted May, 1929, for the murder of Eliza Jane Brown, at Lunenburg, on Sept. 4, 1928, and for the murder of William Stuart, at said Lunenburg, on Oct. 11, 1928; arraigned Aug. 26, 1929, and pleaded not guilty to both counts; retracted former plea and pleaded guilty to manslaughter on both counts, Nov. 6, 1929; plea accepted; thereupon sentence on each count to two years in the house of correction at Worcester.

Annie Kondrot, *alias*.

Indicted October, 1929, for the murder of Ellen Kondrot and Lillian Japalowski, at Worcester, on Sept. 28, 1929; found insane by the court Nov. 5, 1929; thereupon committed to the Worcester State Hospital.

3. Pending indictments and status:

Northwestern District (in charge of District Attorney Charles Fairhurst).

Charles Macules, *alias*.

Indicted in Hampshire County, February, 1929, for the murder of George Chepules, at Amherst, on Dec. 20, 1928; arraigned Feb. 25, 1929, and pleaded not guilty; committed to the Bridgewater State Hospital for observation, May 1, 1929.

Eastern District (in charge of District Attorney William G. Clark).

George Breton.

Indicted in Essex County, June, 1929, for the murder of Caroline Breton, at Methuen, on June 7, 1929; arraigned June 17, 1929, and pleaded not guilty; committed to the Danvers State Hospital for observation, Oct. 7, 1929.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Rocco Cassaro, and Carmelo Garufo as accessory before the fact.

Indicted November, 1929, for the murder of Salvatore Alabiso on Oct. 27, 1929; not yet arraigned; defendants' motions pending.

Gangi Cero.

Indicted June, 1927, for the murder of Joseph Fantasia on June 11, 1927; arraigned July 6, 1927, and pleaded not guilty; trial November, 1927; verdict of guilty of murder in the first degree; motion for new trial and assignments of error, and claim of appeal and assignments of error denied; thereupon sentenced to death by electrocution during the week beginning Nov. 4, 1928; respites of execution of sentence to Dec. 9, 1928, Jan. 8, 1929, Feb. 7, 1929, and April 8, 1929, granted by the Governor and Council; motion for new trial on the ground of newly discovered evidence allowed March 22, 1929.

James F. Doyle.

Indicted March, 1929, for the murder of Mary F. Doyle on Feb. 11, 1929; adjudged insane and committed to the Bridgewater State Hospital.

Samuel Gallo.

Indicted January, 1929, for the murder of Joseph Fantasia on June 11, 1927; arraigned Jan. 11, 1929, and pleaded not guilty; trial February, 1929; verdict of guilty of murder in the first degree; motion for new trial allowed March 22, 1929.

Leong Sang, *alias*, and Ung Hong Yun, *alias*, as accessory before the fact.

Indicted August, 1929, for the murder of Yee Toon Wah on Aug. 5, 1929, Sang arraigned Sept. 5, 1929, and pleaded not guilty; Yun arraigned Aug. 12, 1929, and pleaded not guilty.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Wallace Allan Graham.

Indicted in Norfolk County, December, 1928, for the murder of Janet Graham, at Quincy, on Sept. 9, 1928; arraigned April 16, 1929, and pleaded not guilty; committed to the Bridgewater State Hospital for observation, April 16, 1929.

Christopher E. Cullen.

Indicted in Plymouth County, February, 1929, for the murder of Cora J. Cullen, at Hingham, on Jan. 25, 1929; arraigned March 14, 1929, and pleaded not guilty; committed to the Bridgewater State Hospital for observation, April 17, 1929.

OPINIONS.

Voting — Public Policy Act — Instructions to Legislators.

A vote upon a question of public policy relating to the repeal of the Eighteenth Amendment to the Constitution of the United States is governed by G. L., c. 53, §§ 19–22, as amended.

If such a question receives a majority of all the ballots cast at the election in which it is voted upon, and a majority of the ballots actually cast in relation to the particular question are in the affirmative, the result is to be construed as an instruction to a member of the Legislature.

DEC. 1, 1928.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN:— From your recent communication to me I gather the following facts: At the State election held in November there was submitted to the voters in a senatorial district of this Commonwealth a question of public policy relating to the repeal of the Eighteenth Amendment to the Constitution of the United States. The vote thereon in that district resulted as follows: Affirmative votes, 18,242; negative votes, 11,320; other ballots cast by voters who did not vote on that particular question, 10,339 — making the total number of ballots cast in that district 39,901. You ask me whether G. L., c. 53, §§ 19–22, inclusive, apply to that particular question, and if so, whether the vote above described constitutes an instruction to the senator from that district.

Mass. Const., pt. 1st, art. XIX, is as follows:—

“The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.”

G. L., c. 53, § 19, as amended by St. 1925, c. 97, so far as material, is as follows:—

“On an application signed by twelve hundred voters in any senatorial district, . . . asking for the submission to the voters of that senatorial . . . district of any question of instructions to the senator . . . from that district, and stating the substance thereof, the attorney general shall upon request of the state secretary determine whether or not such question is one of public policy, and if such question is determined to be one of public policy, the state secretary and the attorney general shall draft it in such simple, unequivocal and adequate form as shall be deemed best suited for presentation upon the ballot. Upon the fulfilment of the requirements of this and the two following sections the state secretary shall place such question on the official ballot to be used in that senatorial . . . district at the next state election.”

G. L., c. 53, §§ 20 and 21, deal only with the signing and filing of applications by registered voters, and have no bearing on the question asked by you.

G. L., c. 53, § 22, is as follows:—

“No vote under the three preceding sections shall be regarded as an instruction under article nineteen of the bill of rights of the constitution

of the commonwealth, unless the question submitted receives a majority of all the votes cast at that election."

The question of public policy relating to the repeal of the Eighteenth Amendment to the United States Constitution, which question is referred to in your letter, was the subject of litigation in our Supreme Judicial Court recently, and that court held, in the case of *Thompson v. Secretary of the Commonwealth*, 265 Mass. 16, in substance, that it was a question of instructions under G. L., c. 53, § 19, as amended by St. 1925, c. 97. In answer to the first part of your question, therefore, I am constrained to advise you that G. L., c. 53, §§ 19-22, inclusive, apply.

The next part of your question is, in substance, whether the result of the vote shown above is such as to constitute an instruction to the senator from the district in which the vote was had.

It is necessary under G. L., c. 53, § 22, in order that a vote shall be regarded as an instruction, that "the question submitted" shall receive a majority of all the votes cast at that election. I am of the opinion that by the phrase "a majority of all the votes cast at that election" the Legislature meant to say "a majority of all the ballots cast at that election." If the word "votes" were to be interpreted as meaning simply votes actually cast for or against the particular question, the section would be almost meaningless, because, except in the case of an actual tie vote, there would always be a majority one way or the other on the question submitted. I believe that the Legislature intended that a vote on a question of public policy should not be deemed an instruction to the senator unless at least fifty per cent of the voters who went to the polls in that district cast votes for or against the question. The number of voters who went to the polls in the senatorial district in question, as shown by the total number of ballots cast, was 39,901, and fifty per cent of that figure is 19,951. The total number of votes in that district, both affirmative and negative, which were cast on the question submitted, was 29,562, or more than a majority of all the ballots cast at the election. I am therefore of opinion that the vote in that district is to be "regarded as an instruction under article nineteen of the bill of rights of the constitution of the commonwealth," and inasmuch as the affirmative votes on the question were 18,242 and the negative votes were 11,320, I am of the opinion that the senator from that district was instructed to vote in favor of a resolution seeking the repeal of the Eighteenth Amendment to the Constitution of the United States.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

*Public Health — Consent of Department — Taking by Local Authorities —
Water Supply.*

The Department of Public Health is not limited to approving or disapproving a proposed taking as a whole, under G. L., c. 40, § 41, but it does not possess authority to limit such a taking to a specified time.

DEC. 3, 1928.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have requested my advice relative to proposed action by your Department under the provisions of G. L., c. 40, § 41.

You state in your letter to me as follows:—

"The water commissioners of the town of Weymouth, acting under the provisions of G. L., c. 40, § 41, have requested the approval by this Department of the purchase or taking by right of eminent domain, for the protection of the waters of Weymouth Great Pond, which is the water supply of the town of Weymouth, of certain parcels of land described in a vote taken at the annual town meeting held March 5, 1928.

The Department, in accordance with the requirements of G. L., c. 40, § 41, gave a hearing upon the proposed taking, at its office, on November 20th, after notice.

It appears that, while the town has given the water commissioners authority to secure all of the lands in question, it is not the intention of the town authorities to acquire all of this land at the present time but to acquire only those lots which are likely soon to be developed for building or upon which buildings or structures exist which are a menace to the water supply or likely to become so. The region about Great Pond contains already a considerable number of dwelling houses, and it seems likely that the population will increase more or less rapidly in the future, the effect of which will inevitably cause deterioration in the quality of the water of Great Pond.

Considering the circumstances, the Department would probably be justified in approving the taking of the lands in question if they were to be taken at the present time. The question arises whether it is reasonable under the circumstances for the Department to approve the taking of these lands after having been advised that the takings may extend over a period of ten years, more or less.

A second question is: Has the Department authority to limit the takings to a specified date or within a specified period of years?

There is a third question, and that is: Whether the owner of a piece of land, the taking of which has been approved by this Department but not carried out by the town, can recover damages for injury to the land for the purposes of sale, provided damage can be proven?"

G. L., c. 40, § 41, is as follows:—

"Towns and water supply and fire districts duly established by law may, with the consent and approval of the department of public health, given after due notice and a hearing, take by eminent domain under chapter seventy-nine, or acquire by purchase or otherwise, and hold, lands, buildings, rights of way and easements within the watershed of any pond, stream, reservoir, well or other water used by them as a source of water supply, which said department may deem necessary to protect and preserve the purity of the water supply. All lands taken, purchased or otherwise acquired under this section shall be under the control of the board of water commissioners of the town or district acquiring the same, who shall manage and improve them in such manner as they shall deem for the best interest of the town or district. All damages to be paid by a town or district by reason of any act done under authority hereof may be paid out of the proceeds of the sale of any bonds authorized by law to be issued by such town or district for water supply purposes or from any surplus income of the water works available therefor. A town may also make a contract to contribute to the cost of building, by any other town situated in the watershed of its water supply, a sewer or system of sewers to aid in protecting such water supply from pollution."

The matter of giving consent and approval to the proposed taking is one which rests solely in the exercise of sound discretion by your Department. It may give or withhold its consent and approval upon a consideration of any facts which are before it. It may give its approval to the taking of any part of the realty which is proposed to be taken, and may, if it deems proper, withhold such approval from the taking of any part which it deems not necessary for the protection or preservation of the water supply. The Department is not limited to approving or disapproving of the proposed taking as a whole. It lies within the authority of the Department to withhold its approval from the proposed taking if it is satisfied that the same is to be made at a subsequent period and it is not satisfied that a taking, at a later period than the present time, can be determined by it now to be necessary for the protection and preservation of the water supply as indicated in the statute.

I am of the opinion that the Department does not possess authority under the statute "to limit the takings to a specified date or within a specified period of years."

In view of the opinions which I have already expressed, an answer to your third question is not required.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Constitution — Treasurer and Receiver General — Vacancy in Office.

When a Treasurer and Receiver General who has been elected Lieutenant-Governor takes the oath qualifying him for the latter office, he automatically vacates the former office.

DEC. 5, 1928.

HON. WILLIAM S. YOUNGMAN, *Treasurer and Receiver General*.

DEAR SIR: — You ask my opinion as to whether you cease to be Treasurer and Receiver General on taking the oath of office as Lieutenant-Governor on Wednesday, January 2, 1929.

So much of Mass. Const. Amend. LXIV, § 1, as is material is as follows:—

"The governor, lieutenant-governor, councillors, secretary, treasurer and receiver-general, attorney-general, auditor, senators and representatives, shall be elected biennially. The governor, lieutenant-governor and councillors shall hold their respective offices from the first Wednesday in January succeeding their election to and including the first Wednesday in January in the third year following their election and until their successors are chosen and qualified. . . . The terms of the secretary, treasurer and receiver-general, attorney-general and auditor, shall begin with the third Wednesday in January succeeding their election, and shall extend to the third Wednesday in January in the third year following their election and until their successors are chosen and qualified."

Mass. Const., pt. 2nd, c. VI, art. II, in so far as material to the question asked by you, is as follows:—

"No governor, lieutenant-governor, or judge of the supreme judicial court, shall hold any other office or place, under the authority of this commonwealth, except such as by this constitution they are admitted to hold, . . ."

The third Wednesday in January, 1929, which marks the end of your term of office as Treasurer and Receiver General, falls on January 16th. The first Wednesday in January, 1929, which will mark the first day of your term of office as Lieutenant-Governor, falls on January 2nd.

I find nothing in the Constitution of Massachusetts, or in the amendments thereto, which permits the Lieutenant-Governor to hold the office of Treasurer and Receiver General, and I am therefore of the opinion that under Mass. Const., pt. 2nd, c. VI, art. II, you will, on taking the oath of office as Lieutenant-Governor on January 2, 1929, automatically cease to be Treasurer and Receiver General.

I am confirmed in this opinion by the reasoning adopted by one of my predecessors in an opinion rendered on February 19, 1917, to the Joint Committee on Constitutional Amendments (V Op. Atty. Gen. 20, 22-23), to the effect that the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court could not, while occupying their respective offices, also sit as delegates in the Constitutional Convention, because the position of delegate to said convention was a place under the authority of the Commonwealth.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Metropolitan District Water Supply Commission — Taxes — Payments.

Under St. 1926, c. 375, the Commonwealth should pay to a town wherein lands have been purchased for the purpose of protecting the purity of the Ware River an amount equal to that which the town would receive for taxes upon the average of the assessed value of the lands, exclusive of structures, for the three years last preceding the purchase, reduced by prior abatements.

DEC. 6, 1928.

Metropolitan District Water Supply Commission.

GENTLEMEN:— You have informed me that the Metropolitan District Water Supply Commission has acquired by purchase certain lands, together with the structures thereon, in the town of Rutland for the purpose of protecting the purity of the waters of the Ware River, to be diverted for a water supply under the provisions of St. 1926, c. 375. You have asked my opinion as to whether, under the provisions of G. L., c. 59, § 6, the Metropolitan District Water Supply Commission should pay to the town of Rutland an amount equal to that which the town would receive upon the average of the assessed values of such land, including buildings or other structures thereon.

G. L., c. 59, § 6, provides as follows:—

“Property held by a city, town or district, including the metropolitan water district, in another city or town for the purpose of a water supply, the protection of its sources, or of sewage disposal, if yielding no rent, shall not be liable to taxation therein; but the city, town or district so holding it shall, annually in September, pay to the city or town where it lies an amount equal to that which such city or town would receive for taxes upon the average of the assessed values of the land, which shall not include buildings or other structures except in the case of land taken for the purpose of protecting the sources of an existing water supply, for the three years last preceding the acquisition thereof, the valuation for each year being reduced by all abatements thereon. Any part of such

land or buildings from which any revenue in the nature of rent is received shall be subject to taxation.

If such land is part of a larger tract which has been assessed as a whole, its assessed valuation in any year shall be taken to be that proportional part of the valuation of the whole tract which the value of the land so acquired, exclusive of buildings, bore in that year to the value of the entire estate."

The above section expressly applies to property held by the Metropolitan Water District. G. L., c. 4, § 7, par. 36, provides that "water district" shall include "water supply district." It follows that section 6 applies to property held by the Metropolitan Water Supply District.

It is provided that property held by a district in another city or town for the purpose of a water supply or for the protection of its sources shall not be liable to taxation if it yields no rent. I am informed that the property in question yields no rent. The property is held for the purpose of a water supply and to protect the sources thereof, it having been acquired in connection with the Ware River project for the purpose of furnishing an adequate water supply for the metropolitan district. It follows, therefore, that the property is not liable to taxation in the city or town where it lies.

Said section 6 further provides that if no taxes are payable on the property the district shall pay to the city or town where it lies a certain amount defined by said section, based upon the average of the assessed values of the land, which shall not include buildings or structures except in the case of land taken for the purpose of protecting the sources of an existing water supply. As to the land itself, clearly this method of payment applies in the present case. Buildings and other structures are not to be included in the assessed value of the land, unless the land is taken for the purpose of protecting an existing water supply. There is at present no existing water supply at this place, and it follows, therefore, that buildings and structures in this area are not to be included in the assessed value which forms the basis for the payment to the city or town in lieu of taxes.

The result is that the Commission should pay to the town of Rutland an amount equal to that which the town would receive for taxes upon the average of the assessed values of the land, not including buildings or other structures thereon, for the three years last preceding the acquisition thereof, the valuation for each year being reduced by all abatements thereon.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Registration — Certified Public Accountant — Change of Business Name.

The addition of the words "& Co." to that of a duly certified public accountant, where the accountant has not in fact created a partnership or a corporation, does not violate the provisions of G. L., c. 112, § 87E, relative to registration.

DEC. 6, 1928.

Mr. W. F. CRAIG, *Director of Registration.*

DEAR SIR: — You have asked my opinion as to whether an individual named John Jones, duly certified as a certified public accountant under

the laws of Massachusetts, may do business under the name of "John Jones & Co., Certified Public Accountants."

G. L., c. 112, § 87E, provides as follows:—

"No person, not registered under the provisions of section eighty-seven C or corresponding provisions of earlier laws, shall designate himself or hold himself out as a certified public accountant. No partnership unless all of its members are registered under said provisions, and no corporation, shall use the words 'certified public accountant' in describing the partnership or corporation or the business thereof; . . ."

As long as there is no corporation or partnership, there can be no objection to John Jones doing business under the above name. The use of the words "& Co." does not constitute John Jones, who is the sole owner, a partnership. These words do not necessarily imply that a partnership exists, as it is perfectly proper for an individual to use the words "& Co." after his name. See *Crompton v. Williams*, 216 Mass. 184. There is no violation of the provisions of section 87E disclosed, although it may well be that the individual should file with the city or town clerk the business certificate required by G. L., c. 110, § 5.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Division of Metropolitan Planning — Jurisdiction.

The jurisdiction of the Division of Metropolitan Planning under St. 1923, c. 399, as amended, extends to any town added by the Legislature to the north or south metropolitan district.

DEC. 7, 1928.

HON. HENRY I. HARRIMAN, *Chairman, Division of Metropolitan Planning*.

DEAR SIR:— You have asked my opinion as to whether St. 1928, c. 384, adds the towns of Norwood, Stoughton and Walpole to the district to be covered by your Division with respect to the investigations and recommendations provided for in St. 1923, c. 399, as amended by St. 1924, c. 354.

At the time of the passage of St. 1923, c. 399, it was, obviously, the intent of the Legislature to make the jurisdiction of the Division of Metropolitan Planning, with respect to transportation service and facilities, co-extensive with the jurisdiction exercised by the Metropolitan District Commission over the north and south metropolitan sewer districts and the metropolitan parks district.

I am of the opinion that the jurisdiction of your Division extends automatically to any town which is added by the Legislature to either the north or south metropolitan sewer district, and that, consequently, the towns of Norwood, Stoughton and Walpole are now a part of the district to be covered by your investigations and recommendations under the statutes above mentioned.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Department of Conservation — Governor — Killing Deer.

Neither the Governor nor the Commissioner of Conservation has the power to restrict or prohibit the killing of deer during the open season; except that the Governor may so act when it shall appear to him that by reason of extreme drouth there is danger of forest fires.

DEC. 10, 1928.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR:— You have asked my opinion as to whether or not the Governor of the Commonwealth, the Commissioner of Conservation or any other official has the right to restrict or prohibit the shooting of deer within the open season prescribed by G. L., c. 131, § 63, as amended by St. 1928, c. 215, other than on reservations held by and under the control of the Commonwealth.

Said section 63 provides as follows:—

“Any person duly authorized to hunt in the commonwealth may, between sunrise of the first Monday of December and sunset of the second following Saturday, hunt, pursue, take or kill by the use of a shotgun, a wild deer, subject to the following restrictions and provisions: No person shall, except as provided in the preceding section, kill or have in possession more than one deer. No deer shall be hunted, taken or killed on land posted in accordance with section seventy-nine, or on land under control of the metropolitan district commission, or in violation of any city ordinance or town by-law, or in any state reservation subject to section sixty-eight except as provided therein. No person shall make, set or use any trap, salt lick or other device for the purpose of ensnaring, enticing, taking, injuring or killing a deer. Whoever wounds or kills a deer shall make a written report, signed by him, and send it within twenty-four hours of such wounding or killing, to the director, stating the facts relative to the wounding or killing. Violations of this section shall be punished by a fine of not more than one hundred dollars.”

Assuming that a person qualifies, he is entitled to a sporting license which permits him to take and kill deer within the open season as described in said section 63. Section 63 provides that no deer shall be hunted, taken or killed on land posted in accordance with section 79, or on land under control of the Metropolitan District Commission, or in violation of any city ordinance or town by-law, or in any State reservation subject to section 68, except as provided therein. Every person properly holding a sporting license has the right, under the section, to hunt and kill deer on all other lands, provided it is not in violation of any city ordinance or town by-law. The Commissioner has no power to modify or to limit the right to hunt on such other lands.

G. L., c. 131, § 29, as amended by St. 1925, c. 249, provides that the Governor, with the advice and consent of the Council, may suspend the continuance of any or all open seasons established by this chapter whenever it shall appear to him that by reason of extreme drouth there is danger of forest fires resulting from hunting, trapping, fishing or other cause. It will be seen that the power of the Governor under this section is limited to cases in which it appears to him that such danger exists, and it is, of course, for him to decide whether in any given instance there is such danger.

A city or town may by ordinance or by-law prohibit the taking and killing of deer during this season, but if this is not done a person holding a license as above stated may exercise the rights conferred by section 63. If it is deemed advisable to confer upon the Governor or the Commissioner the power to suspend the open season on deer, such power should be given by the Legislature.

I therefore advise you that the Commissioner has no power to prohibit

the taking and killing of deer during the open season established by the Legislature. I further advise you that the Governor has no power to suspend the continuance of said open season except as indicated above. The open season may be suspended by no other body except a city council or board of selectmen in any given city or town.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Constitution — Treasurer and Receiver General — Vacancy in Office.

When a Treasurer and Receiver General who has been elected Lieutenant-Governor takes the oath qualifying him for the latter office, he automatically vacates the former office.

Two suitable persons are to be appointed in such a contingency to take custody of valuables in the treasury.

DEC. 11, 1928.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth*.

SIR:— You desire the opinion of this Department with respect to certain questions which may arise incident to the ending of Mr. Youngman's term as Treasurer and Receiver General on the beginning of his term as Lieutenant-Governor.

Under Mass. Const. Amend. LXIV it is provided that "the governor, lieutenant-governor and councillors shall hold their respective offices from the first Wednesday in January succeeding their election to and including the first Wednesday in January in the third year following their election and until their successors are chosen and qualified."

I am advised by the Secretary of the Commonwealth that the practice is for the new Governor and Lieutenant-Governor to take their respective oaths of office on the Thursday next following the first Wednesday in January, which this year will be January 3rd. Under the same amendment the term of the Treasurer and Receiver General and the term of certain other State officers "shall begin with the third Wednesday in January succeeding their election and shall extend to the third Wednesday in January in the third year following their election and until their successors are chosen and qualified." Mr. Youngman's term as Treasurer and Receiver General would normally end, therefore, on the third Wednesday of January, 1929, which will be January 16th; but Mr. Youngman has been elected to the office of Lieutenant-Governor, and in the normal course of events would take the oath of office as Lieutenant-Governor on Thursday, January 3rd, thus creating a vacancy in the office of Treasurer and Receiver General.

Mass. Const. Amend. XVII provides, in part, that, "in case the office . . . of treasurer and receiver-general . . . shall become vacant, from any cause, during an annual or special session of the general court, such vacancy shall in like manner be filled by choice from the people at large." The words "in like manner" refer to an election by joint ballot of the senators and representatives in one room.

Mass. Const. Amend. LXIV further provides that "the terms of senators and representatives shall begin with the first Wednesday in January succeeding their election and shall extend to the first Wednesday in January in the third year following their election and until their successors are chosen and qualified." The incoming Legislature, therefore, comes in on Wednesday, January 2nd, and on that day the Senate and

House organize, and the annual session referred to in Mass. Const. Amend. XVII thereupon begins on that day. Therefore, at the time Mr. Youngman, on Thursday, January 3rd, takes the oath of office as Lieutenant-Governor, and thereafter automatically ceases to be Treasurer and Receiver General, the filling of that vacancy in the office of Treasurer and Receiver General is one that must, under Amendment XVII, above quoted, be filled by an election by the two houses of the Legislature on a joint ballot.

G. L., c. 10, § 12, provides as follows: —

“Upon a vacancy in the office of state treasurer, the state secretary, with two suitable persons appointed by warrant of the governor, shall, after notice to the former treasurer, . . . and to his sureties or one of them, or to such of them as are within the commonwealth, seal up and secure, in their presence if they attend, all money, papers and other things supposed to be the property of the commonwealth . . .”

And the same chapter contains further provisions as to what the Secretary of the Commonwealth and the two suitable persons shall thereafter do by way of making an inventory of money and securities and other things and for the exchanging of receipts with the new Treasurer and Receiver General.

My conclusions are that Mr. Youngman, by taking the oath of office as Lieutenant-Governor on January 3rd, will thereby automatically vacate the office of Treasurer and Receiver General; that the Legislature will then be in session, and, under the Constitution, will have the power of filling the office of Treasurer and Receiver General by an election, and that, pending such election, it will be the duty of the Secretary of the Commonwealth and two suitable persons to be appointed by Your Excellency to take custody, after certain formalities, of all the money, papers and other things supposed to be the property of the Commonwealth in the office of the Treasurer and Receiver General, and to retain them until a new Treasurer and Receiver General shall have been qualified. Your Excellency should be prepared, therefore, to appoint under your warrant two suitable persons to act seasonably with the Secretary of the Commonwealth.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Insurance — Stock Company — Dividends.

Policyholders may participate in dividends of stock companies of insurance other than life insurance.

JAN. 2, 1929.

Hon. MERTON L. BROWN, *Commissioner of Insurance*.

DEAR SIR: — My opinion is requested upon the following question: —

“Is it lawful for a stock insurance company, other than a life company, to pay or allow dividends to policyholders under policies issued in this commonwealth, or is the payment or allowance thereof prohibited by G. L., c. 175, §§ 182 and 184?”

I assume from the facts stated in your letter that the privilege or right to participate in dividends declared by the stock insurance company to whom you refer is set forth in the policy itself.

That general participation by policyholders in dividends of stock companies is not a violation of the prohibitions against rebates and considerations, contained in sections of the statutes regulating insurance (now embodied in G. L., c. 175, §§ 182-184, as amended), was held in an opinion of one of my predecessors in office (IV Op. Atty. Gen. 503), with which I concur. The amendments made in the various statutes regulating the insurance business since such opinion was written do not evidence any legislative intent to make such participation unlawful. The particular reference to participation in the savings, earnings or surplus of mutual insurance companies without specification in the policy, inserted in the statutes since the writing of said opinion (G. L., c. 175, § 184, as amended), does not, in my opinion, affect the legality of participation in the dividends of a stock company specified in the policy when such participation is not in its nature a "special advantage" with regard to any particular policyholder or holders, as the words "special advantage" are construed in said opinion of one of my predecessors in office.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Police Commissioner for the City of Boston — Traffic Signs — Expense.

Expenses of erection and maintenance of traffic signs in Boston fall upon the police department.

JAN. 3, 1929.

HON. HERBERT A. WILSON, *Police Commissioner for the City of Boston.*

DEAR SIR: — You have asked me to advise you upon the following: —

"The exact question in issue is whether in Boston the Police Commissioner or the Board of Street Commissioners or the Department of Public Works of the Commonwealth has the authority and duty to place signs, markings, etc., after they have been authorized by ordinance or by-law and approved by the Department of Public Works."

Traffic signs and markings made necessary by ordinance regulation or by law of the city of Boston or its officials, and approved by the Department of Public Works of the Commonwealth, are not required by law to be placed or paid for by said Department. St. 1928, c. 357, authorizes the said Department to erect and maintain such signs and markings on certain highways, and if these be in fact erected and maintained by said Department the expense thereof should be borne by it, but the expense of such signs and markings upon such highways, or upon other highways, erected or maintained thereon by any city or town with the approval of the said Department, is not required to be borne by the said Department.

As to the allocation of the expense of the erection and maintenance of signs and traffic markings to be erected by the city of Boston, with the approval of the said Department, as between the Police Commissioner and the Street Commissioners of Boston, I am of the opinion that such expense should be paid as expenses of the police department, and that the Police Commissioner has the authority and duty of placing such signs and markings as are necessary to enforce the regulations, ordinances and by-laws which have been made and approved with relation to street traffic. St. 1908, c. 447.

I am not unaware of the limitations to the extent to which opinions and advice should be given to the Police Commissioner for the city of

Boston by the Attorney General (see VII Op. Atty. Gen. 735), but I consider that your question so far involves a consideration of the duties of the Commissioner under the statutes governing his office as to require an expression of my opinion thereon.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

*Department of Labor and Industries — Common Drinking Cups and Towels
— Rules.*

The Department of Labor and Industries may make rules and regulations relative to common drinking cups and towels in certain places, under G. L., c. 149, § 113, but not under § 6.

JAN. 5, 1929.

Gen. E. LEROY SWEETSER, *Commissioner of Labor and Industries*.

DEAR SIR:— You have asked my opinion as to whether the Department of Labor and Industries has the legal power, under G. L., c. 149, § 6, to make rules and regulations prohibiting the use of a common drinking cup and a common towel in factories, workshops and mercantile establishments. Said section 6 provides as follows:—

“It shall investigate from time to time employments and places of employment, and determine what suitable safety devices or other reasonable means or requirements for the prevention of accidents shall be adopted or followed in any or all such employments or places of employment; and also shall determine what suitable devices or other reasonable means or requirements for the prevention of industrial or occupational diseases shall be adopted or followed in any or all such employments or places of employment; and shall make reasonable rules, regulations and orders applicable to either employers or employees or both for the prevention of accidents and the prevention of industrial or occupational diseases.”

Section 1 of said chapter 149 contains the following definition:—

“‘Industrial disease’ or ‘occupational disease’, any ailment or disease caused by the nature or circumstances of the employment.”

Industrial or occupational diseases, as defined above, are those arising from the peculiar nature of the employment, and do not include diseases that are communicable to other persons by reason of the use of a common drinking cup or common towel. Diseases communicated to others by the use of such cup or towel are not incidental or peculiar to the employment but are of a nature that may be communicated by such use without reference to the nature or circumstances of the employment. It follows that, under section 6, the Department has no power to make the rules and regulations under consideration.

However, I am of the opinion that the Department, under the authority of G. L., c. 149, § 113, may make reasonable rules and regulations prohibiting the use of the common drinking cup or common towel in any factory, workshop, manufacturing, mechanical or mercantile establishment. Said section 113 provides as follows:—

“Every factory, workshop, manufacturing, mechanical and mercantile establishment shall be well lighted, well ventilated and kept clean and

free from unsanitary conditions, according to reasonable rules and regulations adopted by the department with reference thereto."

In order to keep such places clean and free from unsanitary conditions, it is clearly reasonable to prohibit the common drinking cup and common towel, both of which are universally recognized to be unsanitary and dangerous to public health. The Department will be acting well within the scope of this section if it makes the rules and regulations under consideration.

Section 106 of said chapter 149 provides as follows: —

"All industrial establishments shall provide fresh and pure drinking water to which their employees shall have access during working hours. Any person owning, in whole or in part, managing, controlling or superintending any industrial establishment in which this section is violated shall, on the complaint of the local board of health, the selectmen of a town or an inspector, be punished by a fine of one hundred dollars."

This section, contained in the chapter dealing with Labor and Industries, indicates that the question of supplying fresh and pure drinking water to employees in any industrial establishment is clearly one for the attention of the Department of Labor and Industries, and adds weight to the conclusion that the Department may make the rules and regulations above referred to.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Department of Public Safety — Forfeited Automobiles — Sales.

The Department of Public Safety may sell automobiles forfeited and forwarded to it under an order of court.

JAN. 9, 1929.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You have asked me to advise you on the following matter: —

"Inquiry has been made regarding the status of cases concerning two automobiles forfeited to the Commonwealth but with suits brought against the State to recover. One concerns a Ford coupé forfeited July 6, 1927; the other concerns a Ford coupé forfeited on October 28, 1927.

We have these cars in our possession and desire to dispose of them, our facilities for storage being very limited and the cars not improved by not being used."

I am unable to find any provision of law permitting actions against the Commonwealth to recover, after forfeiture by "authority of the court or trial justice," implements of sale or furniture used or kept and provided to be used in the illegal keeping or sale of intoxicating liquor.

"Under our system of jurisprudence the Commonwealth cannot be impleaded in its own courts except with its consent." *Glickman v. Commonwealth*, 244 Mass. 148.

Suits brought to recover automobiles forfeited would be futile gestures on the part of the petitioners.

In the case of *E. J. Fitzwilliam Co., Inc. v. Commonwealth*, 258 Mass. 103, 107, the court said: —

"Proceedings for the forfeiture of an automobile, because of its connection with the illegal sale or keeping for sale of intoxicating liquor under statutes already cited, are proceedings *in rem*. The principle of the statute is that the container of the intoxicating liquor or the implements of sale used or kept to be used in connection with the illegal sale or keeping for sale of such liquor, themselves constitute a subject liable to offend against the public welfare notwithstanding the innocence of the owner. The things themselves are primarily treated as the offender. The intent of the person in actual control may in some circumstances be enough to determine the guilt of the articles against which the complaint for forfeiture is pending."

G. L., c. 138, § 71, provides that implements of sale and furniture seized and forfeited shall be disposed of in the manner prescribed in G. L., c. 138, § 69, for the disposition of intoxicating liquor. Said section 69, as amended by St. 1923, c. 329, provides, in part, that if, "in the judgment of the commissioner it is for the best interests of the commonwealth to sell the same, he shall cause the same to be sold."

I am of the opinion that you may sell automobiles forfeited and forwarded to the Department of Public Safety by an order of court, if you deem a sale to be for the best interests of the Commonwealth.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

Board of Retirement — State Employees — Age.

A member of the State Retirement Association, sixty years of age, who has been in the service of the Commonwealth over fifteen years immediately preceding request for retirement, and whose retirement is requested by the head of his department, has an absolute right to retire, and must retire at seventy. Between those ages the Board of Retirement has the right to exercise its discretion relative to such retirement.

JAN. 9, 1929.

State Board of Retirement.

GENTLEMEN:— I have been requested by the former Treasurer and Receiver General, while Chairman of the State Board of Retirement, to advise you in relation to your powers and duties under G. L., c. 32, § 2 (4), as amended, upon the following matter in connection with an employee of a State department:—

"The Board of Retirement wishes your opinion as to whether it is the meaning and intent of the law that this Board is obliged to retire a State employee when demand is made by the head of the department for his retirement, as it is in this case, and when it is insisted upon by the head of the department despite the objection of the employee, as it is in this case."

That portion of the said section applicable to your inquiry reads as follows:—

"Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board upon recommendation of the head of the department in which he is employed, or, in case

of members appointed by the governor, upon recommendation of the governor and council, and any member who reaches the age of seventy must so retire."

The jurisdiction of your Board under said subsection to deal with the retirement of a member employed in a department exists (1) when the member has reached the age of sixty and has been in the continuous service of the Commonwealth for a period of fifteen years immediately preceding an application for retirement, and (2) when a recommendation for the member's retirement is presented to you by one who is in fact the head of a department in which such member is employed. See IV Op. Atty. Gen. 105. Such a member, after attaining the age of sixty, has an absolute right to retire, if he desires to do so, without the necessity for any action on the part of your Board, and must retire at seventy.

Between the ages of sixty and seventy such a member may be retired by your Board when it has jurisdiction over the matter by reason of the existence of the facts already referred to, irrespective of the desire of the member. A decision relative thereto rests with your Board, and I am of the opinion that your Board is not obliged to retire such a member merely because a recommendation for retirement is transmitted to it by the proper official, but that the instant statute gives to the Board authority to act in its sound discretion upon such recommendation.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Insurance — Small Loans Law — Installment Notes.

Plans for the payment of insurance upon notes payable by the purchasers do not relate to loans under G. L., c. 140, §§ 96-114.

JAN. 17, 1929.

HON. ROY A. HOVEY, *Commissioner of Banks*.

DEAR SIR:— You have requested my opinion in the following communication:—

"The opinion of your Department is respectfully requested as to whether two plans for financing automobile and fire insurance premiums, where the amounts are \$300 or under, come under the scope of G. L., c. 140, §§ 96-114, inclusive.

The plan marked 'A' has to do with the financing of automobile liability insurance premiums, and the plan marked 'B' has to do with fire insurance premiums."

The plans referred to in your letter as "A" and "B" appear to be, respectively, (a) a promissory note, payable in the installments indicated on its face, to secure payment of premium upon a policy or policies of automobile insurance issued through the office of the payee by insurance companies for which the payee is an agent, with authority to the payee to cancel the policy or policies in the name of the maker if default is made in any of the specified payments in the note; and (b) a similar note to secure payment of premium upon a policy or policies of fire insurance.

I am of the opinion that the plans to which you refer, as evidenced by the face of the notes which you have submitted, do not relate to "loans," within the meaning of G. L., c. 140, §§ 96-114, but are in the nature of

agreements for the extension of credit for policies of insurance actually purchased by the maker of the notes, and as such are not within the purview of said G. L., c. 140, §§ 96-114.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Acceptance of Statute by a Town — Vote of Inhabitants.

Acceptance of an act by vote of the inhabitants of a town is made by a vote at a town meeting.

JAN. 19, 1929.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR: — You have asked my opinion in the following communication: —

“St. 1928, c. 406, entitled ‘An Act to permit certain sports and games on the Lord’s Day,’ by section 2 amends G. L., c. 136, § 21, and provides as follows: —

‘In any city which accepts sections twenty-one to twenty-five, inclusive, by vote of its city council and in any town which accepts said sections by vote of its inhabitants, it shall be lawful to take part in or witness any athletic outdoor sport or game on the Lord’s day between the hours of two and six in the afternoon as hereinafter provided.’

Your opinion is respectfully requested as to whether the phrase ‘by vote of its inhabitants’ means the vote of a town on an official ballot or in open town meeting.

In a town which has a representative form of town government does it mean that the representatives will represent the inhabitants so far as to permit them to vote on the question, or should the question appear on the official ballot to be voted on by the inhabitants?”

G. L., c. 4, § 4, reads as follows: —

“Wherever it is provided that a statute shall take effect upon its acceptance by a city or town, such acceptance shall, except as otherwise provided in such statute, be, in a city, by vote of the city council or, in a town, by vote of the inhabitants thereof at a town meeting.”

The phrase used in St. 1928, c. 406, as to its acceptance in any town “by vote of its inhabitants” does not indicate an intention that the vote shall be taken in a manner other than that set forth in G. L., c. 4, § 4, which provides for a “vote of the inhabitants . . . at a town meeting.”

G. L., c. 54, § 104, is not applicable to a vote upon the acceptance of statutory provisions, for reasons set forth in *Moloney v. Selectmen of Milford*, 253 Mass. 400, 403-404.

The adoption of a representative form of town government does not, in my opinion, so alter the relations of the inhabitants of a town to its town meeting as to make necessary a construction of the words “by vote of its inhabitants,” as used in the instant statute, as expressing a legislative intent that the requisite vote should be by official ballot at the polls and not by the town meeting.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Trust Company — Trust Funds — Commercial Funds — Mingling.

An investment of a group of trust funds by the trust department of a trust company in a mortgage loan or group of loans, in which the funds of the commercial department of the trust company are also invested, is improper.

JAN. 21, 1929.

Hon. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR:— You have requested my opinion as to the propriety of the investment of certain trust funds by trust companies authorized to act in a fiduciary capacity. You state the following facts:—

A trust company suggests that it proposes to have all real estate mortgages owned by the company transferred to the trust department to form a pool of mortgages. Thereupon participation certificates in such pool or fund would be issued to the various trust estates in which the trust company, by its trust department, was acting in a fiduciary capacity. Any excess interests in the pool not absorbed by the trust department for its trust estates would be held by the commercial department of the bank. The result of such an arrangement would be a constant participation by the commercial department of the trust company in the fund or pool through the ownership by the commercial department of trust participation certificates.

You state that under the proposed scheme this form of investment would be used not only for small amounts of trust estates which could not otherwise be advantageously invested, but would also be made the primary form of investment for the funds of all trust estates held by the bank. The propriety of such investment of trust funds by trust companies and national banks doing business as fiduciaries within Massachusetts must be considered in two aspects:—

1. How far does the statute law applicable to trust companies and to national banks acting as fiduciaries, respectively, permit or prohibit such investment?

2. How far may any fiduciary acting under appointment by a court of equity or subject to the control of a court of equity make such an investment properly under the principles of equity applicable to the administration of trust estates?

A. Statute Law Relating to Trust Companies.

G. L., c. 172, §§ 49, 52-54 and 59, read as follows:—

"SECTION 49. Every such corporation acting under any provision of the following section or section fifty-two shall have a trust department in which all business authorized by said sections shall be kept separate and distinct from its general business.

SECTION 52. Such corporation may be appointed executor of a will, codicil or writing testamentary, administrator with the will annexed, administrator of the estate of any person, receiver, assignee, guardian, conservator or trustee under a will or instrument creating a trust for the care and management of property, under the same circumstances, in the same manner, and subject to the same control by the court having jurisdiction of the same, as a legally qualified individual. Any such appoint-

ment as guardian shall apply to the estate and not to the person of the ward. Such corporation shall not be required to receive or hold property or money or assume or execute a trust under this section or of section fifty without its assent.

SECTION 53. Every such corporation may invest the funds or assets which it may receive and hold under the preceding section in the same way, to the same extent, and under the same restrictions as an individual holding a similar position may invest such funds or assets.

SECTION 54. Money, property or securities received, invested or loaned under the provisions of sections fifty to fifty-two, inclusive, shall be a special deposit in such corporation, and the accounts thereof, shall be kept separate. Such funds and the investment or loans thereof shall be specially appropriated to the security and payment of such deposits, shall not be mingled with the investments of the capital stock or other money or property belonging to such corporation, or be liable for the debts or obligations thereof.

SECTION 59. A person creating a trust may direct whether money or property deposited under it shall be held and invested separately or invested in the general trust fund of the corporation; and such corporation acting as trustee shall be governed by directions contained in the will or instrument under which it acts."

In my opinion, sections 53 and 54, above quoted, effectually prohibit such an investment as that suggested in your request for an opinion, and I respectfully advise you that such an investment of trust funds by the trust department of a Massachusetts trust company in a mortgage loan or group of such loans, in which the funds of the commercial department of the bank are also invested, would be manifestly improper. The situation which you suggest, when analyzed, amounts to little more than this: A trust company desires to pool the real estate mortgage loans made by it and to issue against such loans participation certificates to the trust accounts held by it, in the proportion in which funds of such trusts are used in making such loans. At the same time the commercial department will receive participation certificates in the pool mortgage loans in proportion to its interest in those loans. The participation certificate device is really, in substance, not different from a bookkeeping arrangement by which the bank indicates upon its own records the proportion in which its trust accounts and its commercial department have made a loan to strangers in the name of the bank upon the security of real estate mortgages. In my opinion, such an investment of trust funds was intended to be prohibited by the sections to which I have referred, and this conclusion is to some extent reenforced by the language of the Supreme Judicial Court in the cases in which it has construed the sections quoted. *Commonwealth-Atlantic National Bank, petitioner*, 249 Mass. 440, 447-448, approved *Atlantic National Bank, petitioner*, 261 Mass. 217, 219; *Worcester County National Bank, petitioner*, 263 Mass. 444; cf. *Campbell v. Commissioner of Banks*, 241 Mass. 262, 265.

B. *The Situation with Respect to National Banks acting as Fiduciaries in Massachusetts in accordance with a License granted by the Federal Reserve Board under the Provisions of Code of Laws of the U. S., Title 12, § 248 (k).*

(Act of Dec. 23, 1923, chap. 6, § 11, 38 Stat. et al. 264, as amended by Act of Sept. 26, 1918, chap. 177, § 2, 40 Stat. et al. 968.)

In view of the length of the statute above referred to it is not here quoted, but therein it is provided, in part, as follows: —

“National banks exercising any or all of the powers enumerated in this subsection (k) shall segregate all assets held in any fiduciary capacity from the general assets of the bank . . .

Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board.”

The section generally gives to national banks holding the permit authorized by the section the power to act as trustee, or in other fiduciary capacities, in competition with state banks and trust companies, where such power is granted to state banks. There is no indication in the section that a national bank performing the duties of a fiduciary, under appointment of a state court or subject to the provisions of state law as to the administration of trusts, is not in every respect as fully subject to the control of the court or to the provisions of the state law in the administration of such trusts as a trust company or an individual acting in a similar fiduciary capacity. This question was expressly left undecided by the Supreme Judicial Court in the case of *Commonwealth-Atlantic National Bank, petitioner*, 249 Mass. 440, 447. The reasoning of *Worcester County National Bank, petitioner*, 263 Mass. 444, and the cases therein cited, however, is clearly to the effect that a national bank acting as a fiduciary appointed by a state court is, with respect to the administration of the estate and trust committed to it, subject to the control of the court in the same way that an individual or state trust company would be if carrying out the same trust. It therefore becomes pertinent to discover whether the general principles of equity governing the administration of trust estates would permit such an investment by a trustee administering a trust or other fiduciary obligation subject to the control of a court of this Commonwealth.

C. *The General Principles of Equity Applicable to Such Investments.*

It is well settled that it is the duty of trustees holding distinct trust funds to segregate them. They cannot ordinarily be invested together and the net income prorated to the beneficiaries. *Lannin v. Buckley*, 256 Mass. 78, 82. The situation now under consideration even more strongly calls for the application of the rule requiring the complete separation of trust funds from funds owned by the trustee individually, because of the fundamental principle that a trustee, apart from his proper compensation as such trustee, should not in any respect have any pecuniary interest in the administration of his trust. See, for example, *Bullivant v. First National Bank of Boston*, 246 Mass. 324, 334. *Witherington v. Nickerson*, 256 Mass. 351, 357.

The arrangement concerning which you have requested this opinion clearly involves the mingling of trust assets and commercial assets of the trust company in such a way as to create a very decided intermingling of personal interest with that of the bank as fiduciary. In the absence of clear authorization in the trust instrument under which the fiduciary is acting, such a mingling of interest would not, in my opinion, be proper for a trustee, whether an individual or a corporation acting by appointment from a Massachusetts court or subject to the general control of a Massachusetts court of equity.

Nothing in this opinion should be construed as advising that it is improper for a trust department of a trust company to permit two or more of the trust estates held by it to participate in the whole of a single loan secured by mortgage, by use of the participation certificate device. That question has not been considered and no opinion is hereby expressed thereon.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Banking — Deposits in Two Names — Joint Accounts.

A joint account in which the word "and" joins the names of the depositors falls within the provisions of G. L., c. 167, § 14.

An account in a savings bank doing life insurance business, payable to the insured and after his death to a beneficiary, is not a joint account.

JAN. 22, 1929.

HON. ROY A. HOVEY, *Commissioner of Banks*.

DEAR SIR:— You have requested my advice upon certain questions relative to deposits made in the names of two persons.

The applicable statute, G. L., c. 167, § 14, reads as follows:—

"When a deposit is made in any bank, in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or interest or dividend thereon, if not then attached at law or in equity in a suit against either of said persons, may be paid to either of said persons, whether the other be living or not, and such payment shall discharge the bank making such payment from its obligation, if any, to such other person or to his legal representatives for or on account of such deposit."

You state that deposits such as are referred to in the statute are sometimes made in the following form:—

"John Doe *or* Mary Doe
Payable to either or the survivor."

And at other times are written as follows:—

"John Doe *and* Mary Doe
Payable to either or the survivor."

Your first question, which relates to such forms, is:—

"Can the joint account in which the word 'and' joins the names of the depositors be construed as a joint account within the meaning of G. L., c. 167, § 14?"

I answer this question in the affirmative.

Inasmuch as in each instance which you cite the words "payable to either or the survivor" appear, it is immaterial whether the word "or" be used with the two names or the word "and." In each instance the form used sufficiently expresses an intention to make a deposit of the kind which falls within the meaning of the statute, and to which all the terms of the statute are applicable. Were the phrase "payable to either or the survivor" not employed in the second form, the two forms which you have set forth would not have a precisely synonymous meaning.

You have set forth a form said to be used in designating deposits in savings banks which act as agents for savings bank life insurance. This form reads: —

"John Doe or Mary Doe
Payable to the insured during his
or her life.
Payable to the survivor in the event
of death."

Your question with relation to this form is: —

"Can this account be construed as a joint account within the meaning of section 14, since it is not payable to either except on the death of one?"

I answer your question in the negative, inasmuch as the deposit is payable to the insured depositor alone during his life.

Your third question with relation to the form of deposit last mentioned is: —

"Can the bank, upon the death of the insured, pay this account to other than his or her estate?"

A deposit made in the said form is not such a deposit as is governed by said G. L., c. 167, § 14, and the provisions thereof have no application to it. The question, as between the bank and its depositors with relation to a construction of the precise character of the ownership of the deposit, created by the said form, would seem to be one primarily for judicial determination. In the absence of such a determination I do not express an opinion upon this question, which is not one which relates directly to the discharge of your functions as Commissioner.

Your fourth question is: —

"Can the bank loan to one of the parties of a so-called joint account (John Doe or Mary Doe, payable to either or the survivor) without the consent of the other?"

G. L., c. 168, as pointed out in your letter, provides in some of its sections that a savings bank may loan money to a depositor upon the pass book as collateral security.

In *Marble v. Treasurer and Receiver General*, 245 Mass. 504, the court stated that a deposit such as you describe in your fourth question is not strictly a joint tenancy nor is it an estate by the entirety, where the depositors are husband and wife, because of the express terms of the deposit that either one of the depositors may withdraw any part or the whole of the fund on his single receipt or order, and thereby terminate the tenancy without the consent of the other. This right violates the essential character of a true joint tenancy. The estate created by such a deposit is at most analogous to a joint tenancy but is not a joint tenancy in the accurate meaning of those words.

There exists a contract between the bank and the depositors that the bank will pay the whole or any part of the deposit as agreed upon.

Whether an implied contract by the bank to loan to one of the depositors also exists, under the peculiar circumstances surrounding such a deposit, has not been considered by our Supreme Judicial Court. If there were a true joint tenancy in the deposit, no one of the owners might cumber the same by pledging it. Such a pledging would amount to a severance of the joint tenancy, and it would therefore be improper for a savings bank to make such a loan. Whether or not such a deposit is so analogous to a joint tenancy that a pledge by one of the depositors would be improper as against the other, has not been passed upon by the court. These questions are primarily for judicial determination, and relate particularly to the relations between a savings bank and its depositors, under the terms of a contractual arrangement between them. In the absence of judicial determination of the points which I have noted, I do not express an opinion upon your fourth question, which, like the third, is not one relating directly to the discharge of your functions as Commissioner.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Taxation — Life Insurance Policy — Change of Beneficiary.

The proceeds of a life insurance policy in which the insured reserves the right to change the beneficiary, and which is payable after the death of the insured to a beneficiary named in the policy, are not subject to an inheritance tax.

Nor are the proceeds of such a policy subject to tax if the insured has not reserved the right to change the beneficiary.

JAN. 22, 1929.

HON. HENRY F. LONG, *Commissioner of Corporations and Taxation*.

DEAR SIR: — You have requested my opinion on the following questions: —

“Are the proceeds of a life insurance policy in which the insured has reserved the right to change the beneficiary, which policy is payable after the death of the insured to a beneficiary named in the policy, subject to inheritance tax in Massachusetts under the laws now in effect?”

Are the proceeds of a life insurance policy subject to tax if the insured has not reserved the right to change the beneficiary?”

Our Massachusetts succession tax statute does not mention life insurance policies specifically. The only words of the statute which might be said to include life insurance policies taken out by the insured upon his life and payable to other beneficiaries than his own estate are the words in G. L., c. 65, § 1, as amended, — “property . . . which shall pass . . . by . . . gift . . . made or intended to take effect in possession or enjoyment after his death (the death of the donor).” The Massachusetts Supreme Judicial Court has held that these words of the succession tax statute, properly construed, do not include life insurance policies, and that the proceeds of life insurance policies are not subject to an inheritance tax in Massachusetts. *Tyler v. Treasurer and Receiver General*, 226 Mass. 306.

It is my opinion that the recent United States Supreme Court decision in *Chase National Bank v. United States*, 278 U. S. 327, may be distinguished from the decision in *Tyler v. Treasurer and Receiver General*, 226 Mass. 306.

In the Chase National Bank case the United States Supreme Court was considering the Federal estate tax law, which specifically provides that the gross estate of the decedent, for taxation purposes, shall include life insurance policies taken out by the decedent upon his own life and made payable to other beneficiaries than his own estate. The United States Supreme Court was thus considering a tax upon the right to transfer, and held that the reserved power in the insured to change the beneficiary gave the insured a power of control which might properly be made the subject of a transfer tax. By inference it would seem that even in the United States Supreme Court, in a case where the Federal estate tax is involved, the proceeds of a life insurance policy would not be subject to a transfer tax if the insured has not reserved the right to change the beneficiary. The language of the decision strongly suggests that a life insurance policy payable to a beneficiary other than the estate of the insured may properly be considered a gift to take effect in possession or enjoyment after the death of the insured, and to hold that a life insurance policy is a gift from the insured to the beneficiary.

The Tyler case was decided in 1917. It is a case which turns upon the construction of a State statute. The Massachusetts court is not bound by the opinion of the United States Supreme Court as to the construction of a State statute. A State court construction of a State statute is final. In this case the court said that a life insurance policy made payable by the insured to a beneficiary other than his estate "does not by fair intendment come within the descriptive words of the statute as 'property . . . which shall pass . . . by . . . gift . . . made or intended to take effect in possession or enjoyment after the death of the grantor.'"

It seems clear, therefore, that the cases can be distinguished by reason of the construction of the statutes involved; and until the Massachusetts succession tax statute specifically includes life insurance policies of this nature within its terms, it is my opinion that a succession tax upon such insurance policies will not be sustained by our Massachusetts court.

The answer to the first question must therefore be in the negative, and, *a fortiori*, the answer to the second question must also be in the negative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Constitutional Law — Stock of Trust Company held by Other Banking Organizations.

A proposed law penalizing a trust company, by liquidation, for the holding of more than a certain per cent of its stock by certain organizations, would, if enacted, be unconstitutional as drawn.

FEB. 13, 1929.

HON. HENRY L. KINCAIDE, *Senate Chairman, Committee on Banks and Banking.*

DEAR SIR:— Your committee has asked my opinion relative to the constitutionality, if enacted into law, of House Bill No. 613, which reads as follows:—

"Chapter one hundred and sixty-seven of the General Laws is hereby amended by inserting after section twenty-two the following new section:—

SECTION 22A. Whenever it shall appear to the commissioner of banks that more than ten per cent of the capital stock of any trust company is held, owned, or controlled, directly or indirectly, by any other trust company or by any banking association organized under the laws of the United States of America, or by any corporation, association, or trust directly or indirectly owned, controlled, or affiliated with such other trust company or banking association, the commissioner of banks shall notify the holder of such capital stock to divest itself thereof within thirty days from the date of such notice, and in the event of failure so to do, the commissioner of banks shall take possession forthwith of the property and business of such trust company more than ten per cent of the capital stock of which is so held, owned, or controlled, and retain possession of such trust company and liquidate its affairs in the manner herein provided."

The proposed act in effect penalizes a trust company, by the drastic measure of enforced liquidation, not for any unlawful or improper action of such company but solely because of the failure of some other body (not under the control of the trust company) to comply with an order of the Commissioner of Banks. Such a provision, on its face, is so arbitrary and unfair as to give rise to grave doubts as to its validity, if enacted, under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Whether the main objects of the proposed act could be accomplished by legislation which would constitute a valid exercise of the police power by the General Court, and more particularly of the reserved right to amend and repeal the charters of domestic corporations, I do not need to advise. The act, as printed above, is so indefinite, uncertain and vague in the standards of conduct which it lays down, either for the guidance of individuals investing in the stock of a trust company or for the direction of the activities of the Commissioner of Banks, that it would certainly be, for that reason alone, in contravention of the due process clause of the Fourteenth Amendment to the Federal Constitution. What constitutes control "directly or indirectly," within the meaning of the act, is in no way definitely set forth. A corporate purchaser of stock of a Massachusetts trust company, if this bill were enacted, would have no basis for determining whether its purchase (if it involved more than ten per cent of the stock of the trust company) would cause the eventual dissolution of the trust company, thereby endangering the purchase as an investment. The only criterion by which the validity of the purchase could be gauged would be a guess as to the way in which the Commissioner of Banks would regard the corporation's relations with all or any of its banking connections. Because of the absence of any standard which an ordinary man could by his general knowledge apply with reasonable certainty to his proposed conduct, the proposed bill is, in my opinion, unconstitutional. *Connally v. General Construction Co.*, 269 U. S. 385, 391, and cases there cited; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 457; *cf. Nash v. United States*, 229 U. S. 373, 376. Despite grave doubts upon other grounds as to the validity of the whole method provided by the proposed bill for carrying out its purpose, I limit my opinion to the single ground of unconstitutional indefiniteness.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Motor Vehicles — Compulsory Motor Vehicle Insurance — Express Business.

Motor vehicles owned by express companies are excepted from the application of the compulsory insurance act.

FEB. 16, 1929.

HON. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — You request my opinion as to whether motor vehicles owned by a corporation engaged in the express business, and, so far as the statutes provide, under the supervision of the Department of Public Utilities, are outside of the application of the compulsory insurance act.

That act provides (G. L., c. 90, § 1A): —

“No motor vehicle or trailer, except one owned by a person, firm or corporation for the operation of which security is required to be furnished under section forty-six of chapter one hundred and fifty-nine, or one owned by any other corporation subject to the supervision and control of the department of public utilities or by a street railway company under public control, or by the commonwealth or any political subdivision thereof, shall be registered under sections two to five, inclusive, unless the application therefor is accompanied by a certificate as defined in section thirty-four A.”

The question is whether the fact that the jurisdiction of the Department of Public Utilities over express companies appears to be somewhat limited takes the case out of the words of the statute above quoted.

The provisions conferring jurisdiction upon the Department of Public Utilities are contained in G. L., c. 159, § 12, which reads as follows: —

“The department shall, so far as may be necessary for the purpose of carrying out the provisions of law relative thereto, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies furnishing or rendering any such service or services, in sections ten to forty-four, inclusive, collectively called common carriers and severally called a common carrier:

(a) The transportation or carriage of persons or property, or both, between points within the commonwealth by railroads, street railways, in this chapter called railways, electric railroads, trackless trolleys and steamships, including express service and car service carried on upon or rendered in connection with such railroads, railways, electric railroads, trackless trolleys or steamships.

(b) The carriage of passengers for hire upon motor vehicles as provided in sections forty-five to forty-nine, inclusive, of this chapter and section forty-four of chapter one hundred and sixty-one, but only to the extent provided in said sections.

(c) The operation of all conveniences, appliances, facilities or equipment utilized in connection with, or appertaining to, such transportation or carriage of persons or property or such express service or car service, by whomsoever owned or provided, whether the service be common carriage or merely in facilitation of common carriage.

(d) The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other

method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith."

G. L., c. 159, § 33, provides:—

"Every person doing an express business upon either a railroad or railway in the commonwealth shall annually transmit to the department a return on oath of his doings setting forth copies of all contracts made during the year with other persons doing a transportation or express business upon any railroad or railway in the commonwealth, and shall give complete information in reply to the questions presented in the form for such return which shall be prescribed by the department. A person neglecting to make such return or, if defective or erroneous, to amend it within fifteen days after a request so to do shall forfeit twenty-five dollars for each day during which such neglect continues."

Even if it were assumed that the Department, under chapter 159, has no supervision and control over express service except so far as it is rendered upon railroads or steamships, it would be difficult to say that the words of section 1A of chapter 90 are inapplicable, for those words apply to the corporation and not to the service. But, in fact, it seems that the supervision and control of the Department over express companies is not so confined [see G. L., c. 159, §§ 12 (c) and 33], and, in practice, the Department requires companies rendering returns under section 33 to give such information as cost and repairs of motor trucks.

In my opinion, the motor vehicles in question are excepted from the application of the insurance act by the express terms of section 1A.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Constitutional Law — Savings Bank Life Insurance — Statutory Limitations.

The Legislature may, without violating constitutional provisions, limit the amount of the hazard which savings banks as an entire group may venture upon lives of insureds.

FEB. 21, 1929.

HON. C. WESLEY HALE, *Senate Chairman, Committee on Insurance*.

DEAR SIR:—The Committee on Insurance, through you, has asked my opinion upon the following matter relating to savings bank life insurance:—

"Would the limitations, as proposed in document known as Senate 132, if enacted into law, violate any constitutional right of the citizens of this Commonwealth, and how, if at all, would your opinion differ if the life insurance limitation were changed from five thousand dollars to ten thousand dollars, the amount available at the present time?"

The proposed bill, Senate No. 132, is entitled "An Act relative to the amount of insurance which savings and insurance banks may pay upon the death of the insured," and reads as follows:—

"SECTION 1. Section ten of chapter one hundred and seventy-eight of the General Laws is hereby amended by adding at the end thereof the following:—Provided, that the maximum amount of insurance which may be issued to any one person by five or more such banks shall not

exceed in the aggregate five thousand dollars, exclusive of dividends or profits, and the maximum yearly payments to any one person under annuity contracts issued by five or more such banks shall not exceed four hundred dollars.

SECTION 2. This act shall take effect upon its passage."

The writing of policies of insurance and annuity contracts is a business so clothed with public interest that it may be regulated by the Legislature for the public welfare, under its general police power, in a wide variety of ways. Almost all such reasonable regulations interfere with perfect freedom of the exercise of the right to make contracts, both as to the individual insured and the insurer, but as a proper exercise of the police power such interference does not violate the constitutional guarantees of State constitutions or of the Federal Constitution. Such regulations, to be constitutional, must not be arbitrary or unreasonable.

The doing of an insurance business by savings banks was first authorized by the Legislature in 1907, and the manner and mode of conducting such business by these banks is regulated and limited in a wide variety of ways by enactments now embodied in G. L., c. 178, as amended. The system laid down by the Legislature heretofore for the conduct of the business by these banks differs in many particulars from that under which insurance companies are permitted to carry on business under the provisions of G. L., c. 175, as amended.

Among other regulations provided in G. L., c. 178, as amended, for the conduct of the business by savings banks, section 10 of said chapter now provides the following:—

"No savings and insurance bank shall write any policy binding it to pay more than one thousand dollars, exclusive of dividends or profits, upon the death of any one person, except for such amount, if any, as it may be bound to pay upon the death of such person under an employees' group policy, nor any annuity contract binding it to pay in any one year more than two hundred dollars, exclusive of dividends or profits."

The existing law thus limits the amount which any savings bank may hazard upon a single risk, either by way of a policy of insurance or a contract of annuity. The proposed bill limits the amount of the hazard which the savings banks engaged in this business, as an entire group, may venture upon a single risk. If such limitation be necessary to protect the interests of those seeking this particular form of insurance, as well as the insurers, as a provision making for the solvency of the insurers and the safety of the funds to which the insureds are to look for payment upon their contracts, it could not well be said that a legislative measure establishing such a limitation was unreasonable or arbitrary. The determination of the amount of such limitation best adapted to secure such solvency, if fixed by the sound judgment of the Legislature at either of the figures mentioned in your communication, could not, in view of the exercise of the judgment of the Legislature, be said to be arbitrary or unreasonable.

Whether such limitations as are created by the proposed bill are reasonable for accomplishing the purpose which I have above referred to is for the determination of the General Court. If it so determines, I cannot say that such a bill, if enacted into law, would be unconstitutional.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Retirement System — Penal Institutions Officer — Duration of Service.

The Commissioner of Correction may retire and place on the pension roll a penal institutions officer entitled to such retirement under G. L., c. 32, § 46.

FEB. 23, 1929.

MR. EDWARD C. R. BAGLEY, *Deputy Commissioner of Correction.*

DEAR SIR: — You have sent me the following communication: —

"I respectfully refer you to an opinion rendered by a former Attorney General, dated May 12, 1919, relative to the retirement status of a man employed at the Massachusetts Reformatory. This man will attain the age of seventy on January 27, 1929, and has been advised by the Board of Retirement that he must leave the service of the Commonwealth on that date.

In the light of the opinion above referred to will you be kind enough to advise me whether this man is entitled to be retired under the prison officers' retirement law, G. L., c. 32, § 46, or is ineligible to any retirement allowance, as assumed by the Board of Retirement."

You have also submitted to me certain correspondence, from which I assume the facts to be that the person referred to in your letter was first employed at one of the State penal institutions from June 1, 1890, until January 5, 1907; that he then resigned and was absent from the service until re-employed in such an institution on May 10, 1915, and that when so re-employed in 1915 he was over fifty-five years of age.

There can be no question but that the person referred to has been, since attaining the age of sixty-five, eligible to retirement from the service and to have his name placed upon a pension roll, with the approval of the Governor and Council, under the provisions of G. L., c. 32, §§ 46-48, as amended, which relate peculiarly to prison employees. It is specifically provided in section 47 that in computing the twenty years of service for the Commonwealth, which render a prison employee eligible to the pension mentioned in section 46, all the time which he has served in the penal institutions of the State shall be counted, irrespective of whether such service was continuous or not. An opinion of one of my predecessors in office, rendered to you May 12, 1919 (not published), relative to a similar case, makes this plain; but such opinion did not hold that because an employee or officer of a penal institution was eligible for retirement under the particular provisions now embodied in G. L., c. 32, §§ 46-48 (formerly St. 1908, c. 601, as amended), he was also entitled, in addition to such pension, to receive a retiring allowance, or that he was eligible to be a member of the State Retirement Association if over fifty-five years of age at the time of his last re-entry into the service of the Commonwealth. Moreover, it has been held in an opinion of a former Attorney General (V Op. Atty. Gen. 456) that where an employee has ceased by voluntary retirement to hold a position in the service of the State and subsequently re-enters it, his term of service, for the purposes of obtaining the benefits of the retirement system, begins with the date of his re-employment, and that, as the continuity of his service has been broken by his resignation, the term of his prior employment is to be disregarded by the Board of Retirement.

The first plan for a comprehensive retirement system for the em-

ployees of the Commonwealth was enacted by St. 1911, c. 532, and after a series of amendments it was consolidated in G. L., c. 32, with other provisions relative to pension systems for certain classes of employees, enacted by other statutes, among which were the provisions for employees in penal institutions, contained in St. 1908, c. 601, as amended. Employees such as those in penal institutions, as the law now stands, are, when eligible to the benefits of the State retirement law, given the advantage of an option between retiring under the general provisions of the retirement law or under those applicable to their particular class. V Op. Atty. Gen. 634. Their eligibility to the advantages of the general retirement system is governed by the provisions applicable directly thereto, and particular provisions of those sections of the statutes which relate to eligibility to special pension funds do not control or govern their eligibility to the benefits of the general retirement system.

The person to whom you refer in your letter re-entered the service of the Commonwealth in its penal institutions in 1915. He was then over fifty-five years of age. Having attained such age he was not then eligible to membership in the State Retirement Association or entitled to the benefits of the retirement system in that respect. St. 1911, c. 532, § 3 (2), as amended, now G. L., c. 32, § 2 (2) and (3). He was, however, as I have pointed out, eligible to the benefits of the pension provided for penal institution employees by St. 1911, c. 608, now G. L., c. 32, §§ 46-48.

He was also subject to the provisions of St. 1911, c. 532, § 3, as amended, now G. L., c. 32, § 2 (2), to the effect that "no such person (employee) shall remain in the service of the Commonwealth after reaching the age of seventy."

This provision of chapter 32 applies, as part of the comprehensive scheme for the regulation of the retirement of persons in the service of the Commonwealth, to all such persons alike, irrespective of whether or not they are entitled to the advantage of a pension.

The provisions of G. L., c. 32, are intended to, and do, forbid a person employed by the Commonwealth from remaining in the service after reaching the age of seventy (see opinion rendered the Commissioner of Public Works March 19, 1921, not published), with the exception of those persons mentioned in G. L., c. 32, § 2 (3), namely, an "officer elected by popular vote" or "any employee who is or will be entitled to a non-contributory pension from the commonwealth." Admittedly, the person in question does not fall within the exception extended to elective officers nor does he fall within the second exception. It cannot be said that under the provisions of G. L., c. 32, §§ 46-48, "he is or will be entitled to a non-contributory pension." The pension provided for by section 46 is non-contributory, but it cannot presently be said that he "either is or will be entitled" thereto within the meaning of said chapter 32, section 2 (3). It is optional with the Commissioner of Correction to retire him from service and place him upon a pension roll, and the act of the Commissioner in this respect is subject to the approval of the Governor and Council (see V Op. Atty. Gen. 634).

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Motor Vehicles and Trailers — Length — Permits.

No commercial motor vehicle with an extreme over-all length of twenty-eight feet may be operated upon a State highway without a special permit.

Groups of vehicles having altogether an over-all length of twenty-eight feet do not require a special permit.

FEB. 23, 1929.

HON. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — You have directed my attention to G. L., c. 90, § 19, which, as finally amended by St. 1927, c. 72, reads as follows: —

“No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way, or, in case of a state highway or a way determined by the department of public works to be a through route, from the commissioner of public works. The aforesaid dimensions of width and length shall be inclusive of the load.”

You have asked my opinion as to its interpretation in connection with the issuing of the special permits.

Gen. St. 1919, c. 252, §§ 2 and 3, which was the original act dealing with the subject matter of said section 19, was as follows: —

“SECTION 2. The Massachusetts highway commission, as to state highways, and the county commissioners, as to county highways, may likewise grant permits under this act.

SECTION 3. Any person violating any provision of this act, or of the terms of any permit granted hereunder, shall be punished by a fine of not more than one hundred dollars for each offence.”

The provisions of said Gen. St. 1919, c. 252, were originally embraced in G. L., c. 90, § 19, in substantially the same terms, in the following words: —

“No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way, except that such a vehicle exceeding twenty-eight feet may be operated when a special permit so to operate is secured from the superintendent of streets, selectmen, or local authorities, having charge of the repair and maintenance of highways in the several cities and towns, or in the case of state highways, from the commissioner of public works, and in the case of other highways, from the county commissioners having jurisdiction thereof; provided, that the combined length of such a vehicle and trailer or trailers, or of two or more such vehicles fastened together in series, with or without trailers, may exceed twenty-eight feet, but in no event shall such combined length exceed sixty-five feet. All of the aforesaid dimensions shall be inclusive of the load.”

The words of the proviso as contained in said section 19 were omitted when it was amended by St. 1925, c. 180, § 1, which read as follows: —

“SECTION 1. Chapter ninety of the General Laws is hereby amended by striking out section nineteen and inserting in place thereof the fol-

lowing:— *Section 19.* No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches, shall be operated on any way. No commercial motor vehicle, motor truck or trailer, the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way, or, in case of a way determined by the department of public works to be a through route, from the commissioner of public works. The aforesaid dimensions of width and length shall be inclusive of the load."

Nor have the words of the proviso been restored by subsequent legislation.

It follows, then, from the wording of G. L., c. 90, § 19, as it now stands amended, that any commercial motor vehicle, motor truck or trailer, the extreme over-all length of which exceeds twenty-eight feet, may not be operated, without a special permit from you as Commissioner of Public Works, upon a State highway or a way determined to be a through route, and the necessity for such a permit is not removed by the fact that such a vehicle is fastened together with others, irrespective of what the combined length of all the vehicles may be. Nor does a single vehicle, of the types mentioned in the statute, which is not itself over twenty-eight feet in length require a special permit for operation even if it be fastened together with other vehicles, all of which together have a length of over twenty-eight feet. Nor does a group of vehicles fastened together, none of the units of which exceeds twenty-eight feet in length, require a special permit.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Fire Marshal — Licenses and Permits — City Council.

Licenses and permits under G. L., c. 148, § 31, as amended, and licenses under G. L., c. 148, § 14, as amended, may be issued by a head of the fire department and a city council, jointly, if they have been designated for that purpose by the Fire Marshal.

FEB. 25, 1929.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR:— You have asked my opinion relative to delegation of authority by the Fire Marshal to issue licenses and permits under G. L., c. 148, § 31, as amended, and to issue licenses under G. L., c. 148, § 14, as amended. Your question reads as follows:—

"The question upon which your opinion is desired is: Can a designation be made by the Marshal including the city council and the head of the fire department to grant such licenses, so that one document only will be required?"

Section 14 provides for the issuance of permits by the Marshal "or by some *official* designated by him for that purpose." Section 31 provides for delegation by the Marshal to "the head of the fire department or to any other designated *officer*" in a city or town in the metropolitan district.

The terms "official" and "officer," as used in these two sections, are, in my opinion, to be construed as including the plural. See G. L., c. 4,

§ 6, cl. 4th. In *Foss v. Wexler*, 242 Mass. 277, the delegation was to the mayor and the board of street commissioners, and no question was raised on this point.

Nor do I think that the use of the word "or" in section 31 excludes the possibility of delegation to a head of the fire department and some other official jointly. The word "or" may be given a conjunctive as well as disjunctive meaning, and should be so construed here, for certainly it was not intended that, although a delegation might be made to any two other officials jointly, the head of the fire department could be designated only in the event that he should act alone. Nor could it have been intended that the power to make a joint delegation, including the head of the fire department, should be different under section 31 from what it is under section 14.

I am not certain what is meant by the last part of your question, viz.: "so that one document only will be required." If by "document" you refer to notice of the designation, I would say that written notice of the designation must be given to the head of the fire department and also to the city council. If you refer to the license or permit issued by the officials designated, there not only may be, but should be, only one document issued by the head of the fire department and the city council jointly.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Food — Fish — Cold Storage — Advertising.

The provisions of G. L., c. 94, § 78, as to advertisements, do not require that cold storage fish shall be designated as such, but they do forbid representation of the commodity as fresh fish.

The word "fish," as used in St. 1928, c. 40, § 1, includes all forms of fish and shellfish and crustacea.

FEB. 25, 1929.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR:— You have asked my opinion as to whether or not, in advertising or other forms of publicity, cold storage fish must be so designated as to distinguish it from fresh fish.

G. L., c. 94, § 78, is as follows:—

"No person shall sell, offer or expose for sale fish which have been held in cold storage, without notice to purchasers that such fish have been so held, nor without the conspicuous display of a sign marked 'Cold Storage Fish'; nor shall any person represent or advertise or sell cold storage fish as fresh fish."

G. L., c. 94, § 74, as amended by St. 1922, c. 17, § 1, provides, in part, as follows:—

"All fresh food fish before being offered for sale or placed in cold storage shall be graded as follows:—

No person shall represent, sell, offer for sale or advertise fresh or frozen fish of any grade under any but the truthful and correct name and grade or corresponding term for such fish."

The words "advertising or other forms of publicity," as used in your question, may be somewhat ambiguous, and you may mean to include in

these words some specific case in which it would be possible to construe the form of publicity as an offer; in which case, of course, notice that the fish offered has been held in cold storage is required by the statute. An advertisement, however, in the sense in which that word is commonly used, will usually be construed by the courts, not as an offer, but as an invitation for offers. See Williston on Contracts, § 27. And, in any event, it is clear that the word "advertise," as used in the two sections of the statute above quoted, is used as distinct from "offer." Assuming, then, as I must, that your question refers only to advertisements or forms of publicity which are not in law offers, I answer your question in the negative.

The requirement of section 78 as to advertisements is merely that cold storage fish shall not be represented as fresh fish. An advertisement of fish, without more, is not a representation that it is fresh fish, as distinguished from cold storage fish. Nor is there anything in section 74 which leads to a different result. The words "name" and "grade" have no reference, as the preceding part of section 74 clearly shows, to any distinction between fresh and cold storage fish.

You also ask my opinion as to whether or not the word "fish," as used in St. 1928, c. 40, § 1, includes all forms of fish, such as fresh, frozen, cold storage, salted, pickled or otherwise preserved, and all shellfish and crustacea. Said section, amending G. L., c. 94, § 82, makes it criminal to sell for food purposes fish which is unwholesome or unfit for food. I think that shellfish and crustacea were intended to be, and well may be, included under the term "fish" as used in this statute. Provisions relating to these types are contained in G. L., c. 130, entitled "Fisheries."

See also *Weston v. Sampson*, 8 Cush. 347. Nor do I think that this statute makes any distinction as between fresh fish and fish that is salted, pickled or preserved. The purpose of the statute, namely, to guard against the sale of impure food, applies to all equally. Accordingly, I answer your second question in the affirmative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Trust Company — Increase of Capital Stock — Stockholder.

Stockholders of trust companies may, under G. L., c. 172, § 18, as amended, and G. L., c. 156, §§ 41 and 44, authorize an increase of capital stock under such terms and in such manner as the directors or officers may determine.

MARCH 22, 1929.

Hon. ROY A. HOVEY, *Commissioner of Banks*.

DEAR SIR: — You have asked my opinion as to whether stockholders of a trust company have power under the terms of G. L., c. 172, § 18, as amended, to authorize its board of directors or officers to dispose of an increase of capital stock under such terms and in such manner as the board or officers may determine.

G. L., c. 172, § 18, as amended by St. 1926, c. 239, as it relates to the increase of capital stock by trust companies, reads as follows: —

"Any such corporation may, subject to the approval of the commissioner, increase its capital stock in the manner provided by sections forty-one and forty-four of chapter one hundred and fifty-six."

G. L., c. 156, §§ 41 and 44, read as follows:—

"SECTION 41. Every corporation may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, authorize an increase or a reduction of its capital stock and determine the terms and manner of the disposition of such increased stock, or authorize such terms and manner of disposition to be determined in whole or in part by the board of directors or officers of the corporation, may authorize a change of the location of its principal office or place of business in this commonwealth or a change of the par value of the shares of its capital stock, or may authorize proceedings for its dissolution under section fifty of chapter one hundred and fifty-five. Such increased stock may in whole or in part be disposed of without being offered to the stockholders. Any corporation having authorized shares with par value may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, including in any event a majority of the outstanding stock of each class affected, change such shares or any class thereof into an equal or greater number of shares without par value, or provide for the exchange thereof pro rata for an equal or greater number of shares without par value; provided, that the preferences, voting powers, restrictions and qualifications of the outstanding shares so changed or exchanged shall not be otherwise impaired or diminished without the consent of the holders thereof.

SECTION 44. If an increase in the total number of the capital stock of any corporation shall have been authorized by vote of its stockholders in accordance with section forty-one, the articles of amendment shall also set forth— (a) the total amount of capital stock already authorized; (b) the amount of stock already issued for cash payable by instalments and the amount paid thereon; and the amount of full paid stock already issued for cash, property, services or expenses; (c) the amount of additional stock authorized; (d) the amount of such stock to be issued for cash, property, services or expenses, respectively; (e) a description of said property and a statement of the nature of said services or expenses, in the manner required by section ten."

The statute which first provided for increase of capital stock of trust companies, St. 1905, c. 189, was couched in the following language:—

"A trust company may, subject to the approval of the board of commissioners of savings banks, increase its capital stock to the maximum amount allowed by section five of chapter one hundred and sixteen of the Revised Laws, in the manner provided for the increase of capital stock of business corporations under the provisions of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, and of acts in amendment thereof, relative to the increase of capital stock; *provided, however*, that no such stock shall be issued by any trust company until the par value thereof shall be fully paid in in cash."

Provision is made in the General Laws for a mode of disposition of increased capital stock with reference to corporations not subject to G. L., c. 156, when no other provision is made by law with relation thereto. This is contained in G. L., c. 155, § 20, and reads as follows:—

"If a corporation, not subject to chapter one hundred and fifty-six, increases its capital stock and no other provision therefor is made by law, its directors shall forthwith give written notice thereof to each stockholder who was such at the date of the vote to increase, stating the amount of the increase, the number of shares or fractions of shares of the new stock which such stockholder is entitled to take, and the time, not less than thirty days after the date of such vote, within which such new stock shall be taken; and, within said time, each stockholder may take at par his proportion of such new shares, according to the number of his shares at the date of such vote to increase. If, at the expiration of said time, any shares remain untaken, the directors shall sell them by public auction for the benefit of the corporation at not less than the par value thereof."

I am of the opinion that it was the intent of the Legislature, in providing by G. L., c. 172, § 18, as amended, that a trust company might increase its capital stock "in the manner provided by" G. L., c. 156, §§ 41 and 44, to make applicable to such company the provisions of said sections 41 and 44, not only as they refer directly to the method of increasing stock but as they refer to the manner of distributing or disposing of the same. The terms and manner of disposition are such an integral part of an increase of stock that a reference to increase of capital stock in the "manner provided" in sections 41 and 44 would seem, in the ordinary use of words, to include both, as set out in the designated sections. It follows that the terms of G. L., c. 155, § 20, are not applicable to increase of stock by a trust company, for which provision is made by law under said G. L., c. 156, §§ 41 and 44, incorporated by reference in G. L., c. 172, § 18, as amended.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Division of Animal Industry — Rules — Poultry — Animals.

G. L., c. 129, § 2, does not give authority to the Division of Animal Industry to make rules as to giving certificates as to the condition of poultry or animals.

MARCH 27, 1929.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation*.

DEAR SIR: — You ask my opinion as to the validity of certain proposed rules of the Division of Animal Industry, one set relating to a disease of poultry known as salmonella pullorum, and the other to a disease of cattle known as Bang bacillus.

The proposed rules provide, in substance, that if an owner elects to submit his flock or herd to certain blood tests in a laboratory approved by the Director, and if such tests show freedom from the disease in question, and if the owner further observes certain requirements as to care and maintenance, the Division will issue to him a certificate that his flock or herd is free of the disease in question.

The power of the Division to make rules is set forth in G. L., c. 129, § 2, as follows: —

"The director may make and enforce reasonable orders, rules and regulations relative to the following: the sanitary condition of neat cattle, other ruminants and swine and of places where such animals are kept;

the prevention, suppression and extirpation of contagious diseases of domestic animals; the inspection, examination, quarantine, care and treatment or destruction of domestic animals affected with or which have been exposed to contagious disease, the burial or other disposal of their carcasses, and the cleansing and disinfection of places where contagion exists or has existed. No rules or regulations shall take effect until approved by the governor and council."

Nothing therein confers power to issue certificates, and such power cannot, in my opinion, be implied. The Legislature has specifically provided in section 20 that inspectors shall issue certificates in certain cases, but section 20 gives no authority for the procedure proposed. Moreover, it would appear that under the proposed rules the Division would have no first-hand knowledge of the fact which it undertook to certify. The blood tests are not made by the Division, nor is any provision made for the Division to ascertain the existence of the other facts which are supposed to exist in order to make a certificate proper.

As to the proposed set of rules relating to poultry, there is, in my opinion, an additional reason why they are invalid. The words "domestic animals," as used in G. L., c. 129, § 2, do not, I think, include poultry. The Division of Animal Industry succeeded to the powers of the Department of Animal Industry (Gen. St. 1919, c. 350, § 40), which succeeded to the powers of the Board of Cattle Commissioners and the Cattle Bureau (St. 1912, c. 608). The Cattle Bureau was given the powers of the Board of Cattle Commissioners (St. 1902, c. 116). The power of the Board of Cattle Commissioners to make rules is expressed in P. S., c. 90, § 13, as follows:—

"When such commissioners make and publish any regulations concerning the extirpation, cure, or treatment of animals infected with or which have been exposed to any contagious disease, such regulations shall supersede those made by mayors and aldermen and selectmen; and mayors and aldermen and selectmen shall carry out and enforce all orders and directions of the commissioners to them directed."

The authority here given to the Cattle Commissioners is over the same subject matter referred to in section 1 of said chapter 90, in the following words: "The mayor and aldermen of cities and the selectmen of towns, in case of the existence in this commonwealth of the disease called pleuropneumonia among cattle, or farcy or glanders among horses, or any other contagious or infectious disease among domestic animals, shall cause" the animals to be segregated, etc. It would seem that the term "domestic animals," as here used, was not intended to include poultry. This view is confirmed by the words of section 7, which provide that "they may cause every animal infected with any such disease, or which has been exposed thereto, to be forthwith branded upon the rump with the letter P". There is nothing in subsequent statutes tending to show that the term "domestic animals" was intended to be given a new meaning which might confer on the Cattle Commissioners the power or duty of passing rules affecting poultry. This is further confirmed, moreover, by the failure to include any poultry disease in the list of contagious diseases enumerated in R. L., c. 90, § 28 (St. 1911, c. 6).

Furthermore, it is to be noted that in a number of instances the Legislature has used the term "birds or poultry" in addition to "animals," so indicating that the word "animals" is not sufficiently inclusive. Thus in G. L., c. 180, § 2, "for encouraging the raising of choice breeds of domes-

tic animals and poultry"; in G. L., c. 131, § 2, "preservation of birds and animals"; in G. L., c. 130, § 2, "the laws relating to fish, birds, mammals and game." I do not mean to intimate that there may not be statutes in which the word "animals" may be construed as including birds or poultry; but, in my opinion, it is not so to be construed in G. L., c. 129, § 2.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Public Safety — Compressed Air Tank — Operation of Pneumatic Machinery.

A compressed air tank used merely for starting in initial motion one piston of a Diesel engine is comprehended within the meaning of G. L., c. 146, § 34, relative to tanks for the storing of compressed air.

MARCH 28, 1929.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You have asked my opinion upon the following matter: —

"Whether a compressed air tank setting in initial motion one piston of a Diesel engine may be considered as operating pneumatic machinery as specified in the law."

You have advised me of the following facts in connection therewith: —

"The method of using the compressed air contained in the tank is as follows:

For the purpose of starting the engine in the first instance, the compressed air contained in the tank is applied to a cylinder of the engine, compressing the air therein to a temperature of approximately 500 degrees Fahrenheit. A portion of oil at this instant is injected into the cylinder, the heat igniting the oil and causing combustion and explosion. The expansion of this cylinder compresses the next in a similar manner, and so on. The tank is used for the sole purpose of starting the engine. This method has been used for more than twenty-five years, but not to any considerable extent until about 1914, since which time these engines and tanks have been gradually coming into considerable use in place of steam engines."

The pertinent provisions of the statutes are as follows, G. L., c. 146, § 34: —

"No person shall install or use, or cause to be installed or used, any tank or other receptacle, except when attached to locomotives, street or railway cars, vessels or motor vehicles, for the storing of compressed air at any pressure exceeding fifty pounds per square inch, for use in operating pneumatic machinery, unless the owner or user thereof shall hold a certificate of inspection issued by the division, certifying that the said tank or other receptacle has duly been inspected within two years, or unless the owner or user shall hold a policy of insurance upon the said tank or other receptacle issued by an insurance company authorized to insure air tanks within the commonwealth, together with a certificate of inspection from an insurance inspector who holds a certificate of competency described in section sixty-two."

The Attorney General does not pass upon questions of fact, but if, as would appear from the statements in your letter, the motive power of the Diesel engine is not compressed air, the mere fact that compressed air from tanks is used in the initial process of starting the engine would, in my opinion, not be sufficient so that it could be said that a tank employed solely for the purpose of furnishing compressed air for such starting purposes was a tank for the storing of compressed air "for use in operating pneumatic machinery," within the meaning of the statute. The mere starting of machinery whose motive power thereafter is not pneumatic cannot fairly be said to be comprehended by the employment of the words "*use in operating pneumatic machinery.*" The words "operating" and "starting," as the former is used in the statute, are not synonymous. The intent of the Legislature, as expressed in the words of the statute, appears to be to provide for the adequate safeguarding of tanks storing compressed air which were to be used for something more than brief periods.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Water Supply — Cities.

The Legislature may constitutionally redistribute the burdens assumed under an agreement between different cities relative to a water supply.

APRIL 11, 1929.

Committee on Water Supply.

GENTLEMEN: — You request my opinion as to whether House Bill No. 932, entitled "An Act relative to water supply for the cities of Salem and Beverly," would, if enacted, be constitutional.

St. 1913, c. 700, § 3, provides that the payment of certain expenses incurred in connection with a joint water supply for Salem and Beverly should be apportioned two-thirds and one-third. The proposed bill amends this section by changing the apportionment to three-fourths for Salem and one-fourth for Beverly.

The argument that this proposed change is unconstitutional is based upon the contention, made in behalf of the city of Salem, that by action taken by the two cities under earlier statutes, which permitted Beverly to acquire a one-third interest in the water supply of Wenham Lake, a contract was created between the two cities which binds Beverly to bear one-third of the burden of providing and maintaining a joint water supply, and that the change proposed in the present bill impairs the obligation of that contract.

By St. 1864, c. 268, Salem was authorized to take, and did take, for the purpose of a water supply, Wenham Pond, in Wenham and Beverly, and certain lands and water rights in connection therewith. By section 15 of said act towns upon the line of works, including Beverly, were entitled to a reasonable use of the water upon paying an equitable compensation therefor. See also St. 1869, c. 380; St. 1877, c. 144.

By St. 1885, c. 294, Beverly was authorized to supply itself with water, and for that purpose to draw directly from Wenham Pond so much of the waters thereof and of the waters which flow into and from the same "as it may require." By section 10 it was provided that upon the establishment of independent works by Beverly, the town should pay to Salem

one-third of the expense theretofore sustained by Salem in connection with securing and preserving the water supply in Wenham Pond and also one-third of the expenses thereafter incurred by Salem at Beverly's request in securing and preserving the purity of the waters of said pond; and upon the payment by Beverly of one-third of the expense theretofore incurred, Salem should record a declaration of trust in or concerning "said lands, water rights and easements," declaring that "one undivided third part of the same is held in trust" for Beverly, and that Beverly is entitled "to the beneficial enjoyment of said one undivided third part thereof." Beverly paid the one-third, and Salem in 1888 recorded the declaration of trust, as provided for by the statute (Essex Deeds, book 1217, page 128).

By section 11 of said act of 1885, it was further provided that the town of Beverly may draw from said pond "such water as it may require," without compensation to the city of Salem; but that if for any reason the supply in said pond were "insufficient to supply the needs of said city and its inhabitants and of said town and its inhabitants," thereafter, "so long as the supply remains insufficient as aforesaid, said town shall take from said pond only so much water as shall bear the same proportion to the water taken by said city from said pond as the number of inhabitants of said town bears to the number of the inhabitants of said city."

By St. 1893, c. 364, Salem was authorized, for the purpose of providing an additional water supply for Salem and Beverly, to take certain additional waters and to convey them into Wenham Lake; and by section 10 it was provided that upon payment by Beverly of one-third of the expense, Salem should record a declaration of trust, declaring that one undivided third thereof was held in trust for Beverly and that Beverly is entitled to the beneficial enjoyment of the same. It is my understanding that such taking was made, that Beverly made the payment and that Salem filed the declaration of trust.

St. 1913, c. 700, created the Salem and Beverly Water Supply Board. By section 4 said board was authorized, for the purpose of providing for the supply for Salem and Beverly, to acquire waters from the Ipswich River, and to construct works and acquire other rights in connection therewith; and section 5 provided that such property and rights should vest in Salem and Beverly "as tenants in common in the proportion named in section three hereof" — *i.e.*, in the proportion of two-thirds and one-third. Payment of expenses so incurred by the board was to be made from a fund, established by section 16, which was created from the proceeds of the issuance of bonds and notes by Salem and by Beverly as requested by the board, "provided, that at no time shall said city (Beverly) be requested to issue said bonds or notes to an amount greater or less than one-half the amount so requested in the case of the city of Salem" (§ 14).

As to expenses incurred by the board in maintenance, care and operation, it is provided by section 19 that these shall be paid by the respective cities from current revenues derived from water rates or taxation, in the proportion named in section 3 — *i.e.*, two-thirds and one-third, for a term of five years; but that every five years thereafter the board shall determine the proportion, subject to right of appeal to the Superior Court.

Section 3 of said act of 1913, which the present bill aims to amend by changing the proportion from two-thirds and one-third to three-fourths and one-fourth, reads as follows: —

"All expenses, liabilities and damages incurred by said board in carrying out the purposes of this act shall be paid, except as hereinafter provided, by said cities in the proportion of one third by the city of Beverly and two thirds by the city of Salem, and payment shall be made in the manner provided in section seventeen from the fund established by section sixteen hereof."

The proposed amendment effects no change in the proportion of ownership in any property heretofore acquired, nor does it involve any readjustment of payments already made. Neither does it affect in any way the existing liability of the two cities for care and maintenance, either of property now owned in common or hereafter to be acquired, for that is determined by section 19 of the act. The sole effect, therefore, of the proposed change would be to impose a different allocation of the expense in the event that the board shall hereafter acquire additional property or construct additional works, as, for instance, a new reservoir at Putnamville, to which you refer.

If the Legislature decides that, as to this, justice requires a different apportionment of expense from that which has previously been applied in connection with the joint water supply of the two cities, I can see no constitutional objection to the enactment of a law to that effect. The fact that in the case of this proposed reservoir at Putnamville the water will presumably be drawn from there into Wenham Lake, does not, in my opinion, alter the case, especially since the right of the respective cities to draw water from Wenham Lake is not fixed by any apportionment, except in the unusual event of a shortage. (St. 1885, c. 294, § 11.) Under ordinary circumstances the right of the city of Beverly is to draw such water "as it may require" (St. 1885, c. 294, §§ 2 and 11), and the right of the city of Salem is no doubt the same.

Moreover, the Legislature has very broad powers in making readjustments of the rights and property of municipal corporations. In *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 521, the court said:—"Upon the division of counties, towns, school districts, public property with the public duty connected with it is often transferred from one public corporation to another public corporation." As the court in this case and in many others points out, the question is very different from that involved where the rights of individuals or quasi-public corporations are concerned.

In *Scituate v. Weymouth*, 108 Mass. 126, 131, the court said:—"It was an exercise of the authority of the legislature to distribute public burdens and duties. It is clear that, under the same constitutional power, it had the right to change the law and redistribute these public burdens, if from a change of circumstances or other reason it deemed it just and proper so to do."

See also *Cambridge v. Lexington*, 17 Pick. 222; *Attorney General v. Cambridge*, 16 Gray, 247; *Turners Falls Fire District v. Millers Falls Water Supply District*, 189 Mass. 265; *City of Boston, petitioner*, 221 Mass. 468; *Opinion of the Justices*, 234 Mass. 612, 616; *Selectmen of Brookline, petitioners*, 236 Mass. 260.

Indeed, the Legislature, by the act of 1913 here under consideration, has by section 19 apparently made provision for changing the distribution of the burden of care and maintenance from two-thirds and one-third to such proportion as the board should, after a five-year term,

decide to be proper; and the constitutionality of that provision seems not to have been questioned.

I would suggest, however, that House Bill No. 932 seems inadequate to effect the change intended, for the reason that payments are to be made from the fund, and section 14 of said act of 1913 would still provide that Beverly's contribution to the fund should be one-half that of Salem. If, therefore, the Legislature desires to change the allocation, section 14 and perhaps other sections of the act should be amended, in addition to section 3.

You also ask whether the city of Salem now has the legal right to take an unlimited quantity of water from Wenham Lake, which would prevent the city of Beverly from taking one-third of the water of said lake for water supply purposes. The answer to this question depends upon whether Beverly requires one-third of the water. As already stated, either city has the right to take as much as it requires, except in the event of a shortage, when the right is limited as provided in St. 1885, c. 294, § 11.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Constitutional Law — Charitable Trust Funds — Cy Pres.

An act is an unconstitutional invasion by the Legislature of the judicial function if it attempts to alter a trust agreement relative to the application of funds for a charitable purpose.

APRIL 11, 1929.

Mr. ELMER L. McCULLOCH, *House Chairman, Committee on Towns*.

DEAR SIR: — You have asked my opinion as to whether House Bill No. 737 would, if enacted into law, be constitutional. The act authorizes the Trustees of the School Fund in the Town of Hopkinton, a corporation organized under the provisions of an act approved June 17, 1820, to transfer and convey all its property to the town of Hopkinton, which, acting through its school committee, shall receive and apply said funds upon the same trusts as those upon which said trust funds and property are now held. The act further provides that the corporation shall thereupon be dissolved.

The act of 1820 creates the present trustees as a corporation for the purpose of holding and applying certain funds for school purposes. Those funds were apparently originally provided by certain public spirited inhabitants interested in the schools of the town, and the act of 1820 created a method of administering the fund, which method I assume to have been in conformity with the donors' wishes. The persons interested in the present act were not able definitely to trace the original source and history of this fund, and a somewhat limited investigation by this office has not aided materially. The question is therefore treated as if there was, prior to 1820, a gift for charitable uses to be administered for the purposes and in the manner described by the act of 1820.

If the act is unconstitutional, it is because of one or more of the following reasons: —

1. It impairs the obligation of the contract between the State and the corporation.
2. It impairs the obligation of the contract between the corporation and the donor or donors of the fund.
3. It is an attempted exercise of the judicial power by the Legislature.

1. The Legislature may not alter or repeal the charter of a corporation issued prior to 1831 without its consent. The present act, however, is dependent upon the assent of the corporation, and therefore cannot be said to be objectionable on the first ground.

2. It has repeatedly been held that a gift to a charitable corporation constitutes a contract between the corporation and the donor, and that any act impairing this agreement violates the Constitution of the United States. It is very probable that this act, dissolving the corporation by whom the trust is administered and causing the funds to be turned over to the town, may be contrary to the wishes and intent of the donor. It is not unlikely that the donor intended and desired that the management of the fund should be left in the hands of private persons rather than public officers, who might be influenced by political and personal motives. Assuming that the act of 1820 expresses the intent of the donor or donors of this fund, I am of the opinion that the constitutionality of this act would be open to grave doubt upon this ground.

3. Any material change in the objects of a charity or the agents by whom it is to be administered must be made by the courts, and then only if the original purposes are impossible or impracticable; further, the court must also find a dominant or general charitable intent on the part of the donor which is consistent with the contemplated changes. This action on the part of the court is generally referred to as the application of the *cy-pres* doctrine, and is exclusively a judicial function. *Cary Library v. Bliss*, 151 Mass. 364; *Opinion of the Justices*, 237 Mass. 613, 617.

The Legislature has a somewhat vaguely defined power over charitable trusts held by municipalities, and may authorize the conversion of real estate into personalty in certain cases, but beyond this, action in any given case which alters the original gift must be had by the judicial department. The court, in the case of *Ware v. Fitchburg*, 200 Mass. 61, decided that the Legislature had power to determine by statute who should be the agent of the city to administer a charitable fund left to it; the case does not hold that the Legislature may change the trustee or terminate a charitable corporation, and no case has come to my attention where this was properly done by the Legislature.

It follows that the act, in so far as it attempts to alter the trust agreement, is an unconstitutional invasion by the Legislature of an exclusively judicial function.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Public Health — Local Board of Health — Inspector — Appointment.

A city manager, in lieu of a mayor, has the duty to nominate an inspector of slaughtering to the Department of Public Health, but the approval of such nomination by the Department alone constitutes the appointment of the person so nominated.

APRIL 18, 1929.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have asked my opinion upon the following question:—

“Will you kindly inform me whether or not the city charter of Fall River removes from the board of health of Fall River the right to make a

nomination to this Department of a person for the position of slaughtering inspector, and, after such nominee has been approved, the right to make the appointment?"

You have advised me in connection with your inquiry that you have received the following communication from the city manager of Fall River:—

"APRIL 6, 1929.

GEORGE H. BIGELOW, M.D., *Commissioner of Public Health, State House, Boston, Massachusetts.*

DEAR SIR:—The local board of health has recommended the appointment of Edward F. Carey, V.S., as inspector of slaughtering for the city of Fall River.

I do hereby notify you that under the present city charter it is mandatory for all appointments to be made by the city manager. Therefore I have on this date appointed Edward F. Carey, V.S., to said position.

Respectfully yours,

EDWARD F. HARRINGTON,
City Manager."

The government of the city of Fall River is now carried on under Plan D, as set forth in G. L., c. 43, §§ 79-92. Under this plan it is provided that there shall be a "city manager" (§ 89), and he is given the authority, among other things, to "appoint and remove all heads of departments, superintendents and other employees of the city" (§ 90).

G. L., c. 43, §§ 79-92, providing for a special plan of city government, were not intended by the Legislature to override other existing provisions of the General Laws relative to appointments.

G. L., c. 129, § 15, provides as follows:—

"The mayor in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the director. In cities at least one such inspector shall be a registered veterinary surgeon."

As has been said with relation to animal inspectors generally, in an opinion given to the Commissioner of Conservation by my immediate predecessor in office (Attorney General's Report, 1928, pp. 69, 70):—

"Section 15 places an affirmative duty upon mayors and selectmen to nominate inspectors, and provides that the nominee shall not be appointed until approved by the Director of Animal Industry."

Approval of nominations of such inspectors as are termed inspectors of slaughtering rests with the Department of Public Health instead of with the said Director, by virtue of the terms of G. L., c. 94, § 128, which are as follows:—

"For the purposes of sections one hundred and nineteen, one hundred and twenty-five to one hundred and twenty-seven, inclusive, and one hundred and forty-seven, said inspectors shall be appointed and compensated, and may be removed, in the manner provided for inspectors of animals, under sections fifteen to seventeen, inclusive, of chapter one hundred and twenty-nine, except that in respect to such first named inspectors, local boards of health and the department of public health

shall perform the duties and exercise the authority imposed by said sections upon the aldermen or selectmen and upon the director of animal industry, respectively, as to inspectors of animals."

"First named inspectors," in said section, as appears by reference to the earlier sections of the same statute, are what are commonly termed inspectors of slaughtering, and as to them the Department of Public Health exercises a power of approving their nominations similar to that given to the Director with relation to other inspectors.

G. L., c. 94, § 126, refers to "an inspector appointed by the local board of health" as one who performs duties with relation to slaughtering. This may give rise to some confusion, which appears to result from the codification of the General Laws in 1921. Prior to such codification R. L., c. 90, § 12, had provided that "the mayor and aldermen in cities" should nominate inspectors of slaughtering. As the local boards of health were given authority to perform the duties of aldermen, they exercised a part, at least, in the power to appoint such inspectors. As the laws stand since the enactment of the General Laws, the power to nominate such inspectors is vested by said G. L., c. 129, § 15, in the mayors of cities.

Although the power of appointing the employees of cities under Plan D (G. L., c. 43, §§ 90, 91), has been taken from the mayor and vested in the city manager, there is not such repugnancy between G. L., c. 43, §§ 90 and 91, and G. L., c. 129, § 15, as works an implied repeal of the latter section or renders it inapplicable to the cities operating under said plan.

Although it is true that the mode of appointing inspectors has been transferred by said Plan D from the mayor to the manager, yet this difference does not involve a material variation from the procedure outlined in G. L., c. 129, § 15. The duty now rests upon a city manager, in lieu of a mayor, to make a nomination of an inspector of slaughtering to the Department of Public Health. Even though the naming of a person for such a position be called an appointment by the city manager, it is in effect only a nomination and is to be treated as such, and is subject to the approval of the Department. When the Department's approval has been given to the appointment of the person named, then, and not before then, the appointment may be validly made by the city manager. See Attorney General's Report, 1927, p. 155.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Civil Service — Labor Service — Rules.

The Commissioner of Civil Service is bound to provide rules for the registration and certification of laborers in Springfield, and these rules do not need to be approved by the municipality.

APRIL 18, 1929.

Hon. ELLIOT H. GOODWIN, *Commissioner of Civil Service*.

DEAR SIR:— You have asked my opinion upon the three following questions:—

"(a) Is the application of the rules governing the labor service, as

established by the Commission, with the approval of the Governor and Council, mandatory for the city of Springfield?

(b) If not, is action required by the Civil Service Commission in framing a new rule to be submitted to the Governor and Council?

(c) Is such action in any way subject to consideration or approval by the authorities of the city of Springfield?"

G. L., c. 31, § 3, provides: —

"The board shall, subject to the approval of the governor and council, from time to time make rules and regulations which shall regulate the selection of persons to fill appointive positions . . . and, except as otherwise provided in section forty-seven, the selection of persons to be employed as laborers or otherwise in the service of the commonwealth and said cities and towns. Such rules shall be of general or limited application, shall be consistent with law . . ."

Said section 47 referred to in section 3 is as follows: —

"This chapter shall continue in force in all the cities of the commonwealth and in all towns of more than twelve thousand inhabitants which have accepted corresponding provisions of earlier laws, and shall be in force in all such towns which hereafter accept it by vote at a town meeting. The provisions of this chapter and the rules established under it relative to employment of laborers designated as the 'labor service' shall not be in force in any city of less than one hundred thousand inhabitants, which has not heretofore accepted the corresponding provisions of earlier laws, until said provisions are accepted by the city council."

The provision in section 47 above quoted, that rules relative to employment of laborers shall not be in force in any city of less than 100,000 inhabitants is not intended to grant perpetual exemption from the rule making power, under said section 3, to any city which had such a population at the time of the enactment either of the General Laws or of the original statute containing a similar provision in 1896 (St. 1896, c. 449, amending St. 1884, c. 320). All cities in the Commonwealth have been at all times since the passage of said St. 1896, c. 449, subject to the general terms now embodied in said section 3, and when any one of them reaches a population of 100,000 the provisions and rules established under said section 3, relative to employment of laborers, become applicable to such a city. See St. 1884, c. 320, § 2.

Civil Service Rule 32, section 3, provides as follows: —

"The Commissioner shall provide for the registration and certification of laborers in the service of the Metropolitan District Commission and the city of Boston, and in other cities to which the labor rules are or may become applicable. The Commissioner may appoint persons to be registration clerks in such other cities."

Inasmuch as the city of Springfield now has a population in excess of 100,000, said Rule 32, section 3, is now applicable thereto, and from the terms of said Rule 32, section 3, it appears that it is mandatory upon the Commissioner to provide for the registration and certification of laborers in said city.

I therefore answer your question (a) in the affirmative.

This answer precludes the necessity of making a specific reply to your question (b).

The approval and acceptance of any particular laws is not made by the statutes a prerequisite to the establishment of rules relative to the employment of laborers in cities of over 100,000 inhabitants. I therefore answer your question (c) in the negative.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Governor and Council — State House — Radio Equipment.

The Governor and Council have the authority to approve the erection of a part of a radio equipment used by the Department of Public Safety upon the roof of the State House.

APRIL 29, 1929.

To His Excellency the Governor and the Honorable Council.

GENTLEMEN:— You have requested to be advised as to the authority of the Governor and Council to grant their approval to the erection of a steel tower to support an antenna, which is a part of the radio equipment used in the police work of the Department of Public Safety, upon the roof of the rear of the State House, such erection having been asked for by the Commissioner of said Department.

I am of the opinion that such an erection may properly be made if it meets with the approval of the Governor and Council.

G. L., c. 8, § 6, as amended by St. 1923, c. 362, § 10, provides, with relation to the authority of the Superintendent of Buildings, as follows:—

“He shall direct the making of all repairs and improvements in the state house and on the state house grounds. All executive and administrative departments and officers shall make requisition upon him for any repairs or improvements necessary in the state house or in other buildings or parts thereof owned by or leased to the commonwealth and occupied by said departments or officers. Such repairs or improvements shall be made only upon such requisition signed by the head of the department or office. This section shall not apply to state institutions or officers thereof.”

G. L., c. 8, § 9, is, in part, as follows:—

“The superintendent shall, under the supervision of the governor and council, have charge of the care and operation of the state house and its appurtenances.”

The erection of the steel tower may be said to fall within the terms of section 6 as an improvement in the State House, and I assume from the communication which you sent me that a requisition for the same, signed by the Department of Public Safety, has been made upon the Superintendent.

Inasmuch as the intent of the Legislature in enacting said section 9 was, obviously, to provide that the Governor and Council should have direct charge of the State House and its appurtenances, their approval should be given to the making of this contemplated improvement under the direction of the Superintendent of Buildings.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Motor Vehicles — "Right to operate" — Revocation.

The right to operate a motor vehicle without ever having received a license, allowed by G. L., c. 90, § 10, as amended, may be revoked by the Registrar of Motor Vehicles, and any unlicensed operation thereafter may be punished.

MAY 8, 1929.

HON. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — You have asked my opinion as to the interpretation of certain portions of the statutes concerning the operation of motor vehicles in the following communication: —

"I am requested by the Registrar of Motor Vehicles to secure an opinion as to the exact meaning or effect of the suspension of the *right* of any person to operate motor vehicles in the Commonwealth of Massachusetts, under G. L., c. 90, § 22, and whether that person may be prosecuted under section 23 of said chapter."

The pertinent portions of the statutes are quoted below.

G. L., c. 90, § 10, as amended by St. 1923, c. 464, § 4, provides: —

"No person shall operate a motor vehicle upon any way unless licensed under this chapter, except as is otherwise herein provided; but *this section shall not prevent the operation of motor vehicles by unlicensed persons if riding with or accompanied by a licensed operator*, excepting only persons who have been licensed and whose licenses are not in force because of revocation or suspension, persons whose right to operate has been suspended by the registrar, and persons less than sixteen years of age; but such licensed operator shall be liable for the violation of any provision of this chapter, or of any regulation made in accordance herewith, committed by such unlicensed operator; provided, that the examiners of operators, in the employ of the registrar, when engaged in their official duty, shall not be liable for the acts of any person who is being examined. During the period within which a motor vehicle of a non-resident may be operated on the ways of the commonwealth in accordance with section three, such vehicle may be operated by its owner or by his chauffeur or employee without a license from the registrar if the operator is duly licensed under the laws of the state in which he resides, or has complied fully with the laws of the state of his residence respecting the licensing of operators of motor vehicles; but if any such non-resident or his chauffeur or employee be convicted by any court or trial justice of violating any provision of the laws of the commonwealth relating to motor vehicles or to the operation thereof, whether or not he appeals, he shall be thereafter subject to and required to comply with all the provisions of this chapter relating to the registration of motor vehicles owned by residents of the commonwealth and the licensing of the operators thereof. A record of the trial shall be sent forthwith by the court or trial justice to the registrar. This section shall apply to the operation of all vehicles propelled by power other than muscular power, except railroad and railway cars, road rollers, and motor vehicles running only upon rails or tracks."

G. L., c. 90, § 22, as amended by St. 1923, c. 464, § 6, provides: —

"The registrar may suspend or revoke any certificate of registration or any license issued under this chapter, after due hearing, for any cause which he may deem sufficient, and he may suspend the license of any

operator or the certificate of registration of any motor cycle in his discretion and without a hearing, and may order the license or registration certificate to be delivered to him, whenever he has reason to believe that the holder thereof is an improper or incompetent person to operate motor vehicles, or is operating improperly or so as to endanger the public; and neither the certificate of registration nor the license shall be reissued unless, upon examination or investigation, or after a hearing, the registrar determines that the operator should again be permitted to operate. *The registrar, under the same conditions and for the same causes, may also suspend the right of any person to operate motor vehicles in the commonwealth under section ten until he shall have received a license from the registrar."*

G. L., c. 90, § 23, as finally amended by St. 1927, c. 267, § 2, provides: —

"Any person convicted of operating a motor vehicle after his license to operate has been suspended or revoked or after notice of the suspension of his right to operate a motor vehicle without a license has been issued by the registrar and received by such person or by his agent or employer and prior to the restoration of such license or right to operate or to the issuance to him of a new license to operate, and any person convicted of operating or causing or permitting any other person to operate a motor vehicle after the certificate of registration for such vehicle has been suspended or revoked and prior to the restoration of such registration or to the issuance of a new certificate of registration for such vehicle, shall, except as provided by section twenty-eight of chapter two hundred and sixty-six, be punished for a first offence by a fine of not less than fifty nor more than one hundred dollars or by imprisonment for not more than ten days, or both, and for any subsequent offence by imprisonment for not less than ten days nor more than one year, and any person who attaches or permits to be attached to a motor vehicle a number plate assigned by the registrar to another vehicle, or who obscures or permits to be obscured the figures on any number plate attached to any motor vehicle, or who fails to display on a motor vehicle the number plate and the register number duly issued therefor, with intent to conceal the identity of such motor vehicle, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than ten days, or both."

The proper construction of the statutes with relation to the subject matter of your inquiry will ultimately be one for judicial determination, but for your guidance and that of the Registrar of Motor Vehicles I state that my opinion is that "the right of any person to operate motor vehicles in the Commonwealth under section ten until he shall have received a license from the registrar," mentioned in the last sentence of G. L., c. 90, § 22, refers to the right to operate accorded by G. L., c. 90, § 10, to (1) unlicensed persons riding with or accompanied by a licensed operator who are not within the classes of persons specifically excepted from the enjoyment of such right by said section, and (2) non-residents, unlicensed in this Commonwealth, under certain circumstances set forth in said section. Any of such persons who operates a motor vehicle after his right to operate, as defined above, is suspended by the action of the Registrar, under said section 22, may be prosecuted under the provisions of said section 23.

In other words, the right to operate, referred to in the last sentence of said section 22, is the right to operate without ever having received a license, and when such right is lost by the action of the Registrar further

unlicensed operation of any sort, whether the specific kind enjoyed under the particular "right" or not, pending restoration of such right, subjects the person to the penalties appropriate for such offence set forth in said section 23. A similar interpretation is to be applied to the words "after his right to operate without a license has been suspended," as used in G. L., c. 266, § 28, as amended by St. 1926, c. 267, § 1, reading as follows: —

"Whoever steals an automobile or motor cycle, or receives or buys an automobile or motor cycle knowing the same to have been stolen, or conceals any automobile or motor cycle thief knowing him to be such, or conceals any automobile or motor cycle knowing the same to have been stolen, or takes an automobile or motor cycle without the authority of the owner and steals from it any of its parts or accessories, or without the authority of the owner *operates an automobile or motor cycle after his right to operate without a license has been suspended* or after his license to operate has been suspended or revoked and prior to the restoration of such right or license to operate or to the issuance to him of a new license to operate, shall be punished by imprisonment in the state prison for not more than ten years or imprisonment in jail or house of correction for not more than two and one half years."

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Commissioner of Correction — Officer — Pension.

With relation to certain employees of the Department of Correction only "officers" may be retired on a pension, and a preliminary determination as to whether an applicant for a pension is an officer must be made by the Commissioner.

MAY 17, 1929.

HON. SANFORD BATES, *Commissioner of Correction*.

DEAR SIR: — You ask my opinion on the following question: —

"A man, employed at the Reformatory for Women since January, 1894, under various titles but doing practically the same kind of work, largely disciplinary cases with the inmates, has asked for a ruling as to whether or not he is eligible for retirement under the prison officers' retirement act, G. L., c. 32, § 46. He contends that while he has not been listed as an officer of the institution he has in fact been the only disciplinary officer there since his appointment, and therefore should be eligible for retirement as an officer."

G. L., c. 32, § 46, as amended by St. 1921, c. 403, and St. 1926, c. 343, § 7, provides: —

"The commissioner of correction may, with the approval of the governor and council, retire from active service and place upon a pension roll any officer of the state prison, the Massachusetts reformatory, the prison camp and hospital, the state farm, the reformatory for women or any jail or house of correction, or any person employed to instruct the prisoners in any prison or reformatory, as provided in section fifty-two of chapter one hundred and twenty-seven, or any other employee of the state prison, the Massachusetts reformatory or the prison camp and hospital, who has attained the age of sixty-five and who has been employed in prison service in the commonwealth, with a good record, for not less than twenty years; or who, without fault of his own, has become

permanently disabled by injuries sustained in the performance of his duty; or who has performed faithful prison service for not less than thirty years; . . . and provided, that no such officer, instructor or employee shall be retired unless he began employment as such in one of the above named institutions, or as an officer or instructor in one of those named in the following section, on or before June seventh, nineteen hundred and eleven. The word 'officer', as used in this and the two following sections, shall extend to and include prison officer, correction officer and matron."

It is clear that the only employees of the Reformatory for Women eligible for a pension under the foregoing statute are officers, which term includes "prison officer, correction officer and matron," and instructors.

In an opinion of a former Attorney General, dated February 24, 1914 (not published), in which he had occasion to consider St. 1908, c. 601, as amended by St. 1911, c. 673 (the original statute providing for the retirement and pensioning of officers and instructors and other employees in penal institutions of the Commonwealth), he defined the word "officer," as used therein, to mean "those persons who are employed to, and who as a regular part of their duties do, have charge either of all or a definite number of persons committed to prison, jail or reformatory by legal process."

St. 1921, c. 403, enlarged the scope of the law relative to retiring and pensioning all prison officers by defining the word "officer" to include "prison officer, watchman and matron." The term "watchman" was stricken out by St. 1926, c. 343, § 7, and the words "correction officer" were substituted. The additions and elisions made by these statutes do not, in my opinion, alter the definition quoted above.

In a later opinion of another Attorney General (V Op. Atty. Gen. 227) it was said, in speaking of said definition: —

"This seems to me to be an appropriate definition of the term, and, in my opinion, it should be employed in determining who are officers in the prison service, within the meaning of the statute under consideration. . . .

If an employee is appointed and carried on the pay roll as an officer, that fact may, *prima facie*, entitle him to the benefits of this statute, though it is not conclusive. Calling a clerk an officer, of course, cannot make him such. Nor does the fact that an employee may occasionally, as an incidental part of his work, have some supervision over a few of the prisoners who are assigned to work in his department make him an officer. It must be a regular and substantial part of his duty to have charge and control of prisoners in order to bring him within the definition of prison officers to which I have referred. Thus, the engineers, assistant engineers and stewards or cooks cannot, in my opinion, be regarded as officers merely because prisoners are from time to time assigned to work in their departments under their direction. Again, persons appointed as, and in the main performing the duties of, clerks are not officers unless in addition they perform substantial duties of the character indicated in this definition of prison officers."

It would seem, therefore, that this resolves itself into a question of fact in each individual case, and whether or not a person is an officer must be determined by the Commissioner of Correction before such person can be pensioned.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

Marriage and Divorce — Records — Corrections.

City or town clerks' records of marriages may not be expunged but may be corrected.

The validity of a marriage is not determined by the records of a city or town clerk.

Decrees of nullity as to marriages are not required to be filed with city or town clerks.

MAY 23, 1929.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR:— You have requested my opinion upon the following questions:—

"1. Can the record of a marriage which is subsequently annulled by decree of court, or voided without a decree of divorce or other legal process as provided in G. L., c. 207, § 8, be expunged from the record books of a city or town clerk or registrar?

2. If such record cannot be expunged and such marriage stands as a matter of record, must either party to such marriage, in making written notice of intention of another marriage, state that such subsequent marriage is his or her second marriage?

3. Must a copy of the decree, if any, be filed with the notice of intention of marriage?"

1. There do not appear to be any provisions of the statutes which provide for the expunging of records of a marriage kept by city or town clerks. Correction of such records may be accomplished, however, in the manner described in G. L., c. 46, § 13, as amended by St. 1925, c. 281, § 2, which reads as follows:—

"If the record relating to a birth, marriage or death does not contain all the required facts, or if it is claimed that the facts are not correctly stated therein, the town clerk shall receive an affidavit containing the facts required for record, if made by a person required by law to furnish the information for the original record, or, at the discretion of the town clerk, by credible persons having knowledge of the case. If a person shall have acquired the status of a legitimate child by the intermarriage of his parents and the acknowledgment of his father, as provided in section seven of chapter one hundred and ninety, the record of his birth may be amended or supplemented hereunder so as to read, in all respects, as if such person had been reported for record as born to such parents in lawful wedlock. For such purpose, the town clerk shall, if satisfied as to the identity of the persons and the facts, receive an affidavit executed by the parents or by either if the other is dead, setting forth the material facts. Unless the marriage is recorded in the records in the custody of such clerk, such affidavit shall be accompanied by a certified copy of the record thereof. He shall file any affidavit submitted under this section and record it in a separate book kept therefor, with the name and residence of the deponent and the date of the original record, and shall thereupon draw a line through any incorrect statement, or statements, sought to be amended in the original record, without erasing them, shall enter upon the original record the facts required to correct, amend or supplement the same and forthwith, if a copy of the record has been sent to the state secretary, shall forward to the state secretary a certified copy of the corrected, amended or supplemented record upon blanks to be

provided by him, and the state secretary shall thereupon correct, amend or supplement the record in his office. Reference to the record of the affidavit shall be made by the clerk on the margin of the original record. If the clerk furnishes a copy of such record, he shall certify to the facts contained therein as corrected, amended or supplemented, and shall state that the certificate is issued under this section, a copy of which shall be printed on every such certificate. Such affidavit, or a certified copy of the record of any other town or of a written statement made at the time by any person since deceased required by law to furnish evidence thereof, may, in the discretion of the clerk, be made the basis for the record of a birth, marriage or death not previously recorded, and such copy of record may also be made the basis for completing the record of a birth, marriage or death not containing all the required facts."

Under the foregoing provisions the city or town clerk is not required to initiate action for the correction of marriage records, nor are there any special requirements relative to such corrections in relation to marriages which have been recorded but which are void.

With relation to the facts which are required to be recorded by said clerks to make up such marriage records, it is provided by G. L., c. 46, § 1, as follows: —

"Each town clerk shall receive or obtain and record in separate columns the following facts relative to births, marriages and deaths in his town:

In the record of marriages, date of record, date of marriage, place of marriage, name, residence and official station of the person by whom solemnized, names and places of birth of the parties married, residence of each, age and color of each, the number of the marriage (as first or second) and if previously married, whether widowed or divorced, the occupation of each and the names of their parents, and the maiden names of the mothers. If the woman is a widow or divorced, her maiden name shall also be given."

If a marriage which has been recorded under the terms of said chapter 46, section 1, is a void marriage, an affidavit containing facts showing that it is void, accompanied by a certified copy of a decree of nullity entered by a court of competent jurisdiction under the provisions of G. L., c. 207, § 14, if any such there be, although not required, might well be made "by a person required by law to furnish the information for the original record or at the discretion of the town clerk by credible persons having knowledge of the case," and the clerk would be required to receive it. Such affidavit would then be filed by the clerk in the manner described in said G. L., c. 46, § 13, as amended. The clerk would then make such corrections, amendments, references and supplements on and in the original records as said section 13 requires.

If this be done the void character of the marriage will appear of record, and confusion with relation thereto in the future will be obviated. A city or town clerk, however, as I have said, has no authority to "expunge" the record of a marriage.

2. I answer your second question in the negative. The validity or invalidity of a marriage is not determined by the records of a city or town clerk relating to such a marriage. If a ceremony has not resulted in a valid marriage, a subsequent marriage of either of the parties to such

ceremony is a first marriage as to him or her, irrespective of what appears upon the records of a city or town clerk concerning the facts connected with the first ceremony. See in this connection VII Op. Atty. Gen. 728.

3. I answer your third question in the negative. The filing of a copy of a decree of nullity, either in connection with a correction of a record of a marriage subsequently shown to have been void, or with a notice of intention of marriage subsequent thereto, would tend to make records in the offices of city and town clerks more accurate, but such filing is not required by the terms of any statute.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Milk — Misbranding — Prosecution.

Misbranding of milk by the use of the word "Guernsey" on a container when the milk is not from Guernsey cattle and is inferior to the product known as Guernsey, may be prosecuted.

MAY 23, 1929.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have asked my opinion as to whether misbranding of milk by the use upon the container of the word "Guernsey" in connection with milk, when the milk is inferior to the product known as Guernsey milk and not in fact obtained from Guernsey cattle, may be prosecuted under the provisions of G. L., c. 94, § 187. I am of the opinion that it may be so prosecuted.

The general definition of food, in section 1 of said chapter 94, is broad enough to cover milk. The specific sections of chapter 94, which deal with improperly labeling milk, such as sections 18 and 19, relate to misleading names applied to grades and qualities of milk different in character from those comprehended in the definition of "misbranded," as used in said section 187.

As originally enacted, that portion of G. L., c. 94, entitled "Adulteration and misbranding of food and drugs," contained in section 185 an exclusion from the operation of the ten following sections of various commodities, including milk and cream.

By St. 1921, c. 486, § 26, section 185 was repealed, and there is now no specific statutory limitation of the words "article of food" or "food" as used generally in section 187. Of course, the ultimate decision of your question is one for judicial determination in relation to any particular prosecution which may be started.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Laborers — Contracts — Public Works — Payments.

Contractors engaged in the construction or repair of any water or electric light works, pipes or lines may not contract with their workmen to pay less often than once a week.

MAY 24, 1929.

Gen. E. LEROY SWEETSER, *Commissioner of Labor and Industries*.

DEAR SIR:— You have asked my opinion as to whether it is legal for a contractor who is doing work for the Commonwealth to pay less often than weekly such of his employees as may request in writing to be paid in a different manner.

The law pertinent to the question is contained in G. L., c. 149, § 148, as most recently amended by St. 1925, c. 165. There is no restriction in this respect upon contractors doing work for the Commonwealth as such. The section, however, does apply to contractors engaged in certain enumerated types of work, among which is "the construction or repair of any . . . water or electric light works, pipes or lines." The company to which your letter refers is apparently engaged in the construction of the works in connection with the taking of the Swift and Ware rivers, and therefore would come under the prohibition contained in the statute.

In my opinion, a company engaged in any of the types of work enumerated in the statute must pay its employees weekly, and may not avoid this duty by contract with the employee or otherwise. That part of the section which permits payment to be made in a different manner, if the employee in writing so requests, applies only to cases involving employment by the Commonwealth or a county, city or town, and cannot be construed to apply to employees of private companies, whether they are or are not doing work for the Commonwealth. It follows, therefore, that your question should be answered in the negative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Department of Public Health — Investigation — Barbers.

Under a resolve of the Legislature the Department of Public Health has authority to investigate barbering wherever practiced.

JUNE 10, 1929.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health*.

DEAR SIR:— You have asked my opinion relative to the duties of your Department under Resolves of 1929, chapter 43, in the following language:—

"Chapter 43 of the Resolves of 1929, recently passed, directs this Department to investigate the matter of barbering in the Commonwealth. In defining what constitutes 'barbering,' singeing, dyeing and various manipulations of and applications to the face are mentioned. Such procedures are practiced in so-called beauty parlors. I should like to know whether, in your opinion, this definition of 'barbering' extends the scope of our investigation to this latter type of establishment."

Resolves of 1929, chapter 43, reads as follows:—

"*Resolved*, That the department of public health is hereby authorized and directed to investigate the need, as a health measure, for establishing a board of registration of barbers or otherwise regulating the practice of barbering. For the purposes of the investigation, a barber shall be construed to be any person who, for hire, shaves or trims the beard, cuts the hair, gives facial or scalp massage or facial or scalp treatment with oils, creams or other preparations, or singes or shampoos the hair or applies any hair tonics or dyes to the hair of any person and who is not a registered physician or a registered embalmer; and the performance of any such service shall be construed as practising barbering. In connection with its investigation the department shall consider the subject matter of house document numbered one hundred and eighty-one of the current year, and shall make such examination of the sanitary condition of barbering establishments and the practices of barbers as it deems necessary.

Said department shall report to the general court its findings and its recommendations, if any, together with drafts of such legislation as may be necessary to carry its recommendations into effect, by filing the same with the clerk of the house of representatives not later than the first Wednesday of December in the current year. Said department may expend for the aforesaid purpose such sum, not exceeding three thousand dollars, as may hereafter be appropriated by the general court."

By the terms of this resolve your investigation is to be directed to a determination of the need, as a health measure, for establishing a board of registration of barbers, or otherwise regulating the practice of barbering, and you are also directed to consider the subject matter of House Document No. 181, dealing with the same subject, and in connection therewith to make such examination of the sanitary condition of barbering establishments and the practices of barbers as your Department may deem necessary. A definition of "barber," for the purpose of the investigation, is set forth in the resolve. There is no definition of "barber shop" or of "beauty parlor" contained in the resolve.

You have authority, and it is your duty under this resolve, to investigate the practice of barbering, as defined in the resolve, in whatever place such barbering may be practiced. In so far as it may be carried on in beauty parlors, the practice of barbering there is properly subject to your investigation; and it is possible that the relation of the general type of business conducted in the beauty parlor to barbering, as this affects the sanitary condition of the latter, may require your investigation.

You have no authority under this resolve to investigate beauty parlors as such, but whenever the practice of barbering, as defined in the resolve, is carried on therein that practice and the surroundings which affect it may well be considered by you.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Corporations — Fee — Certificate of Change in Stock.

The fee under G. L., c. 156, § 54, as amended, is to be figured at one cent per share for additional shares without par value.

JUNE 11, 1929.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You request my opinion as to the fee to be charged for filing a certain certificate relating to a change in authorized stock of a certain corporation.

The certificate, or articles of amendment, in question provides for the issuance of 6,000 shares of common stock without par value, in addition to 6,000 shares without par value originally authorized and now outstanding, and also provides for the retirement of 3,000 shares of preferred stock, which you state to have a par value of \$100.

G. L., c. 156, § 54, as amended by St. 1928, c. 360, § 2, reads as follows:—

"The fees for filing and recording the following certificates shall be as follows:

For filing and recording a certificate providing for an increase of capital stock with par value, one twentieth of one per cent of the amount by which the capital is increased; but not in any case less than twenty-five dollars.

For filing and recording a certificate providing for a change of shares with par value to shares without par value, whether or not the capital is changed thereby, one cent for each share without par value resulting from such change, less an amount equal to one twentieth of one per cent of the total par value of the shares so changed; but not in any case less than twenty-five dollars.

For filing and recording a certificate providing for an increase in the number of shares without par value, whether or not the capital is changed thereby, one cent for each additional share; but not in any case less than twenty-five dollars."

You state that the attorney for the corporation contends that the net result of the transaction in question is a reduction of capitalization, and that therefore the fee should be \$10.00, as provided in section 55 for certificates other than those covered by section 54.

But in determining whether an increase of capitalization is effected, shares without par value are to be treated as having a par value of \$100 (see V Op. Atty. Gen. 570), and therefore the present transaction results in a net increase rather than in a reduction.

Furthermore, under the amendment of 1928, above quoted, the fee in the case of additional shares without par value does not appear to be dependent upon a net increase in capitalization being effected. In the case of shares without par value the law as it previously existed (see *Commonwealth v. United States Worsted Co.*, 220 Mass. 183; G. L., c. 156, § 54) has been changed by the amendment of 1928. The reduced fee of one cent per share is expressly made independent of the question "whether or not the capital is changed thereby." It is clear that the transaction in question, involving, as it does, the issuance of additional shares without par value, comes within the provisions of section 54, as amended.

It might be questioned whether the certificate comes under the provisions of paragraph 3 or of paragraph 4 of section 54, as amended. You assume in your letter that it comes under the fourth paragraph, if under either, and I think that that assumption is correct. Paragraph 3 refers to "a change of shares with par value to shares without par value"; and it cannot be said of the present transaction that any outstanding stock of par value is being changed to stock without par value. The new stock is to be issued for cash; it is not to be exchanged for the preferred, which is retired.

The present certificate provides for an increase in the number of shares "without par value," and therefore comes within paragraph 4. It may seem that the corporation should receive a deduction on account of the preferred stock retired, and that the fee should be figured only upon net increase of capitalization, as would have been done under section 54 before the amendment. That would make the fee \$30.00. Or perhaps it may be thought that a deduction should be given at the rate of five cents per share upon the stock retired, as is provided in paragraph 3. That would make the deduction \$150, and therefore make the fee the minimum of \$25.00. But, in my opinion, under the words of paragraph 4 the fact that the preferred stock is being retired can have no bearing upon the amount of the fee, which is to be figured upon the increase in the number of shares without par value. If the Legislature had intended the fee under paragraph 4 to be based upon the amount by which the capital is increased, it would have said so, as it did in connection with paragraph 2; or if it had intended to give a deduction because of a retirement of other stock, it would have said so, as it did in connection with paragraph 3.

In my opinion, therefore, the fee in the present case must be figured at one cent per share for the additional 6,000 shares without par value, that is, \$60.00.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

Agriculture — Retailer of Seeds — Name.

The name of the retailer of agricultural seeds must appear on every package of seeds, however put up.

JUNE 12, 1929.

DR. ARTHUR W. GILBERT, *Commissioner of Agriculture*.

DEAR SIR:— You ask my opinion on certain questions relative to G. L., c. 94, as amended by St. 1927, c. 274, in the following language:—

“G. L., c. 94, §§ 261A, 261B, 261C and 261E, require that the name and address of the vendor be shown on containers of agricultural seeds or mixtures of agricultural seeds. The question arises as to who the vendor of the agricultural seeds is when there has been a sale of such seeds in the Commonwealth. Many of the seeds that are sold have the name and address of the wholesaler on the package, and a large amount of seeds that are sold have the name and address of the wholesaler on the tag fastened to the large container from which the seeds are sold in smaller packages.

It is the contention of many of those who have been requested to appear with reference to reported violations of our seed law that the name and address of the wholesaler satisfies the law as to the requirement for the name and address of the vendor of such seeds or mixtures. Your opinion is therefore requested as to who is the vendor in the sale of agricultural seeds or mixtures thereof in the State of Massachusetts.

Sections 261A, 261B and 261C indicate that agricultural seeds or mixtures of agricultural seeds shall have affixed thereto in a conspicuous place on the exterior of the container of such seeds or mixtures a plainly written or printed tag or label with a statement in the English language of certain required information. The question has arisen as to the interpretation of the word ‘container.’ . . .

This Department is interested in the interpretation of the word ‘container.’ . . . The question of importance, therefore, is whether or not the word ‘container’ refers to the package that is handed over the counter to the vendee in a sale of agricultural seeds or mixtures thereof.”

G. L., c. 94, as amended by St. 1927, c. 274, § 2, provides:—

“SECTION 261A. Every lot of agricultural seeds of ten pounds or more, except as otherwise provided in sections two hundred and sixty-one B to two hundred and sixty-one L, inclusive, shall have affixed thereto, in a conspicuous place, on the exterior of the container of such agricultural seeds, a plainly written or printed tag or label in the English language, stating:

(f) Name and address of the vendor of such agricultural seed.”

Sections 261B, 261C and 261E, added to G. L., c. 94, by St. 1927, c. 274, § 2, contain similar provisions with reference to the information to be written or printed on the tag or label to be affixed to the container.

Section 261L, added to said chapter 94 by the 1927 statute, provides:—

"Whoever sells, offers or exposes for sale, any lot of agricultural seeds, or mixtures of agricultural seeds, without complying with the requirements of sections two hundred and sixty-one A to two hundred and sixty-one K, inclusive, or falsely marks or labels such agricultural seeds or mixtures thereof or vegetable seeds, or impedes, obstructs or hinders the commissioner of agriculture or any of his duly authorized agents in the discharge of the authority or duties conferred or imposed by any provision of said sections, shall be punished by a fine of not more than five hundred dollars."

G. L., c. 4, § 6, provides:—

"In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning."

I am of the opinion that the words "container" and "vendor," as used in the statute above quoted, are to be given their ordinary meaning. The word "container" means a package of any description capable of holding the various seeds described in the statute. Said package may be in the form of a box made of wood, tin, cardboard, fibre, etc., or it may consist of a paper bag ordinarily used in retail stores. The word "vendor," as used in said statute, must be construed to mean a person, firm or corporation which actually sells within the Commonwealth the seeds described in the statute.

The statute applies equally to producer, wholesaler or distributor and retailer of agricultural seeds if he engages in business in this Commonwealth. The tag or label required to be affixed to the container must have written or printed thereon all of the information required by this statute. This applies to the retailer who sells the seeds within the Commonwealth, notwithstanding the fact that the seeds which he sells may have been put up in packages by the producer, wholesaler or distributor doing business within or without the Commonwealth, and that tags or labels bearing the name and address of such wholesaler, producer or distributor are plainly printed in the English language and affixed to said containers. In other words, the name of the retailer must appear on every package of seeds whether the seeds are contained in packages put up by the producer, wholesaler or distributor or put up in a "paper bag package." This contention is clearly supported by the last paragraph of St. 1927, c. 274, § 2 (G. L., c. 94, § 261L).

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Election Commission of Lowell — Appointment of Clerk — Civil Service.

An appointment of a clerk by the election commission of Lowell is not under the Civil Service Rules.

JUNE 24, 1929.

Hon. ELLIOT H. GOODWIN, *Commissioner of Civil Service.*

DEAR SIR:— You request my opinion as to whether the appointment of a clerk by the election commission of the city of Lowell is within the civil service.

The appointment is made under St. 1920, c. 154, § 4, which provides that the election commission "may employ such persons as they may deem necessary in the performance of their duties: *provided, however,* that among the persons so employed after the passage of this act, the two dominant political parties shall at all times be equally represented."

In my opinion, the provision which makes party affiliation a qualification leads to the conclusion that the appointment was not intended to be within the civil service. G. L., c. 31, § 10, provides:

"No question in any examination shall relate to political or religious opinions or affiliations, and no appointment to a position or selection for employment shall be affected by them."

The Civil Service Commission, therefore, has no official means of knowing which, if any, of the persons whose names appear upon its list are eligible for the appointment. Moreover, even if it did know, it could not make a selection for certification, for it is required to certify names in the order of standing upon the eligible list. G. L., c. 31, §§ 15 and 23; Civil Service Rule 16. The civil service laws and rules do not fit the case in question.

This conclusion is confirmed by the fact that the appointment of assistant registrars by the election commission of Boston, under St. 1913, c. 835, § 80, which provided, similarly to the statute now in question, that the two leading political parties should be equally represented in appointments, was recognized as not within the civil service; and also by the fact that when the Legislature, by St. 1920, c. 305, placed such appointments by the Boston commission within the civil service it was thought necessary at the same time to alter the civil service law to fit the situation, which was done by providing in section 2 of the 1920 statute that an applicant must file with the Civil Service Commission a certificate of party enrollment.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Medical Examiner — Absence — Associate.

Absence of a medical examiner sufficient to authorize an associate examiner to perform his duties is not restricted to absence from the Commonwealth of the former official.

JUNE 25, 1929.

Hon. CHARLES R. CLASON, *District Attorney for the Western District.*

DEAR SIR:— It was held by one of my predecessors in office, in an opinion given to the medical examiner in the Third Bristol District, dated April 11, 1917 (not published), that actual absence of a medical examiner

from his district was not required in order to authorize associate medical examiners to act. It was pointed out that "the administration of the law in relation to medical examiners ordinarily requires prompt action, and therefore the determination of when the associate medical examiner should act in place of the medical examiner must depend upon the facts arising in each case."

G. L., c. 38, § 2, reads:—

"Associate examiners in the other counties" (exclusive of Suffolk) "shall, in the absence of the medical examiners or in case of their inability to act, perform in their respective districts all the duties of medical examiners."

Apparently my predecessor, in construing the Revised Laws, where similar language was used, felt, as I do, that there might be situations, other than the actual absence of the medical examiner from the district, in which the associate was authorized to perform the former's duties. I think that section 16 of said chapter 38, with relation to the duties of the associate examiners, should be construed, in the light of section 2, with the meaning which I have indicated.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Supervisor of Public Records — Custody — Rules.

The Supervisor of Public Records has authority to approve specifications of a safe for the preservation of records, and may make rules relative thereto.

JUNE 27, 1929.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You have asked my opinion as to whether or not the Supervisor of Public Records is authorized to establish or approve specifications of fireproof safes or vaults to be used for the safe-keeping of public records, and also to promulgate rules and regulations for the manufacture, construction and use of such fireproof safes or vaults.

G. L., c. 66, § 1, provides as follows:—

"The supervisor of public records . . . shall take necessary measures to put the records of the commonwealth, counties, cities or towns in the custody and condition required by law and to secure their preservation. . . ."

Section 11 of said chapter 66 provides as follows:—

"Officers in charge of a state department, county commissioners, city councils and selectmen shall, at the expense of the commonwealth, county, city or town, respectively, provide and maintain fireproof rooms, safes or vaults for the safe-keeping of the public records of their department, county, city or town, other than the records in the custody of teachers of the public schools, and shall furnish such rooms with fittings of non-combustible materials only."

While this last section imposes a duty upon the various officers to keep public records in fireproof safes or vaults, I am of the opinion that under section 1 the Supervisor of Public Records has authority to determine what is a proper fireproof safe or vault, and that such safe or vault must cor-

respond with specifications which he may approve. Section 1 gives him the power to secure the preservation of such records and to see to it that they are kept in the custody and condition required by law. This duty imposed by this section cannot be successfully carried out unless the Supervisor has the power to decide and determine the specifications of such a safe or vault. If, in his opinion, a safe or a vault is not fireproof or otherwise proper, it is my opinion that it may not be used for the keeping of public records. I do not believe that the Supervisor may approve specifications of manufacturers or can in any way determine questions arising out of the manufacture of these safes or vaults, as his only concern is their use as a container for public records.

Under section 1 he also has the power to promulgate reasonable rules and regulations concerning the use and construction of such safes or vaults, as this obviously is one of the "necessary measures" to secure the preservation of the records.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Sentence — State Farm — Indeterminate Sentence.

A prisoner committed to the State Farm may be held in custody for two years under an indeterminate sentence.

JUNE 28, 1929.

Dr. A. WARREN STEARNS, *Commissioner of Correction*.

DEAR SIR: — You have addressed the following communication to me, setting forth certain facts relative to a person committed to the State Farm:

"A person was committed to the State Farm May 8, 1929, from the District Court in Malden, for the offence of 'refusing to work while an inmate of a city home,' under G. L., c. 117, § 22, which specifically states that the sentence shall be for one year.

G. L., c. 279, § 36, states: 'In imposing a sentence of imprisonment at the state farm, the court or trial justice shall not fix or limit the duration thereof.'

Said section 36 also states: 'Whoever is sentenced to the state farm for drunkenness may be there held in custody for not more than one year, and if so sentenced for any other offence may be there held in custody for not more than two years.'

In view of the above two apparent inconsistencies in the law, and in view of the ruling of the Supreme Court in *Platt v. Commonwealth*, 256 Mass. 539, I write to ask you for an opinion as to whether this man's maximum sentence should be one year or two years for the above offence."

I assume, for the purposes of this opinion, although you do not definitely so state, that the sentence of the judge in the District Court was a sentence for an indefinite period to the State Farm, and that the judge did not himself in the sentence attempt to fix a definite period for such confinement. I gather from your communication that the sentence was imposed under the provisions of G. L., c. 117, § 22, which reads as follows: —

"Whoever refuses or neglects to perform any labor required of him under the two preceding sections, or who, while performing such labor, wilfully

damages any property of the town requiring the same, shall be punished, in Suffolk county by imprisonment in the house of correction for not more than one year, and in other counties, in the house of correction or at the state farm for a like term."

The original enactment, which is now embodied in said section 22, is St. 1895, c. 445, § 3, which reads as follows:—

"Whoever refuses or neglects to perform any labor required of him as aforesaid, or while performing such labor wilfully damages any property of the city or town requiring the performance of such labor, shall on conviction thereof by any court or magistrate having jurisdiction of the offence be punished by imprisonment not exceeding one year in the house of correction or at the state farm, or, in the county of Suffolk, in the house of correction or house of industry."

This statute of 1895 was incorporated in the Revised Laws as section 24 of chapter 81, as follows:—

"Whoever refuses or neglects to perform any labor required of him under the provisions of the two preceding sections, or while performing such labor wilfully damages any property of the city or town requiring the same, shall be punished, in the county of Suffolk, by imprisonment in the house of correction for not more than one year, and in other counties, in the house of correction for a like term, or at the state farm."

Subsequent to the enactment of said statute of 1895, St. 1898, c. 443, was enacted, which, in section 1, reads as follows:—

"When a convict is sentenced to the state farm the court or trial justice imposing the sentence shall not fix or limit the duration thereof. Whoever is so sentenced for drunkenness may be held in the custody of said state farm for a term not exceeding one year, and whoever is so sentenced for any other offence may be held in such custody for a term not exceeding two years."

Section 4 of said chapter 443 provides as follows:—

"All acts and parts of acts inconsistent with this act are hereby repealed."

Said St. 1898, c. 443, § 1, is now embodied in G. L., c. 279, § 36, which is as follows:—

"In imposing a sentence of imprisonment at the state farm, the court or trial justice shall not fix or limit the duration thereof. Whoever is sentenced to the state farm for drunkenness may be there held in custody for not more than one year, and if so sentenced for any other offence may be there held in custody for not more than two years."

At the time of the imposition of the sentence to which you refer in your communication, under the terms of said G. L., c. 279, § 36, the judge could not impose any sentence to the State Farm except an indeterminate one, under which a person convicted of a crime other than drunkenness might be held in custody for a term not exceeding two years. The judge might have adopted the alternative course of a sentence to the house of correction for one year, but if he elected to sentence to the State Farm the sentence was governed by the provisions of said G. L., c. 279, § 36, the original terms of which were enacted in 1898, and which in that year

superseded the terms of St. 1895, c. 445, § 3, which contained the original of the provisions of said section 22.

It is provided in G. L., c. 281, § 2, that:—

“The provisions of the General Laws, so far as they are the same as those of existing statutes, shall be construed as a continuation thereof and not as new enactments.”

The provisions of R. L., c. 81, § 24, and of G. L., c. 117, § 22, above referred to, indicate that they were clearly intended as a continuation of the original enactment of the statute of 1895, and the effect of the statute of 1895 had long since been altered by the enactment of said St. 1898, c. 443, already referred to, wherein the provisions for indefinite sentence to the State Farm were incorporated and all earlier acts repugnant thereto were repealed. The present provisions of the General Laws (c. 117, § 22) continue the effect of the provisions of the statute of 1895 as they existed subsequent to the passage of St. 1898, c. 443, and are to be read with a consideration of the language used in both of such statutes.

It was said by the Supreme Court in *Moulton v. Commonwealth*, 215 Mass. 525, 527:—

“If, however, an earlier statute is repugnant to the subsequent act the presumption is, that the latter statute is intended as the final expression of the legislative will, and the former statute is necessarily repealed by implication.”

Moreover, it is a general principle of statutory interpretation that a body of laws enacted at one time, as were the General Laws, is to be construed so as to constitute, so far as practicable, an harmonious entity. *Brooks v. Fitchburg & Leominster St. Ry. Co.*, 200 Mass. 8. And the Supreme Judicial Court, in *Platt v. Commonwealth*, 256 Mass. 539, 543, has said:—

“The history of legislation shows that the General Court in comparatively recent years has established the indeterminate sentence to exist alongside the definite sentence as to many offences. The underlying design of the indeterminate sentence is to subject the offender to reformatory influences, to rescue for useful citizenship one started on a criminal career and thus enable him to assume right relations with society. It is manifest that the bringing back to upright conduct of one embarked upon evil courses cannot commonly be easily or quickly accomplished. Time is required for the operation of physical, industrial, mental and moral training and education essential to the work of reclamation of human beings.

There have been superimposed by the Legislature, upon its statutes requiring sentences for specifically defined terms of incarceration upon a finding or verdict of guilty as to misdemeanors like the present, the newer statutes relative to the indeterminate sentence. These several provisions are not contradictory and incompatible, but constitute a consistent frame of law. It has been left to the court to determine on the evidence in each case whether the purely punitive sentence for a specified period, or the indefinite sentence with a reformatory purpose even though invoking longer restraint, is better for the common welfare.”

If, as I have said, the trial judge in pronouncing sentence had desired to avail himself of that portion of the law which permitted a definite sentence of one year, he might have done it by a sentence to the house of

correction. If he elected to adopt the use of the indefinite sentence, as he apparently did, he could not set the term thereof (G. L., c. 279, § 36), and by the provisions of said G. L., c. 279, § 36, which control the limits of the indeterminate sentence, the prisoner committed thereunder may be held in custody for not more than two years.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Marriage Records — Certificate — Death Records — Diseases.

The date of a certificate of the filing of intention of marriage should be the date of its issue.

Diseases which are the cause of a death should be entered upon the death records of municipal clerks and the Secretary of the Commonwealth.

JUNE 28, 1929.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You have asked my opinion upon certain questions of law relative to various sets of facts which you have set forth in a letter to me.

Your first question is as follows:—

“G. L., c. 207, § 28, provides that ‘on or after the fifth day from the filing of notice of intention of marriage . . . the clerk or registrar shall deliver to the parties a certificate,’ and that ‘if such certificate is not used it shall be returned to the office issuing it within six months after it is issued.’

Some clerks mail the certificate on the fifth day after the intention has been filed, dating the certificate on that date. Other clerks do not date the certificate until it is called for, in some cases several months (possibly years) after the date of filing the notice of intention.

What is to be considered the date a certificate is issued?”

G. L., c. 207, § 28, reads as follows:—

“On or after the fifth day from the filing of notice of intention of marriage, except as otherwise provided, the clerk or registrar shall deliver to the parties a certificate signed by him, specifying the date when notice was filed with him and all facts relative to the marriage which are required by law to be ascertained and recorded, except those relative to the person by whom the marriage is to be solemnized. Such certificate shall be delivered to the minister or magistrate before whom the marriage is to be contracted, before he proceeds to solemnize the same. If such certificate is not used, it shall be returned to the office issuing it within six months after it is issued.”

I am of the opinion that the date on which a certificate is issued is the date of its delivery to the parties referred to in the said section. The date written upon the certificate by the clerk may well be considered *prima facie* evidence of the date of such delivery, but it would appear to be the proper course for the clerk or registrar to follow to date the certificate upon the day of delivery.

Your second question is as follows:—

“If a city or town clerk or the Secretary of the Commonwealth has received facts relative to a death, giving gonorrhœa or syphilis as the

disease or cause of death, is he prohibited from entering such facts in the record of death and from subsequently issuing a certificate containing said facts?"

G. L., c. 46, § 1, relative to facts to be recorded by city and town clerks, in its pertinent parts reads as follows:—

"Each town clerk shall receive or obtain and record in separate columns the following facts relative to births, marriages and deaths in his town:

In the record of deaths, date of record, date of death, name of deceased, sex, color, condition (whether single, widowed, married or divorced), supposed age, residence, occupation, place of death, place of birth, names and places of birth of the parents, maiden name of the mother, disease or cause of death, defined so that it can be classified under the international classification of causes of death . . ."

The provisions of G. L., c. 111, § 119, are as follows:—

"Hospital, dispensary, laboratory and morbidity reports and records pertaining to gonorrhœa or syphilis shall not be public records, and the contents thereof shall not be divulged by any person having charge of or access to the same, except upon proper judicial order or to a person whose official duties, in the opinion of the commissioner, entitle him to receive information contained therein. Violations of this section shall for the first offence be punished by a fine of not more than fifty dollars, and for a subsequent offence by a fine of not more than one hundred dollars."

These provisions do not relate to the public records relative to deaths which are required to be kept by city and town clerks, under G. L., c. 46, or by the Secretary of the Commonwealth, and their prohibitions have no application to such records.

I therefore answer your second question in the negative.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Massachusetts Agricultural College — Trustees — Expenditures — Committee.

No person not a member of the board of trustees of the Massachusetts Agricultural College may be appointed to serve on a committee of that body to deal with expenditures.

JUNE 29, 1929.

MR. R. W. THATCHER, *President, Massachusetts Agricultural College*.

DEAR SIR:— You ask my opinion on the question of whether or not G. L., c. 75, § 5, "gives the trustees of the Massachusetts Agricultural College the right to appoint a committee to authorize expenditures consisting of others than members of this Board."

G. L., c. 75, § 5, provides:—

"Expenditures for maintenance shall be authorized by the trustees or by their duly appointed committee. The expenditure of special appropriations shall be directed by such trustees, and shall be authorized and accounted for as are appropriations for maintenance."

Prior to May 31, 1918, the Massachusetts Agricultural College was a public charitable corporation organized for educational purposes by vir-

tue of St. 1863, c. 220, and amendments thereof. By said statute the Legislature reserved certain rights, among which was the right to alter, limit, annul or restrain the powers vested in said corporation. See III Op. Atty. Gen. 308; 460.

By Gen. St. 1918, c. 262, the Legislature exercised the right reserved in said St. 1863, c. 220, and dissolved the corporation, and the Commonwealth took over said college, thenceforth to be maintained as a State institution under the name of "Massachusetts Agricultural College." Gen. St. 1918, c. 262, also prescribed the powers and duties of the trustees, and in section 4 provided:—

"All expenditures for the maintenance of the institution shall be authorized by a majority of the trustees, or by a majority of a duly appointed committee of the trustees. . . . The expenditure of special appropriations shall be under the direction and control of the trustees, and shall be accounted for in the same manner as appropriations for maintenance."

In the rearrangement and consolidation of the General Laws the present language of the statute was adopted, but the elisions made by the commissioners in charge of said rearrangement do not affect the original intent of the Legislature.

I am of the opinion that the words "or by their duly appointed committee" are to be construed to mean "or by a majority of a duly appointed committee of the trustees," and that the trustees of the Massachusetts Agricultural College have not "the right to appoint a committee to authorize expenditures consisting of others than members" of the board of trustees.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Auditor — Civil Service — Veteran.

A veteran appointed to the Auditor's office under St. 1920, c. 428, and St. 1921, c. 380, when not, as a matter of fact, employed under the civil service law, may be removed without a hearing.

JULY 1, 1929.

HON. ALONZO B. COOK, *Auditor of the Commonwealth*.

DEAR SIR:— You request my opinion as to whether a veteran appointed and employed in your Department under St. 1920, c. 428, and St. 1921, c. 380, is entitled to a hearing in the event of your discontinuing his employment.

In my opinion, he is not. Said chapter 380 provides for the continued employment of the employee in question "notwithstanding any civil service rules to the contrary." Moreover, it is my understanding that the employee in question was not originally appointed and never has been employed under the civil service law. This being so, he cannot avail himself of G. L., c. 31, § 26, which provides that no veteran shall be removed except after hearing, for that statute has been construed as applying only to veterans appointed under the civil service law. *Ayers v. Hatch*, 175 Mass. 489; *Bates v. Selectmen of Westfield*, 222 Mass. 296; VII Op. Atty. Gen. 90.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Joint Special Committee — Clerk of a Senate Committee — Wages or Salary.

The clerk of the Senate Committee on Rules and assistant to the President of the Senate may not, while drawing his salary for such position, receive compensation for work as secretary of a joint special committee.

JULY 2, 1929.

HIS HONOR WILLIAM S. YOUNGMAN, *Chairman, Committee of the Executive Council on Finance, Accounts and Warrants.*

DEAR SIR: — You have asked my opinion upon the following question: —

“Eugene W. Mason was employed as clerk of the Senate Committee on Rules and assistant to the President of the Senate for the year 1929, at an annual salary of \$3,000. The joint special committee created by order of the Legislature to investigate civil service laws, rules, etc., under date of June 25, 1929, have advised His Excellency the Governor and the Honorable Council that they desire to employ Eugene W. Mason for special legislative work as secretary of their committee, at a compensation not to exceed \$1,000, payable at the rate of \$150 a month, dating from July 1, 1929.

The Committee desires to know whether the Council may legally approve the proposed payments to Eugene W. Mason for the special legislative work above described.”

I am advised that Mr. Mason's duties as clerk of the Senate Committee on Rules and assistant to the President of the Senate do not cease with the prorogation of the annual session of the Legislature, but that he is still discharging the same and will be required to continue to do so, especially in relation to those pertaining to his work as assistant to the President of the Senate, throughout the current year, although they are not sufficient in amount fully to occupy his time during regular working hours, at least between July 1st and December 1st; and that Mr. Mason's salary is an annual salary, paid to him monthly throughout the year, and not in full at the close of the regular annual session of the General Court. Mr. Mason's situation in these respects does not resemble that of a member of the General Court, and the considerations relative to the latter in regard to a salary paid for services in another official capacity rendered after prorogation, as set forth in VI Op. Atty. Gen. 220, are not applicable to him.

Both sums which Mr. Mason would receive for his various forms of work, if the compensation as secretary of the joint special committee, referred to in your communication, were allowed him, would be payable out of the treasury of the Commonwealth.

G. L., c. 30, § 21, provides: —

“A person shall not at the same time receive more than one salary from the treasury of the Commonwealth.”

There is undoubtedly sometimes a distinction between a salary and compensation, as when the latter word is used as a synonym for wages. This difference has been pointed out and defined in an opinion of one of my predecessors in office (V Op. Atty. Gen. 700), in which I concur, and from which I quote as follows: —

"It is not necessary to quote authorities in defining what is meant by the word 'salary' other than to point out that it is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called 'piece work' basis, and are more frequently subject to deductions for loss of time."

Under this definition the payment which Mr. Mason would receive as secretary of the said joint special committee, as described in your communication, would be a salary. It would not be compensation on a per diem basis paid for the limited time in which he was engaged on the special work of said committee. There can be no doubt but that the sum of \$3,000 which Mr. Mason receives as clerk of the Senate Committee on Rules and assistant to the President of the Senate is a salary.

The facts as you have set them forth in your communication and as you have advised me regarding them do not appear to bring this matter within the principles relative to overtime work, as set forth in V Op. Atty. Gen. 697 and 699. See also II Op. Atty. Gen. 309.

Accordingly, I am constrained to advise you that the proposed payment to Mr. Mason for work for the said joint special committee, in the form in which it is now presented, should not, as a matter of law, be approved by your Committee.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Teachers' Retirement Law — Assessments — Failure to deduct Assessments seasonably.

Teachers must pay back assessments and interest thereon before being granted a retiring allowance.

JULY 2, 1929.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You have asked my opinion as to four questions, which are listed below:—

"1. If the assessments required by section 9 (2) of the retirement law (G. L., c. 32) are not deducted from the salary of a teacher who is subject to the law, is it necessary that the omitted assessments be paid by the teacher if the teacher is in the service of the public schools of Massachusetts, serving either in the city or town where the deductions were not made or in some other city or town?

2. If it is necessary that a teacher pay assessments in error omitted, is it also necessary that the teacher pay the interest which would have been credited on the omitted assessments, so that the teacher will have to his credit in the retirement fund the same amount which he would have had if the assessments had been paid in the regular manner as provided by section 12 (5); or, if the payment of interest is not required, is the payment of interest permissible?

3. If it is necessary that a teacher pay assessments in error omitted, either with or without the interest on said assessments, can the teacher be granted a retiring allowance before the amount due the retirement fund has been paid in full?

4. Is the following rule adopted by the Retirement Board at a meeting held September 29, 1925, in accordance with the provisions of the retirement law:

'If a school committee shall neglect to deduct from the salary of a teacher the assessments required by law, the amount due the annuity fund shall be paid in one sum by the teacher, or in equal monthly installments over a period of not exceeding five years, provided that the monthly installments shall not be less than the regular monthly assessment and they shall be deducted from the salary of the member by the employing school committee as directed by the Retirement Board.'

1. In my opinion, a teacher who is subject to the law must pay into the retirement fund all payments required by law which have not been deducted by the proper authorities. G. L., c. 32, § 7, defines who are members of the Teachers' Retirement Association, and makes membership in certain cases mandatory. Your question assumes that the teacher under consideration is subject to the law, and the teacher must therefore become a member of this Association. Section 9 of said chapter 32 requires that each member shall pay into the annuity fund certain assessments, which are to be deducted from his salary. Section 12 (5) of said chapter 32 provides that the school committee of each town shall, as directed by the Board, deduct from the amount of the salary due each teacher employed in the public schools of such town such amounts as are due as contributions to the annuity fund, as prescribed in section 9.

I am informed that in certain cases deductions have not been made and that several teachers who, under the law, are required to be members of the Association have not paid, either by deduction or otherwise, any sums into the annuity fund. In view of the fact that both membership and payments are mandatory under the statute, I am of the opinion that it is necessary that such teachers pay into the fund an amount equal to that which they would have paid had the deductions been properly made.

2. I am of the opinion that such a teacher must pay the interest which would have been credited on the unpaid assessments, so that he will have to his credit in the fund the same amount which he would have had if he had regularly paid the assessments as provided by law. It is to be noted that section 7 (3) of said chapter 32, as amended by St. 1927, c. 173, provides that in certain cases a teacher may become a member of the Association by paying an amount equal to the total assessments, together with regular interest thereon, which he would have paid if he had joined on September 30, 1914. This section is dealing with the case of a teacher who, as far as unpaid assessments are concerned, is in exactly the same position as the teacher about whom you inquire in your second question; and if the law requires that a teacher described in said section 7 (3) must pay regular interest, it would seem to follow logically that a teacher of the type about whom you inquire should also pay that interest. Further, it is only equitable that a teacher who has during the past years had the use of the money should pay a fair rate of interest upon it, so that he will be in approximately the same position as the teacher who has complied with the law and from whose salary installments have been deducted.

3. In my opinion, a teacher may not be granted a retiring allowance before the amount due the retirement fund has been paid in full. The law contemplates that only teachers who have complied with the law

relative to the payment of installments shall receive the retiring allowance. Section 7 (3) of said chapter 32, as amended, provides that certain teachers who are not compelled to become members of the Association may become such members if they so wish. With reference to the payment by such teachers of back installments, the paragraph provides that the teacher shall become a member of the Association when the total amount due on account of back assessments and interest has been accumulated in the annuity fund. Such a person is not enrolled as a member until the entire amount of back assessments is paid. Logically, the situation would seem to be similar in the case of a teacher who is compelled to become a member of the Association with reference to the right to receive the benefits thereof. There is no statute covering the exact point at issue, and the law most nearly applicable is that above cited. The whole theory and purpose of the law, as indicated throughout, is to confer its benefits upon teachers only when they have completely complied with its provisions, and if a teacher has not paid the full amount due at a given time it does not seem consistent with the purpose of the law that he should be permitted to receive its benefits. The mere fact that a school board or committee has failed to deduct from a teacher's salary the amounts due from time to time, as required by law, does not in any way alter the situation. The amounts are due regardless of whether or not the school board performs the mechanical details of deducting them.

4. In my opinion, the rule adopted on September 29, 1925, is within the power of the Board. Section 8 (2) of said chapter 32 provides that "the board may make by-laws and regulations consistent with law." In my opinion, it is well within the scope of the power of the Board to enact the rule referred to, although as to its desirability I, of course, make no comment.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Insurance — Fraternal Organizations — Certificates.

A final certificate may not be granted to a fraternal organization, under G. L., c. 176, which has already made contracts for the payment of death or disability benefits or has made such contracts or payments for death before the provisions of G. L., c. 176, § 8, have been complied with.

JULY 3, 1929.

HON. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have sent me a letter which, in part, is as follows: —

"G. L., c. 176, §§ 6-9, inclusive, regulate the formation and authorization of domestic fraternal benefit societies. Section 8 provides, in part, that no such society shall incur any liability except for advance payments made by applicants for membership, nor pay or allow any death or disability benefits until it has performed certain acts, and that upon the presentation of satisfactory evidence that the society has complied with all the provisions of said chapter, the Commissioner shall issue to the society a certificate to that effect.

A certain society in the process of formation has received a preliminary certificate under said section 8 but has not received the final certificate required under said section. It has complied with all the requirements of section 8 but it or its incorporators have in fact made contracts for the

payment of death or disability benefits or have paid such benefits contrary to the foregoing prohibition of said section. It now applies for a final certificate."

You request my opinion upon the two following questions relative to the matters which you have set forth:—

"1. Is the Commissioner precluded as a matter of law from granting a final certificate to a society, under said section 8, which has fulfilled all the requirements of said section 8 but which has admittedly made contracts for the payment of, or has paid, death or disability benefits contrary to said section, on the ground that the society has not complied with all the provisions of said chapter 176?

2. If you answer the preceding question in the negative, is the society as a matter of right entitled, on the facts set forth in the preceding question, to receive a final certificate in such circumstances, or is the issue thereof discretionary with the Commissioner?"

I answer your first question in the affirmative.

G. L., c. 176, § 8, provides, with relation to an unincorporated fraternal benefit society, the incorporators of which have held their first meeting, that—

"The commissioner shall then furnish the incorporators of any such society, if on the lodge plan, with a preliminary license, authorizing it to solicit members for the purpose of completing its organization. It shall collect from each applicant the amount of not more than one periodical benefit assessment or payment, in accordance with its tables of rates as provided by its constitution and by-laws, and shall issue to every such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advance payments, nor issue any benefit certificate, nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death or disability benefit certificates, as the case may be, have been secured from at least five hundred persons, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of the society; nor until there shall be established ten subordinate lodges or branches, in which said five hundred applicants have been initiated; nor until there has been submitted to the commissioner, on oath of the president and secretary or corresponding officers of such society, a list of the said applicants, giving their names, addresses, date of examination, date of approval, date of initiation, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, and rate of regular payments or assessments, which for societies offering death benefits shall not be lower for death benefits than those required by the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress August twenty-third, eighteen hundred and ninety-nine, or any higher standard at the option of the society, with an interest assumption not higher than four per cent per annum; nor until it shall be shown to the commissioner, by the sworn statement of the treasurer or corresponding officer of such society, that at least five hundred applicants for death benefits have each paid in cash one regular payment or assessment as herein provided, and the payments in the aggregate shall amount to at

least twenty-five hundred dollars, all of which shall be credited to the mortuary or disability fund on account of the applicants, and no part of which may be used for expenses. Such advance payments shall, during the period of organization, be held in trust for the applicants, and if the organization is not completed within one year as hereinafter provided, shall be returned to them. The commissioner may make such examination and require such further information as he deems advisable; and upon presentation of satisfactory evidence that the society has complied with all the provisions of this chapter, he shall issue to the society a certificate to that effect."

In addition to the information contained in your letter, you have advised me that the incorporators of the society as to which your inquiries are particularly addressed have both made promises to pay death and disability benefits and have paid such benefits before actual bona fide applications for certificates had been secured from at least five hundred persons, and have actually in fact paid death benefits before the medical examinations required by the said statute had been made and certificates thereof filed.

If the explicit provisions of said section 8 have been violated in the ways above described, it cannot be said that the society has complied with all the provisions of chapter 176, and, accordingly, satisfactory evidence of compliance with the provisions of said chapter, upon which the issuance of the certificate mentioned in said section 8 is predicated, cannot be before the Commissioner so as to require him to issue such certificate.

Moreover, payment of benefits before receipt of the Commissioner's certificate, which can from the nature of the case be made only from "advance payments," as those words are used in said section 8, has prevented the society from a compliance with that provision of section 8 which requires that advance payments "shall, during the period of organization, be held in trust for the applicants," to be returned if the organization is not completed.

My answer to your first inquiry precludes the necessity of answering your second question.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Public Welfare — Minor Children — Settlements.

After a divorce, when the children of a marriage have a settlement within the Commonwealth, derived from their mother, they will not lose it if the father has no settlement in the Commonwealth.

JULY 11, 1929.

HON. RICHARD K. CONANT, *Commissioner of Public Welfare*.

DEAR SIR: — You have asked my opinion in a communication which reads as follows: —

"I respectfully request your opinion whether or not three minor children, who now live in Athol, have a legal settlement within the Commonwealth. The father of the children was granted a decree of divorce which becomes absolute on July 21, 1929, and the court awarded the custody of the three children to him. He was born in Wisconsin May 8, 1894, and has never resided in any town in Massachusetts long enough to gain a legal settle-

ment. The mother of the three children was born in Erving, Massachusetts, February 4, 1902, and she admittedly has a legal settlement in that town."

I assume that your question relates to the settlement as of the time, July 21st, when the decree of divorce becomes absolute. G. L., c. 116, § 1, cl. Third, reads:—

"Legitimate children shall follow and have the settlement of their father if he has one within the commonwealth, otherwise they shall follow and have the settlement of their mother if she has one; if the father dies during the minority of his children they shall thereafter follow and have the settlement of the mother. Upon the divorce of the parents the minor children shall follow and have the settlement of the parent to whom the court awards their custody."

The provision in the above-quoted section in regard to divorce was added by St. 1911, c. 669. Under R. L., c. 80, § 1, cl. Second, which contained only what is now the first part of the section of the General Laws above quoted, the children in the case in question would clearly, because of the divorce, not lose their settlement in the town of Erving. In my opinion, the terms used in the provision added by the act of 1911 cannot properly be construed as changing the result. The word "settlement" must mean settlement within this Commonwealth; and since in the case in question the father, to whom custody is given, has no settlement within the Commonwealth, the provision has, by its terms, no application. The provision does not purport in terms to change the law in a case where the parent to whom custody is given does not have a settlement, and, in my opinion, no such meaning can be read into it.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Physician — Certificate of Registration — Town.

A physician must present his certificate of registration to the city or town clerk of each city or town in which he establishes an office.

JULY 16, 1929.

Mr. WILLIAM F. CRAIG, *Director of Registration*.

DEAR SIR:— You request my opinion as to whether it is necessary, under G. L., c. 112, § 8, for a physician to record his certificate of registration with the city or town clerk "each time he establishes a new business address."

Said section 8 provides, in part:—

"No person shall enter upon, or continue in, the practice of medicine within the commonwealth until he has presented to the clerk of the town where he has, or intends to have, an office or his usual place of business, his certificate of registration as a physician in the commonwealth."

I assume that your question refers to a case where a physician, who has recorded his certificate in one town, moves to or opens an office in another town. There seems to be nothing in the statute to require a new record where the physician takes a new business address within the same town.

The statute, in my opinion, requires the certificate to be recorded in each town in which the physician establishes an office.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Insurance — Life Policies — Incontestability — Forms.

A clause eliminating hazards of aviation from the coverage of a life policy may not be disapproved upon that ground alone.

AUG. 8, 1929.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR:— You have asked my opinion, in the first portion of a written communication, upon several questions relative to the interpretation and application of the incontestability provision concerning policies of life insurance embodied in G. L., c. 175, § 132, cl. 2. You have directed my attention particularly to certain forms of riders or endorsements intended to be attached to life policies, as to which your approval has been requested and which are before you for consideration.

The first two questions which you have propounded in relation to this portion of your communication are not limited in their scope to the forms of riders as to which you are now required to act, but are general in their nature and deal with possible and hypothetical states of fact which may or may not be called to your attention in the future and which are not necessarily governed by precisely the same principles of law as are applicable to the specific problems which arise upon the matters now actually before you for determination. I therefore do not at the present time deem it incumbent upon me to answer your questions numbered I, 1 and 2.

I.

You advise me in your communication as follows:—

“I. Certain life insurance companies have filed with me, and have requested me to approve, under said section 132 and section 192 of said chapter 175, certain forms of riders or endorsements which they propose to attach to forms of life or endowment policies to be issued in this Commonwealth, said policy forms having been duly approved by the Commissioner under said section 132 and containing the provision required by clause 2 of said section 132.

These forms of riders or endorsements read as follows:—

‘(1) Death as a result of service, travel or flight in any species of aircraft, except as a fare-paying passenger, is a risk not assumed under this contract; but, if the Insured shall die as a result, directly or indirectly, of such service, travel or flight, the Company will pay to the beneficiary the reserve on this contract.

(2) Death or disability resulting directly or indirectly from being in, on or about or operating or handling any vehicle or mechanical device for aerial navigation or in falling therefrom or therewith is a loss not assumed under any of the terms of this Policy; but in the event of such death the Company will pay to the beneficiary the amount of the reserve on this Policy.

(3) In the event of the death of the Insured within a period of ten years from the date of issue of this policy resulting directly or indirectly from travel, service or flight in any species of aircraft, the Company’s liability under this contract shall be limited to the reserve guaranteed by the policy.’ ”

With relation to the foregoing you have asked me the following questions:—

"3. May the Commissioner, under G. L., c. 175, §§ 132 and 192, as amended, lawfully approve any form of policy of life or endowment insurance, except an industrial policy, containing in substance the provisions required by clause 2 of said section 132 and the provisions of the forms of riders or endorsements set forth in I, *supra*, and numbered (1) and (2), or the form of the said riders or endorsements for attachment to the aforesaid forms of policies?"

4. May the Commissioner, as aforesaid, lawfully approve any such form of policy containing in substance the provisions required by said clause 2 and the provisions of the form of rider or endorsement set forth in I, *supra*, and numbered (3), or the form of the said rider or endorsement for attachment to the aforesaid forms of policies?"

I am also advised that one of your predecessors in office has at some time in the past approved riders similar to one of the three forms described in your letter, so that there would not appear to be an established departmental interpretation of the incontestable clause of G. L., c. 175, § 132, cl. 2, adverse to the approval of such riders.

G. L., c. 175, § 132, cl. 2, as amended, reads as follows: —

"A provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue except for non-payment of premiums or violation of the conditions of the policy relating to military or naval service in time of war and except, if the company so elects, for the purpose of contesting claims for total and permanent disability benefits or additional benefits specifically granted in case of death by accident."

G. L., c. 175, § 192, as amended, in its pertinent parts is as follows: —

"All provisions of law relative to the filing of policy forms with, and the approval of such forms by, the commissioner shall also apply to all forms of riders, endorsements and applications designed to be attached to such policy forms and when so attached to constitute a part of the contract."

The incontestability of the policy as provided for in said section 132, clause 2, precludes a defense that the contract made between the parties is not valid and binding. It does not preclude a defense that the subject matter of a claim is outside the scope of the contract as written. It does not enlarge the coverage of the contract, neither does it of itself determine the risk or hazard which the parties to the contract elect to include therein.

The policy with its rider or endorsement constitutes the contract of insurance made between the parties, and where the risk of aviation hazards is limited in, or eliminated from, such contract the fact that the contract as made is incontestable in no way tends to make illegal the terms of the agreement as written by the mutual consent of the parties in the policy and endorsement.

It cannot fairly be said that because the statute sets forth certain exceptions to incontestability of a policy no contract may be made which by the mutual agreement of insured and insurer lessens the extent of the coverage by removing those connected with aviation from the scope of coverage.

The riders or endorsements with relation to aviation, set forth above as (1), (2) and (3), do not appear to be contrary to any provisions of law, and I answer your questions I, 3 and 4, in the affirmative.

II.

You have advised me in your communication as follows: —

“II. Certain life insurance companies are issuing in this Commonwealth a form of industrial life policy which contains a provision that the policy —

‘shall be incontestable after it has been in force during the lifetime of the Insured, for a period of two years from the date of issue, except for nonpayment of premiums, fraud or misstatement of age’;

and further provisions which read as follows: —

‘If, (1) the Insured is not alive or is not in sound health on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has, within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, unless such rejection, medical attention or previous disease is specifically recited in the “Space for Endorsements” on page 4 in a waiver signed by the Secretary; or if (3) any Policy on the life of the Insured hereunder has been previously issued by this Company and is in force at the date hereof, unless the number of such prior Policy has been endorsed by the Company in the “Space for Endorsements” on page 4 hereof (it being expressly agreed that the Company shall not, in the absence of such endorsement, be assumed or held to know or to have known of the existence of such prior Policy, and that the issuance of this Policy shall not be deemed a waiver of such last mentioned condition), then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud, in which case all premiums will be forfeited to the Company.’”

In relation thereto you have asked me this question: —

“5. May the Commissioner, under said section 132, as amended, lawfully approve a form of industrial life policy containing the provision for incontestability and the other provisions set forth in II, *supra*, or should such a form of policy be disapproved, as a matter of law, on the ground that any condition, a violation of which, existing prior to the expiration of the period of time specified in said provision for incontestability and continuing or occurring, thereafter, relieves the company from liability, is repugnant to the provision for incontestability?”

G. L., c. 175, § 132, does not require the insertion of a clause as to incontestability in a policy of industrial insurance.

An incontestable clause is a part of the industrial life policy under consideration, but various provisions are introduced into the contract by which the insurer may avoid liability. In each instance the exceptions to the incontestability of the contract, introduced into the policy, relate to facts, circumstances or events prior to, and in some instances leading up to, the making of the contract. Such exceptions would be plainly repugnant to a statutory requirement that such policies should contain an incontestable clause, such as is required for the life policies, which have previously been considered. In this instance, however, the incontestable

clause, modified by the exceptions, constitutes, when read in connection with each other, a term of the policy fixed by agreement of the insured and insurer which is not contrary to any provision of law governing the form of industrial policies.

I therefore answer your fifth question in the affirmative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

State Hospital — Gardner State Colony — Superintendent — Inmates.

A superintendent of a State hospital or colony has authority to allow patients to leave the grounds, under proper supervision, for short periods, under conditions beneficial to their health.

SEPT. 7, 1929.

Dr. GEORGE M. KLINE, *Commissioner of Mental Diseases*.

DEAR SIR:— You have asked my opinion relative to the authority and liability of the superintendent of the Gardner State Colony in a communication as follows:—

“Your opinion is respectfully requested on certain questions raised by Dr. Charles E. Thompson, Superintendent of the Gardner State Colony.

He states that a short while ago after sending a number of patients to attend a circus at Fitchburg he became concerned as to possible legal liability should injuries occur to them. Inasmuch as this procedure is one that might arise in any institution, the Department feels that the subject is of sufficient importance to ask for an opinion on certain specific questions.

(1) Has the superintendent authority legally to allow a group of patients to leave the confines of an institution temporarily for recreation, entertainment or similar purpose?

(2) What liability, if any, attends a superintendent or other official in authority sending a patient or group of patients temporarily away from the confines of an institution for recreation, entertainment or similar purpose should injury occur to them, or should such patients injure persons or property?

(3) Is the State liable legally in such a case?”

1. I answer your first question in the affirmative. The Gardner State Colony is an institution under the control of your Department, listed under G. L., c. 123, as a State hospital to which insane persons may be committed. The authority to act, in the exercise of a wise discretion, for the benefit of such insane persons, vested in the Department and in its superintendents of State hospitals, is necessarily very broad. I cannot say, as a matter of law, that such a superintendent is not acting within his implied authority in allowing a group of patients, whose condition is such that they may reasonably be expected to receive benefit therefrom, to leave the confines of a State hospital for a short period of recreation or entertainment, when properly supervised and guarded. Of course, in any given instance the facts connected with each individual patient's well-being and safety must be considered by a superintendent.

2. Your second question asks for a somewhat general statement of law without reference to any specific facts. Speaking broadly, an official in charge of patients of a State hospital may be liable individually for acts

of negligence on his part which are the direct cause of injury to such patients or to the person or property of others. In taking action in relation to the care of his patients such official is bound to exercise such reasonable care as may properly be expected of a person occupying such a position of responsibility, having regard especially to the mental characteristics of those under his care.

3. The Commonwealth cannot be sued in its own courts for injuries or damages sustained by persons through the negligence of officials such as you describe in your letter. Claims with relation to such injuries or damages might, under certain circumstances, which it is not necessary for me to attempt to describe in detail, require the disbursement of money by the Commonwealth.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Citizenship — Registration of Voters.

The burden of proving citizenship is upon a person applying for registration as a voter.

The registrars of voters are to determine the question of citizenship upon such proof.

SEPT. 23, 1929.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR:— You ask my opinion on the following question:—

“Have registrars of voters or election commissioners authority to register as a voter in this Commonwealth a person whose only right to citizenship is derived through naturalization of husband or father, upon presentation of certificate of naturalization of such husband or father, or must such person present a certificate obtained after application of said section 33 (45 Stat. at L., pt. I, p. 1512)?”

You state in your communication that—

“In the case of a wife, or a child who was a minor at the time of naturalization of his parent, and who is otherwise qualified to register, it is the present practice, I believe, of registrars of voters and election commissioners to require the production for inspection of the papers of the husband or parent. Such papers in late years bear the names of wife and minor children”; and that “the new form to be used for certificate of naturalization does not contain any blank for statement of wife or minor children, and election officials are apprehensive and in disagreement concerning proof of citizenship to be required.”

The laws of the United States conferring citizenship upon minor children of naturalized parents are found in the United States Code, Title 8, chapter 1, sections 7 and 8, as follows:—

“SECTION 7. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and

jurisdiction of the United States, be considered as citizens thereof. (R. S. § 2172.)

SECTION 8. A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent, where such naturalization or resumption takes place during the minority of such child. The citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States. (Mar. 2, 1907, c. 2534, § 5, 34 Stat. 1229.)"

In passing upon these statutes the Circuit Court of Appeals, Second Circuit, in *United States ex rel. Patton v. Tod*, 297 Fed. 385, said: —

"We have a simple system under which each statute confers rights in two different situations. Under R. S. U. S. § 2172 (U. S. C., Title 8, c. 1, § 7, above quoted), a foreign-born minor child dwelling in the United States at the time of the naturalization of the parent automatically becomes an American citizen. Under section 5 of the Act of March 2, 1907 (U. S. C., Title 8, c. 1, § 8, above quoted), a foreign-born child, not in the United States when the parent is naturalized, becomes a citizen only from such time as, while still a minor, it begins to reside permanently in the United States."

A person claiming to be a citizen by virtue of the naturalization of his parent can establish that fact, it seems to me, by producing substantial proof of his minority at the time of naturalization of the parent and that he was either dwelling in this country at that time or that he began to reside permanently in the United States during his minority.

The law relative to citizenship of a wife of a naturalized person, prior to Act of Congress approved September 22, 1922, provided (Rev. Stat. 1874, § 1994): —

"Any woman who is now or may hereafter be married to a citizen of the United States and who might herself be lawfully naturalized, shall be deemed a citizen."

A similar act has been construed in *Kelly v. Owen*, 7 Wall. 496, 498, to confer —

"The privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms 'married,' or 'who shall be married,' do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that, whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after marriage, she becomes, by that fact, a citizen also."

Rev. Stat. 1874, § 1994, was repealed by Act of Congress approved September 22, 1922. The repealing statute expressly provides that citizenship acquired thereunder "shall not terminate." See U. S. C., Title 8, c. 9, § 368.

G. L., c. 51, § 44, provides, in part: —

"The registrars shall examine on oath an applicant for registration relative to his qualifications as a voter."

This statute places the burden of proving citizenship upon the person

applying for registration. It does not prescribe the manner in which the proof shall be established. The sufficiency of such proof is to be determined by the registrars in each individual case.

The prevailing practice of the registrars, in cases where applicants for registration claim citizenship by virtue of the naturalization of a parent or husband, of requiring the production by the applicant of the naturalization certificate of the parent or husband, is one way in which the question of citizenship of the applicant may be determined.

Another way in which the question may be determined is by the production by the applicant of a "certificate of citizenship" issued by the Commissioner of Naturalization under section 9 of the Act of March 2, 1929 (45 Stat. at L., pt. I, p. 1512), which section provides as follows:—

"Any individual over twenty-one years of age who claims to have derived United States citizenship through the naturalization of a parent, or a husband, may, upon the payment of a fee of \$10, make application to the Commissioner of Naturalization, accompanied by two photographs of the applicant, for a certificate of citizenship. Upon obtaining a certificate from the Secretary of Labor showing the date, place, and manner of arrival in the United States, upon proof to the satisfaction of the commissioner that the applicant is a citizen and that the alleged citizenship was derived as claimed, and upon taking and subscribing to, before a designated representative of the Bureau of Naturalization within the United States, the oath of allegiance required by the naturalization laws of a petitioner for citizenship, such individual shall be furnished a certificate of citizenship by the commissioner, but only if such individual is at the time within the United States. In all courts, tribunals, and public offices of the United States, at home and abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States, the certificate of citizenship issued under this section shall have the same effect as a certificate of citizenship issued by a court having naturalization jurisdiction."

An examination of the legislative history of the Act of March 2, 1929 (45 Stat. at L., pt. I, p. 1512), leads me to believe that Congress did not intend that all persons claiming citizenship through the naturalization of a parent or husband should be required to secure a "certificate of citizenship" to entitle them to the privileges of native born or naturalized Americans. I believe that until and unless the Legislature of the Commonwealth, by legislative act, requires the production of a "certificate of citizenship" issued under said Act of March 2, 1929, to establish citizenship for the purposes of registration as voters, the registrars of voters or election commissioners cannot require an applicant for registration to procure such a "certificate of citizenship" if the citizenship of such applicant can be proved in any other manner. I am therefore of the opinion that registrars of voters or election commissioners have authority to register as a voter in this Commonwealth a person whose only right to citizenship is derived from naturalization of husband or parent, upon presentation of a certificate of the naturalization of such husband or parent, if they are satisfied that citizenship was derived in that manner; and if, in their judgment, the proof offered is not sufficient, they may require a "certificate of citizenship," but they cannot arbitrarily require the production of such certificate in all cases.

Yours very truly,

JOSEPH E. WARNER, *Attorney General*.

Fire Marshal — Rules — Enforcement.

It is the duty of both the State Fire Marshal and the local authorities to prosecute violations of regulations made under G. L., c. 148.

OCT. 3, 1929.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR:— You state that certain persons in the city of Lynn are violating the regulations of the State Fire Marshal relative to the use of inflammable fluids and compounds in the manufacture of shoes, that the Marshal has delegated to the head of the fire department of said city "the carrying out of any lawful rule, order or regulation established by the Fire Marshal," that the city officials have taken the position that it is not their duty but the duty of the Fire Marshal to enforce the regulations, and that accordingly they are not prosecuting said violations. You request my opinion as to "whether it is the duty of the State Fire Marshal to execute and enforce" these regulations, "or whether it is incumbent upon the Lynn authorities to execute and enforce these regulations under the authority vested in them by the aforesaid delegation of power."

The regulations in question are made under authority of G. L., c. 148, § 30, which authorizes the Marshal, among other things, to inspect or regulate the keeping or use of inflammable fluids and compounds. Section 31 of said chapter provides:—

"The marshal may delegate the granting and issuing of any licenses or permits authorized by sections thirty to fifty-one, inclusive, or the carrying out of any lawful rule, order or regulation of the department, or any inspection required under said sections, to the head of the fire department or to any other designated officer in any city or town in the metropolitan district."

Acting under said section 31 the Marshal has delegated to the head of the fire department of the city of Lynn —

"The right to issue any permit authorized by G. L., c. 148, §§ 30-51, inclusive, the carrying out of any lawful rule, order or regulation established by the Fire Marshal, and the right to make any inspection required under said sections."

Section 51 of said chapter 148 imposes the penalty of a fine for violation of rules made under section 30.

The regulations in question "have the force and effect of law." *Guinan v. Famous Players-Lasky Corporation*, Mass. Adv. Sh. (1929) 1297, 1305.

In my opinion, it is the duty of both the State Fire Marshal and the local authorities to see to it that these violations of law are prosecuted. If it appears to the Marshal that the local authorities are failing to prosecute violations of law, it is his duty as a public official to cause such violations to be prosecuted. The fact that the Marshal has delegated the carrying out of these regulations to local authorities does not deprive him of the power or free him from the duty of acting in cases where it becomes known to him that the local authorities are failing to act.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Fire Marshal — Municipalities — Ordinances — Fire Prevention.

Cities and towns have no power to make ordinances regulating storage and use of explosives and inflammable fluids within the Metropolitan Fire Prevention District, but may regulate by ordinances for fire prevention in connection with the construction of buildings.

OCT. 8, 1929.

Special Commission for Investigation of the Laws, Rules and Regulations relating to Fire Prevention.

GENTLEMEN: — You request my opinion upon the following questions: —

"1. Have municipalities within the Metropolitan Fire Prevention District authority to adopt ordinances, in addition to the rules of the State Fire Marshal and the Department of Public Safety, relating to fires and to fire prevention?

2. Have municipalities outside the Metropolitan Fire Prevention District authority to adopt ordinances, in addition to the rules of the State Fire Marshal and the Department of Public Safety, relating to fires and to fire prevention?"

Under G. L., c. 143, § 3, every city, except Boston, and every town accepting the statute is authorized, "for the prevention of fire," among other things, to regulate by ordinance or by-law "the inspection, materials, construction, alteration, repair, height, area, location and use of buildings and other structures."

By G. L., c. 148, § 39, the Fire Marshal is given certain limited powers to make rules within the metropolitan district "relating to fires, fire protection and fire hazard." By section 42 the Fire Marshal may require reports from heads of fire departments of violations "of ordinances, by-laws, rules or orders made by the various cities and towns, or by the Marshal, relating to fires, fire hazard and fire protection." The statute first cited, giving to cities and towns power to regulate as therein stated, is in full force and effect. It has not been abrogated by any delegation of authority to regulate given to the State Fire Marshal or to the Department of Public Safety, either within or without the metropolitan district. See *Storer v. Downey*, 215 Mass. 273; *Kilgour v. Gratto*, 224 Mass. 78.

As to any ordinances or by-laws relating to the storage or use of explosives or inflammable compounds, assuming that such ordinances or by-laws cannot be brought within the scope of G. L., c. 143, § 3, above referred to, a different question is presented. Under the Revised Laws cities and towns, in addition to the power given them to regulate, for the prevention of fire, the inspection, materials, construction, alteration and use of buildings and other structures (R. L., c. 104, § 1, now G. L., c. 143, § 3), were authorized to adopt ordinances, by-laws and regulations relative to the storage and sale of camphine or any similar explosive or inflammable fluid (R. L., c. 102, § 94), and also to make certain orders relative to storage of gunpowder and use of certain explosives (R. L., c. 102, §§ 89 and 91).

But by St. 1904, c. 370, § 1, it was provided that —

"The powers conferred on city councils of cities and selectmen of towns by chapter one hundred and two of the Revised Laws, to regulate the keeping, storage, use, manufacture or sale of gunpowder, dynamite or

other explosives and inflammable fluids, shall hereafter be exercised by the fire marshal's department of the district police."

By section 5 it was provided that —

"So much of chapter one hundred and two of the Revised Laws as is inconsistent herewith is hereby repealed."

By St. 1914, c. 795, which created the office of Fire Prevention Commissioner for the Metropolitan District, it was provided in section 3 that —

"All existing powers, in whatever officers, councils, bodies, boards or persons, other than the general court and the judicial courts of the commonwealth, they may be vested, to license persons or premises, or to grant permits for or to inspect or regulate or restrain the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, nitroglycerine, camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, firecrackers, or any other explosives, and the use of engines and furnaces described in section seventy-three of chapter one hundred and two of the Revised Laws, are hereby transferred to and vested in the commissioner."

The power of the Department of Public Safety, as now constituted, to make rules, applicable outside of the metropolitan district, governing the storage or use of explosives or inflammable fluids or compounds is found in G. L., c. 148, § 10, which reads as follows: —

"The department may make rules and regulations for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, and may prescribe the materials and construction of buildings to be used for any of the said purposes, except that cities and towns may by ordinances or by-laws prohibit the sale or use of fireworks or firecrackers within the city or town, or may limit the time within which firecrackers and torpedoes may be used."

The power of the Marshal to make rules governing the storage or use of explosives or inflammable fluids and compounds within the metropolitan district is found in G. L., c. 148, § 30, in the following words: —

"The marshal shall have within the metropolitan district the powers given by sections ten, thirteen, fourteen, twenty, twenty-one and twenty-two to license persons or premises, or to grant permits for, or to inspect or regulate, the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, nitroglycerine, camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, firecrackers, or any other explosives, and the use of engines and furnaces as described in section one hundred and fifteen of chapter one hundred and forty; provided, that the city council of a city or the selectmen of a town may disapprove the granting of such a license or permit, and upon such disapproval the permit or license shall be refused. In Boston certificates of renewal of licenses as

provided in section fourteen shall be filed annually for registration with the fire commissioner, accompanied by a fee of one dollar."

In my opinion, the terms of these statutes must be construed as divesting cities and towns of any power which they previously had to regulate the storage and use of explosives or inflammable fluids as such. Such powers to make rules and regulations became vested in the Fire Marshal's department of the District Police, or afterwards, within the metropolitan district, in the Fire Prevention Commissioner; and to these powers the Department of Public Safety (or the State Fire Marshal) has succeeded. Gen. St. 1919, c. 350, § 99.

As before stated, however, cities and towns may still, under G. L., c. 143, § 3, by ordinances or by-laws regulate, for the prevention of fire, the construction and use of buildings and other structures. (It will also be noted that under G. L., c. 148, § 30, the power of the Fire Marshal to *license* within the metropolitan district is subject to the approval of the local authorities.)

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Motor Vehicles — Length — Ways.

Motor vehicles and trailers when used for transportation of poles, and various single units having an over-all length, inclusive of load, of not more than 60 feet, may operate on any public way.

OCT. 14, 1929.

Hon. FRANK E. LYMAN, *Commissioner of Public Works*.

DEAR SIR:— You have asked my opinion concerning the interpretation of G. L., c. 90, § 19, as amended, with relation to two questions which you have set forth as follows:—

"(1) If the Department should decide to designate localities or ways, as provided in this act, will it be possible to limit any such way to a 33-foot vehicle, or will the act of designation automatically carry with it authority for the use of such ways by vehicles which, when loaded with poles, have an over-all length of 60 feet?

(2) If no designation is made by the Department under the provisions of this act, can motor vehicles loaded with poles, having an over-all length of 60 feet, be legally operated on any way without the 'special permit' mentioned in the tenth line of this act?"

G. L., c. 90, § 19, as amended by St. 1929, c. 313, reads:—

"No motor vehicle or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which is more than twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way or, in case of a state highway or a way determined by the department of public works to be a through route, from said department; provided, that such width may be exceeded by the lateral projection of pneumatic tires beyond the rims of the wheels for such distance on either side of the vehicle or trailer as will not increase its outside width above one hundred and two inches; and provided, further, that the extreme over-all length of such a vehicle or trailer when used in localities or on ways designated by the said department may exceed twenty-eight feet but not thirty-three feet, and

that, when used for the transportation of poles or single units of lumber or metal, such length may exceed twenty-eight feet but not sixty feet, except as authorized by a special permit granted as aforesaid. The aforesaid dimensions of width and length shall be inclusive of the load."

Before the enactment of the amending act, St. 1929, c. 313, G. L., c. 90, § 19, as then amended by St. 1927, c. 72, was as follows:—

"No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way, or, in case of a state highway or a way determined by the department of public works to be a through route, from the commissioner of public works. The aforesaid dimensions of width and length shall be inclusive of the load."

Accordingly, the law as it stood before the passage of St. 1929, c. 313, prohibited the operation on any way of a commercial motor vehicle or trailer having an over-all length, inclusive of its load, of more than 28 feet, without a special permit.

The amendment of section 19 by St. 1929, c. 313, in its first clause establishes precisely the same general prohibition as to over-all length of all motor vehicles and trailers as had been set forth for commercial motor vehicles and trailers immediately prior thereto, and then sets up certain exceptions to the general prohibition of an over-all length, inclusive of load, in excess of 28 feet, and these exceptions are: First, as to such vehicles when used in localities or on ways designated by the Department of Public Works, in which instance the maximum length may be 33 feet; and second, as to such vehicles "when used for the transportation of poles or single units of lumber or metal," in which latter instance the maximum length may be 60 feet.

I am of the opinion that the second exception noted above, in favor of such vehicles as are used for the designated transportation purposes, is not limited to such vehicles so used when run upon designated ways or in designated localities, but applies to them wherever used upon the ways throughout the Commonwealth. I am constrained to think that such was the intent of the Legislature as expressed by the words of St. 1929, c. 313, by reason of the fact that the word "that" immediately follows the word "and," in the twenty-second line of said chapter, indicating, in connection with the context, a separation of the provisions which immediately follow it from those employed just before in relation to designated ways and localities. I am confirmed in this view by the further fact that the provisions of the exceptions concerning motor vehicles on "designated" ways state that their length "may exceed twenty-eight feet but not thirty-three feet," and that the language with relation to motor vehicles engaged in the designated transportation is that their length "may exceed twenty-eight feet but not sixty feet." If the exception with relation to the last-named class of vehicles had been intended by the Legislature to be limited by the provisions connected with use on designated ways, the wording used would not have been as above quoted but would naturally have been,—"may exceed thirty-three feet but not sixty feet."

In accordance with the foregoing considerations I answer your first question to the effect that, irrespective of a designation of localities or

ways by your Department, motor vehicles and trailers, "when used for the transportation of poles and single units of lumber or metal," having an over-all length, inclusive of load, of not more than 60 feet, may operate in any locality and upon any public way, designated or undesignated; and that you have no authority to limit the use of any public way whatsoever to 33-foot vehicles to the exclusion of those not over 60 feet, used in said transportation.

I answer your second question in the affirmative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Civil Service — Chief of Police of Leominster.

The chief of police of Leominster is within the civil service law and rules.

OCT. 23, 1929.

HON. ELLIOT H. GOODWIN, *Commissioner of Civil Service*.

DEAR SIR:— You have asked me the two following questions:—

"1. Did the passage of Gen. St. 1918, c. 291, § 22, legalize the act of the town of Leominster in accepting St. 1911, c. 468, and place the chief of police of that town within the civil service classification?"

2. If the answer to question number one is in the affirmative, does the fact that Leominster became a city on January 3, 1916, prior to the passage of the 1918 amendment, affect the situation?"

You advise me that on March 3, 1915, the town of Leominster voted to accept the provisions of R. L., c. 19, § 37, and "at the same time," but I assume somewhat thereafter, the town voted to accept the provisions of St. 1911, c. 468, which in effect classified the chief of police of the town under the civil service.

An opinion of one of my predecessors in office, to which you refer in your communication and with which I agree, was given the Civil Service Commission under date of March 21, 1917 (not published), and was to the effect that the town of Leominster did not by its votes of March 3, 1915, so accept St. 1911, c. 468, as to place its chief of police within the classified service.

The reason for the result arrived at by the opinion was that the town, by its first vote of March 3, 1915, accepted only the provisions of R. L., c. 19, § 37, and not the whole of said chapter 19, and that since by the terms of St. 1911, c. 468, as it then read, the acceptance by a town of St. 1911, c. 468, was not effective unless it had previously accepted all the provisions of R. L., c. 19, the action of the town did not in the then existing state of the law constitute a valid acceptance of St. 1911, c. 468.

After the said opinion was rendered, the Legislature enacted in 1918 an amendment to said St. 1911, c. 468, namely, Gen. St. 1918, c. 291, § 22, which reads as follows:—

"Section one of chapter four hundred and sixty-eight of the acts of nineteen hundred and eleven is hereby amended by inserting after the word 'of' in the ninth line the words — section thirty-seven of, — and by inserting at the end thereof the words — as applied to the police force thereof, — so as to read as follows:— *Section 1.* The provisions of chapter nineteen of the Revised Laws, entitled 'Of the Civil Service', and all acts in amendment thereof and in addition thereto, and the civil service

rules made thereunder, and all acts now or hereafter in force relating to the appointment and removal of police officers, shall apply to the superintendent, chief of police or city marshal in all cities except Boston, and in all towns that have accepted, or may hereafter accept, the provisions of section thirty-seven of said chapter nineteen as applied to the police force thereof."

This statute made applicable to cities and towns which had accepted said section 37 only, all acts then or thereafter in force relative to chiefs of police upon acceptance of the statute of 1911. The town had previously voted to accept St. 1911, c. 468, but its vote was ineffectual as an acceptance only because said statute as it then stood required the acceptance of the whole of R. L., c. 19, as a prerequisite to the acceptance of St. 1911, c. 468. The town had in fact prior to its vote on the acceptance of the statute of 1911, voted to accept said section 37 of R. L., c. 19. The effect of the amendment of the statute of 1911 by Gen. St. 1918, c. 291, § 22, was to make effective the vote of the town accepting said statute of 1911, by reason of its acceptance of said section 37. In my opinion, the intent of the Legislature in amending St. 1911, c. 468, was to give to the amended section a retroactive effect to the extent above set forth.

You advise me that Leominster became a city January 3, 1916, that is, prior to the passage of Gen. St. 1918, c. 291, § 22. The fact that it was so incorporated prior to the enactment of Gen. St. 1918, c. 291, § 22, is immaterial. The city of Leominster is the same municipal corporation as the inhabitants of the town of Leominster were. By being incorporated as a city the identity of the municipal corporation is not lost (*Higginson v. Turner*, 171 Mass. 586, 591), and the acceptance of R. L., c. 19, § 37, and of St. 1911, c. 468, by the town in 1915 is an acceptance of said chapters by the city of Leominster, within the meaning thereof, in view of the effect of Gen. St. 1918, c. 291, already noted.

I answer your first question to the effect that the passage of Gen. St. 1918, c. 291, § 22, had the effect of making R. L., c. 19, and all acts in amendment thereof and in addition thereto, and the civil service rules made thereunder, and all acts in force at the effective date of said chapter 291 and thereafter enacted, relating to the appointment and removal of police officers, applicable to the chief of police of Leominster.

I answer your second question in the negative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General*.

Incompatibility of Offices.

The positions of register of probate of Hampden County and special justice of the District Court at Holyoke may both be held by one person.

Nov. 4, 1929.

His Excellency FRANK G. ALLEN, *Governor of the Commonwealth*.

SIR: — You have requested my opinion upon the following question of law: —

"On October 30, 1929, the name of Russell L. Davenport, Esquire, of Holyoke, was submitted for the position of register of probate for the County of Hampden. For your information Mr. Davenport at the

present time is special justice of the District Court at Holyoke. If the Executive Council confirms the nomination of Mr. Davenport for the position of register of probate on November 6th, will it be constitutional for him to hold the two offices mentioned at the same time?"

Mass. Const., pt. 2nd, c. VI, art. II, and Mass. Const. Amend. VIII set forth certain offices not more than one of which may be held by a single individual, and certain other offices not more than two of which may be held by a single individual. Certain other offices are described which may not be held by members of the General Court.

The positions of register of probate for Hampden County and special justice of the District Court at Holyoke are not so designated in the Constitution but that they may be held by one individual. There appears to be no provision of statutory law making it illegal for one person to hold both of these offices, and I consequently advise you that it will be constitutional for the person whom you name in your letter to retain his office as said special justice while holding also the position of said register of probate.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Director — Two Positions — Text Books.

A person may not hold the position of principal of the Massachusetts School of Art and State Director of Art Education if he has a direct or indirect pecuniary interest in the books or school supplies used in public schools.

Nov. 15, 1929.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You have asked my opinion as to the application of G. L., c. 15, § 5, as it affects the services of a person employed as principal of the Massachusetts School of Art and State Director of Art Education, in so far as such person may have a pecuniary interest in books or supplies used in the public schools.

G. L., c. 15, § 5, in its pertinent parts, reads as follows:—

"Except in the case of the teachers' retirement board, the division of public libraries, the division of the blind and institutions under the department, the commissioner may appoint such agents, clerks and other assistants as the work of the department may require, may assign them to divisions, transfer and remove them and fix their compensation, but none of such employees shall have any direct or indirect pecuniary interest in the publication or sale of any text or school book, or article of school supply used in the public schools of the commonwealth."

You have advised me that a single person is employed by your Department under one title or description but with two distinct lines of work, with dissimilar duties: namely, first, as principal of the State school of art, which you tell me corresponds in general scope of administration to that of a State normal school, and, second, as Director of Art Education; and I am informed that the duties of this latter position are not unlike the functions usually discharged by the agents appointed under the provisions of said section 5, except that they are confined to promotion of a single branch of education only, — that of art. In your letter to me

you have described the duties which such person performs as Director of Art Education as follows:—

“He visits the various towns and cities of the Commonwealth for the purpose of conferring with art supervisors and school officials on their art programs in the public schools; addresses groups of people on art subjects; confers with art supervisors and school officials; and conducts regional conferences of art supervisors.”

If the duties of the person who bears the title of principal of the Massachusetts School of Art and State Director of Art Education were confined to the administration of the School of Art, the prohibition of said section 5 would not be applicable to such a person, for the reasons set forth in an opinion of one of my predecessors in office rendered to you August 5, 1924 (VII Op. Atty. Gen. 495), inasmuch as it appears plain that in the capacity of such a principal alone he would not be an agent of the Department appointed under the authority of said section 5, but rather would be appointed by virtue of G. L., c. 73, § 1, as amended by St. 1926, c. 6. But the duties of the person who bears the said title embrace also duties such as visiting cities and towns and doing other acts particularly prescribed for agents of the Board under earlier statutes, now embodied in said section 5 (P. S., c. 41, § 9; R. L., c. 39, § 9).

It would seem that in his capacity as State Director of Art Education he is acting as an agent of the Department, within the meaning of said section 5, and, though called a director, his appointment would appear to be that of an agent, made by virtue of the provisions of said section 5, especially as no specific statutory authority exists relative to the directorship of art education, and no division of art education which would require a director as its head appears, from what you have advised me, to be in existence.

Since, then, the position in question is, in part at least, that of an agent appointed under G. L., c. 15, § 5, the incumbent is subject to the terms of said section relative to pecuniary interest in books and supplies.

Consequently, I am constrained to advise you that a person may not lawfully hold the position called principal of the Massachusetts School of Art and State Director of Art Education if he has “any direct or indirect pecuniary interest in the publication or sale of any text or school book or article of school supply used in the public schools of the Commonwealth.” If, as a matter of fact, the two employments constitute one position, such a pecuniary interest would debar a person from holding the same.

Yours very truly,
JOSEPH E. WARNER, *Attorney General*.

State Board of Retirement — Members — Probation.

The Board has authority to make a by-law that an employee shall not be a member during a probationary period of employment nor until ninety days thereafter, and an employee has not the right to apply for retirement during such periods.

Service of members is to be computed alone from the beginning of non-probationary employment by the Commonwealth.

Nov. 16, 1929.

Hon. JOHN W. HAIGIS, *Chairman, Board of Retirement.*

DEAR SIR:— You have asked my opinion upon the following questions relating to the authority of the Board of Retirement:—

“(1) Has the Board exceeded its authority in establishing a by-law that an employee shall not become a member during a period of probationary employment?”

(2) Is it correct for the Board not to enroll a person until ninety days after he has completed a period of probationary employment?”

(3) Is it correct after the enrollment of an employee to include the probationary plus additional ninety days of service when computing his total period of continuous service for retirement benefits under the law?”

(4) Has an employee any rights under G. L., c. 32, § 2 (9), to apply to the Board for retirement during a probationary period of employment and the additional ninety days specified by the law?”

G. L., c. 32, § 2, provides that —

“There shall be a retirement association for the employees of the commonwealth.”

Section 1, as amended by St. 1922, c. 341, § 1, defines “employees,” as the word is used in said chapter 32, as —

“Persons permanently and regularly employed in the direct service of the commonwealth . . . whose sole or principal employment is in such service.”

G. L., c. 31, § 3, provides that the Civil Service Commissioners may make rules and regulations which shall regulate “the selection of persons to fill appointive positions in the government of the commonwealth,” and that such regulations shall include — “(e) A period of probation before an appointment or employment is made permanent.” You advise me that the Civil Service Commissioners have duly made a regulation providing a probationary period of six months in the classified service before an appointment or employment is made permanent. It is plain that a person while employed during a probationary period, whether his employment is under civil service or not, is not, from the very nature of such employment, a “permanent” employee of the Commonwealth; and that he was not, if under civil service, intended by the Legislature to be considered as one follows from the language of G. L., c. 31, § 3 (e), above quoted.

The provision of G. L., c. 32, § 2 (2), that “persons who enter the service of the commonwealth hereafter shall, upon completing ninety days of service, become thereby members of the association,” would seem to apply only to persons who enter the service of the Commonwealth as permanent employees, for such alone are eligible to membership in the association. It would therefore follow that a period of ninety days from the expiration of a probationary period of employment should elapse before an employee could be said to be a member of the association and entitled to the benefits thereof.

Accordingly, I answer your first and second questions in the affirmative, and your fourth in the negative.

The answer to your third question involves a consideration of other factors in addition to those affecting the answers to your other queries.

G. L., c. 32, § 2 (4), as amended by St. 1925, c. 12, provides that —

"Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire."

Paragraphs (5) and (8) contain similar references to "continuous" service with relation to periods entitling a member to retire.

I am informed that it has been the practice of your Board to include the time of a probationary employment and the ninety days of employment before a person gains membership in the association as parts of the period of continuous service mentioned in said paragraphs (4), (5) and (8). I am of the opinion that your departmental practice in this respect is correct. It appears from the definition of "continuous service" set forth in said section 1, above quoted, and from the absence of any provisions in said chapter 32 indicating an intention on the part of the Legislature to make the "continuous service" essential to retirement coincident with continuous membership in the association, that continuous service is to be computed from the beginning of employment of a member by the Commonwealth and not from the beginning of his membership in the association.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Secretary of the Commonwealth — Initiative Petition — Transmission to General Court.

The Secretary of the Commonwealth must transmit a certified initiative petition, having the required number of signatures, to the General Court upon and not before its assembling.

Nov. 26, 1929.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth*.

DEAR SIR: — You have asked my opinion as to your duty with relation to the transmission to the General Court of an initiative petition, duly signed by the required number of qualified voters, which has been filed with you. Your request reads as follows: —

"Will you kindly give me your opinion whether such petition must be transmitted to the Clerk of the House of Representatives upon the exact date of assembling of the General Court or whether it may be transmitted prior to that date?"

The meaning of the applicable provision of the Constitution seems clear upon this matter. Mass. Const. Amend. XLVIII, The Initiative, II. *Initiative Petitions*, § 4, is as follows: —

"*Transmission to the General Court.* — If an initiative petition, signed by the required number of qualified voters, has been filed as aforesaid, the secretary of the commonwealth shall, upon the assembling of the general court, transmit it to the clerk of the house of representatives, and the proposed measure shall then be deemed to be introduced and pending."

This section of the Constitution places upon you the duty to transmit to the Clerk of the House of Representatives such an initiative petition at a fixed time, namely, "upon the assembling of the General Court."

The time of such transmission is not left to your discretion, and I am of the opinion that you are not authorized to transmit the petition before the time designated in section 4.

Very truly yours,
JOSEPH E. WARNER, *Attorney General*.

Commissioner of Correction — Life Prisoner — Removal to State Prison Colony.

The Commissioner of Correction may, in his reasonable discretion, remove a life prisoner from the State Prison to the State Prison Colony.

Nov. 30, 1929.

Dr. A. W. STEARNS, *Commissioner of Correction*.

DEAR SIR: — In a recent communication to me you state: —

“St. 1927, c. 289, § 1, states that ‘the commissioner may remove to the state prison colony *any* prisoner held in the state prison,’ etc.

G. L., c. 265, § 2, provides that ‘whoever is guilty of murder in the second degree shall be punished by imprisonment *in the state prison for life*.’

Before this Department orders the transfer of any life prisoners from the State Prison to the State Prison Colony I desire to ask your opinion as to the legality of the same.”

G. L., c. 265, § 2, provides: —

“Whoever is guilty of murder in the first degree shall suffer the punishment of death, and whoever is guilty of murder in the second degree shall be punished by imprisonment in the state prison for life.”

G. L., c. 125, § 41B (St. 1927, c. 289, § 1), provides: —

“The commissioner may remove to the state prison colony any prisoner held in the state prison who, in his judgment, may properly be so removed and may at any time return such prisoner to the state prison. Prisoners so removed shall be subject to the terms of their original sentence and the provisions of law governing parole from the state prison.”

The provisions of G. L., c. 265, § 2, standing alone, are mandatory, and the judge of the court in which a prisoner has been convicted of murder in the second degree must impose upon such person the sentence of imprisonment for life in the State Prison, and a sentence, so imposed, with certain exceptions, is required to be executed in the State Prison.

St. 1927, c. 289, § 1, in my opinion, constitutes an exception to the mandatory provisions of G. L., c. 265, § 2. The words “any prisoner,” as used in St. 1927, c. 289, § 1, are sufficiently broad to include prisoners serving life sentences. If the Legislature had intended to limit the removal of prisoners from the State Prison to the State Prison Colony to only those prisoners sentenced to that institution for a term of years, it would have used appropriate language to express that intent, as it did in the passage of St. 1898, c. 393, §§ 5 and 7, now G. L., c. 125, § 39, where it specifically provided that “such male prisoners, except those serving sentences for life in the state prison, . . . may be removed from the state prison” to “the prison camp . . . at West Rutland.”

The words “may properly be so removed” are to be construed to mean that any prisoner in the State Prison, except such prisoners confined

therein in the manner and for the purposes provided by G. L., c. 279, § 44, may be removed to the State Prison Colony if, in the judgment of the Commissioner, such prisoner, by his disposition and previous conduct, has shown that he will be amenable to the discipline at said State Prison Colony and will benefit by his removal thereto.

I am of opinion that the Commissioner of Correction may remove a prisoner serving a life sentence in the State Prison to the State Prison Colony, provided that he is of the opinion that such prisoner may "properly be so removed."

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

INDEX TO OPINIONS.

	PAGE
Agricultural seeds; retailer; name on package	94
Animal Industry, Division of; rules; poultry; animals	72
Banking; deposits in two names; joint accounts	57
Barbers; investigation by Department of Public Health	91
Certified public accountant; change of business name; registration	43
Charitable trust funds; <i>cy-pres</i> doctrine	78
Citizenship; registration of voters	115
Civil service; chief of police of Leominster	123
Clerk of election commission of Lowell; appointment	96
Labor service; rules	81
Veteran; Auditor of the Commonwealth	103
Clerk of a Senate committee; secretary of a joint special commission; wages or salary	104
Common drinking cups and towels; rules; Department of Labor and In- dustries	49
Compressed air tank; operation of pneumatic machinery	74
Constitution; Treasurer and Receiver General; vacancy in office	41, 46
Constitutional law; charitable trust funds; <i>cy-pres</i> doctrine	78
Savings bank life insurance; statutory limitations	63
Stock of a trust company held by other banking organizations	60
Water supply; cities	75
Corporations; certificate of change in stock; fee	92
Correction, Commissioner of; life prisoner; removal to State Prison Colony	129
Deer, killing of, during open season; restriction by Governor or Commissioner of Conservation	44
Education, Department of; employees; pecuniary interest in text books	125
Eighteenth Amendment; instructions by voters to legislators under public policy act	38
Fish; cold storage; fresh; advertising	69
Forfeited automobiles; sales by Department of Public Safety	50
Governor and Council; approval of erection of radio equipment upon the roof of the State House	83
Incompatibility of offices	124
Initiative petition; transmission to the General Court by the Secretary of the Commonwealth	128
Inspector of slaughtering; appointment by local board of health	79
Insurance; fraternal organizations; certificates	107
Installment notes; small loans law	52
Life policies; incontestability; forms	111
Stock company; dividends	47
Labor and Industries, Department of; rules as to common drinking cups and towels	49
Laborers; contracts; public works; payments	90
Lowell, election commission of; clerk; civil service	96
Marriage and divorce; records; corrections	88
Massachusetts Agricultural College; committee of trustees to authorize ex- penditures	102
Medical examiner; absence; associate	96
Metropolitan Planning, Division of; jurisdiction	44
Milk; misbranding; prosecution	90

	PAGE
Motor vehicles; compulsory insurance act; express business	62
Interpretation of "right to operate"; revocation	84
Over-all length; trailers; permits; public ways	67, 121
Physician; certificate of registration; presentation to city or town clerk	110
Public Health, Department of; inspector of slaughtering; appointment; local board of health	79
Investigation of barbering	91
Taking of land by local authorities for protection of water supply; consent of department	39
Public policy act; instructions by voters to legislators; Eighteenth Amendment	38
Public records; corrections by city and town clerks; marriage and divorce	88
Death records; diseases	101
Marriage records; certificate of filing of intention	101
Public Records, Supervisor of; rules; custody	97
Public welfare; minor children; settlement	109
Retirement system; certain employees of the Department of Correction; "officers"	86
Members; probationary period	126
Penal institutions officer; duration of service	65
State employees; retirement ages	51
Sentence; State Farm; indeterminate sentence	98
State Fire Marshal; delegation of authority to a city council and the head of the fire department, jointly, to issue licenses and permits	68
Enforcement of rules; local authorities	118
Municipalities; ordinances; storage and use of explosives and inflammable fluids; fire prevention	119
State hospital; authority of superintendent to allow inmates to leave grounds	114
Statute, acceptance of by a town; vote of inhabitants	53
Taxation; assessments on land taken for protection of water supply; payment by Metropolitan District Water Supply Commission	42
Inheritance tax; life insurance policy; change of beneficiary	59
Teachers' retirement law; assessments; failure to deduct assessments seasonably	105
Traffic signs in Boston; expense	48
Treasurer and Receiver General; vacancy in office	41, 46
Trust company; increase of capital stock; stockholders	70
Stock held by other banking organizations	60
Trust funds; commercial funds; mingling	54

RULES OF PRACTICE

IN INTERSTATE RENDITION.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:—

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(b) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate.

(A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

